American Legal Ethics in an Age of Anxiety

Michael Ariens
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by

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ABSTRACT

The thesis of this article is that the development of American legal ethics was accompanied by an anxiousness within the profession, to the extent that the legal profession’s understanding of its ethical precepts has been molded and reshaped during periods of professional anxiety. The profession’s understanding of legal ethics changed dramatically during various crises in the 19th century, exemplified by the different approaches taken by David Hoffman in the mid-1830s, George Sharswood in the mid-1850s, and David Dudley Field in the early 1870s. The profession changed just as dramatically during the 20th century, beginning with the ABA’s adoption of the Canons of Ethics in 1908, and in the 1930s, when the ABA appeared ready to amend the Canons. The drafting of the Model Rules of Professional Conduct in the late 1970s and early 1980s represented a dramatic turn as the legal profession stumbled from actual

1Professor, St. Mary’s University School of Law, San Antonio, Texas. Thanks to Russ Pearce for his comments, and to my colleague Vincent Johnson for his comments on an earlier draft. Thanks to the librarians at Special Collections at the Harvard Law School, Jordon Steele at the Biddle Law Library at the University of Pennsylvania School of Law and Allen Streicker at the Northwestern University Library for their kind assistance with my requests, and to the American Bar Foundation for allowing me to use a number of interviews in its Oral History Program. Thanks also to Stacy Fowler for her assistance with my many inter-library loan requests.
economic and social threats to the profession’s status. Even during the legal profession’s golden age in the 1960s, when the legal profession found itself both economically stable and socially prominent, the ABA’s Code of Professional Responsibility was warped by an anxiousness that the profession was under economic siege.

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I. INTRODUCTION

“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.”

Since 1958, the United States celebrates “Law Day” on May 1. Law Day was created by lawyers in the American Bar Association (ABA) in order to cultivate in the people that “respect for law that is so vital to the democratic way of life.” Law Day was a Cold War response to the Soviet Union’s May Day celebrations, when military parades there were a familiar sight on the American evening news. As noted by then-ABA President Charles Rhyne concerning the first


4May 1 was acknowledged in the United States and Europe shortly after the Chicago Haymarket Square riots in 1884 as “International Workers’ Day.” In 1894, possibly to sever the link with the events in Haymarket Square, the United States government adopted the first Monday in September as Labor Day. See Pub. L. 53-118, 28 Stat. 96, adopted on June 28, 1894.
Law Day:

The selection of May 1 as “Law Day—U.S.A.” has great significance. May 1 is also the day on which international Communism celebrates its past victories and looks forward to its future conquests. There could be no better date for us to recall the basic moral and philosophical principles upon which our society is based, and to contrast them with the cynical, immoral and atheistic philosophy which underlies the international Communist conspiracy.¹

The movement to create Law Day occurred when the American legal profession perceived lawyers as peculiarly capable of solving apparently intractable problems. In the wake of the success of Law Day, the ABA created a special committee on “World Peace through Law.”² This confidence was a byproduct of the increasing power and influence of lawyers in the post-World War II era, a “golden age” for the profession.³

Law Day symbolized the difference between the Soviet Union and the United States, for only Americans “live

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²See Charles S. Rhyne, World Peace through Law, 83 A.B.A. Rep. 624 (1958)(printing President’s Annual Address). The Special Committee on World Peace through Law was created by ABA President Rhyne that year.

The rule of law requires, at a minimum, that the American government constitute a government of laws, not of men. The rule of law constraints lawgivers. 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, 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, lawyers. As stated by Professor Brian Tamanaha, “The legal profession, then, is

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9 Mass. Const. pt. 1, art. XXX (1780)(“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, 1 Cranch (5 U.S.) 137, 163 (1803)(“The government of the United States has been emphatically termed a government of laws, and not of men”).

10 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.” James Madison, The Federalist Papers No. 51, at 322 (paperback ed. Clinton Rossiter ed. 1961).

located at the crux of the rule of law.”

But if lawyers are at the crux of the rule of law, as its guardians, “Who will guard the guards?”

The traditional check on the conduct of lawyers is the internal command that they adhere to a code of ethics. The history of the development of American legal ethics is the subject of this essay.

A code of ethics offers insights into both a profession’s internal understanding of itself and its desired appearance to outsiders. Much of the internal understanding concerns “technical” issues of interest only to those in the profession, such as defining terms of art or jurisdictional issues. But other issues, though often directed to insiders, are of interest to the public, and must be written in a way palatable to the public’s understanding of the role of the profession and its exercise of power in a democratic society.

Self-policing limitations on the behavior of American lawyers can be charted beginning in 1836 with David Hoffman’s *Resolutions in Regard to Professional Deportment* in his book *A Course of Legal Studies*. In the 1840s David Dudley Field wrote a lawyer’s oath, modeled on


14 *See* Model Rules of Prof. Cond. 1.0 (“Terminology”).

15 *See* Model Rules of Prof. Cond. 8.5: “A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs.”

16 David Hoffman, *Resolutions in Regard to Professional Deportment* in *A Course of
an oath given to lawyers in the canton of Geneva, Switzerland, to be sworn to by lawyers in New York. On October 2, 1854, Judge George Sharswood gave an Introductory Lecture to students at the University of Pennsylvania Department of Law, where Sharswood was also Dean and Professor of the Institutes of Law, later published as *A Compend of Lectures on the Aims and Duties of the Profession of Law, Delivered Before the Law Class of the University of Pennsylvania.* In 1887, the Alabama State Bar Association became the first bar association to adopt a Code of Ethics. Its code was largely based on Sharswood’s lectures, and followed Field

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18 It was subsequently titled was *An Essay on Professional Ethics.* I will cite both the *Compend* edition of 1854, and the fifth edition reprinted in 32 A.B.A. Rep. 9 (1907).
and Hoffman. Finally, in 1908, the American Bar Association adopted Canons of Ethics, largely based on the Alabama Code.

The 1908 Canons of Ethics were 32 in number. In 1928, the ABA added 13 Canons,


20 Proceedings, 33 A.B.A. Rep. 55, 86 (1908)(adopting 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)(noting “‘[i]n 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”).

21 See Report of the Special Committee on Supplements to the Canons of Professional
and two final Canons were adopted in the 1930s. Although a revision of the Canons was suggested then, it wasn’t 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. The Code of Professional Responsibility was adopted by the ABA in 1969. Within three years most states had adopted the Code. Despite its overwhelming success, the ABA

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appointed a commission in 1977 to evaluate “all facets of legal ethics.”\textsuperscript{26} The commission, chaired by Nebraska lawyer Robert Kutak, fashioned the Model Rules of Professional Conduct, adopted by the ABA in 1983.\textsuperscript{27} Fourteen years after adoption of the Model Rules, the ABA created an “Ethics 2000” commission to determine whether to modify the Model Rules.\textsuperscript{28}

The thesis of this essay is that the legal profession’s understanding of itself has been molded and reshaped during periods of professional anxiety. The profession’s understanding of its ethical precepts changed dramatically during various crises in the 19\textsuperscript{th} century, exemplified by the different approaches taken by David Hoffman in the mid-1830s, George Sharswood in the mid-1850s, and David Dudley Field in the early 1870s. The profession changed just as dramatically during the 20\textsuperscript{th} century, beginning with the ABA’s adoption of the Canons of Ethics in 1908, and in the 1930s, when the ABA appeared ready to amend the Canons but backed away at the last minute. The drafting of the Model Rules of Professional Conduct in the late 1970s and early 1980s represented a dramatic turn as the legal profession stumbled from actual economic and social threats to the profession’s status. Even during the legal profession’s golden age in the

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1960s, when the legal profession found itself both economically stable and socially prominent, the ABA’s Code of Professional Responsibility was warped by an anxiousness that the profession was under economic siege. Attacks on the legal profession beginning in the late 1960s and early 1970s, joined by the profession’s need to justify its elevated place in American society, led elite lawyers to jettison the Code less than a decade after its nearly universal adoption. The lost moment, I will argue, occurred during the crafting of the Code of Professional Responsibility between 1965 and 1969, when the profession was, in hindsight, both stable and influential. The largely inchoate anxiousness about the future of the profession culminated in the late 1970s in the ABA’s decision to write the Model Rules, and to approach the question of professionalism in a way very differently than the Code. The structure of the Model Rules was trumpeted as an advance from the immature Code; instead, the Model Rules represent the abandonment of the profession’s efforts, as shown in the ABA’s efforts to create Law Day, to see itself as a “purposive” profession. That abandonment is both a consequence and a cause of continued anxiety within the American legal profession.

Section II examines the several transformations of the legal profession’s understanding of its ethical responsibilities from the 1830s through the adoption in 1908 by the ABA of its Canons of Ethics. Section III assesses terrain of legal ethics from the Canons through World War II, and offers some explanations why the profession did not re-state the strongly criticized Canons during the 1930s. Section IV evaluates the debate in the 1950s and 1960s concerning the philosophy and structure of an ethics code, and the changes made to the understanding of the structure and goals of legal ethics codes between the 1969 Code and the 1983 Model Rules. Section V offers a 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.”

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

A. Introduction

When the ABA adopted its Canons of Ethics in 1908, it helpfully included an “Index and Synopsis of Canons.” This Index and Synopsis listed the titles of the 32 Canons of Ethics. Following the titles were parentheses inside which were listed corresponding provisions to David Hoffman’s 1836 *Resolutions in Regard to Professional Deportment* and the Code of Ethics adopted by the Alabama State Bar Association in 1887 and later by other states. Alabama’s

29 Walter P. Armstrong, Jr., *A Century of Legal Ethics*, 64 ABA J. 1063, 1063 (1978). Armstrong was a former President of the ABA and a member of the Wright Committee.


32 David Hoffman, *A COURSE OF LEGAL STUDY* 752-77 (2d ed. 1836).

33 The 1887 Code of Ethics is re-published in *GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES’ 1887 CODE* 45-59 (Carol Rice Andrews et al. eds. 2003). In 32 A.B.A. Rep. 685-713 (1907) the Alabama Code of Ethics, supplemented by additions made by 10 other states (Colorado, Georgia, Kentucky, Maryland, Michigan, Missouri, North Carolina, Virginia, West Virginia and Wisconsin) was reproduced. The Alabama Code consisted of 57 provisions.
Code of Ethics, in turn, was based on Judge George Sharswood’s 1854 *Compend of Lectures*. Additionally, section III of the Canons included a lawyer’s Oath of Admission traceable to David Dudley Field’s 1850 Code of Civil Procedure for the state of New York.

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. Of

The reproduction consisted of 70 numbered provisions.


36As noted by the ABA, this oath of attorneys was further traced back to the Swiss canton of Geneva. *See Report of the Committee on Code of Professional Ethics*, 32 A.B.A. Rep. 676, 676 (1907).

37*See also* Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year
Hoffman’s 50 *Resolutions* (the last of which directed the lawyer to read the foregoing 49 twice yearly), only Resolutions 22, 39, 45 and 46 were not cross-referenced in the Canons. Of the 70 provisions found in the Alabama and other state codes of ethics, the Index cross-referenced 56 provisions in the Canons.

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 not to commingle their property with that of the client (26) and to return client funds as soon as possible (25), to represent the client with zeal (18) and never represent both sides in a matter (8), to withdraw when lacking competence in the matter (20), to treat all cases in the same conscientious fashion (23), to respect the judge presiding in court (3), to charge reasonable fees (27) and refund any retained fees for services not rendered (29), to avoid testifying in a case in which he represented a client (35), and to communicate with the opposing party only with the consent and in the presence of the attorney for the opposing party (33). The 1887 Alabama Code barred lawyers from using personal ties to influence the court (3), required speaking to the court and opposing counsel with candor and fairness (and prohibited a lawyer from citing overruled cases and repealed statutes) (5), 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). Further, the lawyer had the duty under the Alabama Code to maintain

*Evolution*, 57 SMU L. Rev. 1385, 1442 (2004)(noting “[t]he 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”).

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client confidences and secrets (21)\textsuperscript{38} after the representation was completed (and even after the death of the client), even if that meant later declining a matter from a prospective client (22).

As noted above, a few Resolutions were not referred to by the Canons of Ethics, and several Canons contained no comparable counterpart in the Resolutions. The Resolutions not referenced in the Canons were numbers 22, 39, 45, 46 and 50. Those Resolutions suggested 1) that 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; 2) that the lawyer accept a jury verdict without impugning the jury’s or the court’s integrity; and 3) that the lawyer neither use rhetorical skills to fool listeners nor assume a pose of false modesty. Just seven Canons failed to reference one or more of the Resolutions: 1) 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; 2) two Canons concerned newspapers, the first (Canon 20) noting that statements by lawyers in the newspapers could prejudice the administration of justice and the second banning advertising (Canon 27); 3) one Canon banned barratry (Canon 28);\textsuperscript{39} 4) one Canon demanded the lawyer use his best efforts

\textsuperscript{38}The 1908 Canons did not include a provision on keeping client confidences. The lawyers’ oath adopted with the Canons did include an oath respecting the keeping of client confidences. The ABA adopted as Canon 37 “Confidences of a Client” in 1928. See Report of the Special Committee on Supplements to the Canons of Ethics, 53 A.B.A. Rep. 495, 497 (1928)(recommending adoption of Canon on confidences); Proceedings of the American Bar Association, 53 A.B.A. Rep. 130 (1928)(adopting Special Committee’s additions to Canons).

\textsuperscript{39}Although not referenced in the Index, Hoffman’s 24\textsuperscript{th} Resolution stated in part, “I will
to restrain a client from doing anything a lawyer would not do (Canon 16); and 5) one Canon
discussed the lawyer’s duties when advocating for a client outside of the courts (Canon 26). 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 while under attack 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 the lawyer’s relations 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 18
years between Hoffman’s 1836 Resolutions and Sharswood’s 1854 Compend of Lectures and in
the years between Sharswood 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 20th century. Hoffman’s A Course of Legal Study was originally
published in 1817, when Hoffman turned 33. In 1810, when Hoffman began the practice of law
in Baltimore, there were 43 lawyers in the city.40 Apprentices had to study law for three years
never be tempted ... to purchase, in whole, or in part, my client’s cause.” David Hoffman, A

\[\text{\textsuperscript{40}}\text{See Maxwell Bloomfield, David Hoffman and the Shaping of a Republican Legal}\]
before becoming eligible to practice law, making it difficult for any but the sons of the wealthy and prosperous to become lawyers.⁴¹ A small, tight-knit, socially homogenous community already possessed of wealth had the ability to police itself, making a listing of rules of professional deportment superfluous. It makes sense, then, that the 1817 edition of *A Course of Legal Study* did not include any rules on professional deportment. Hoffman included the subject of Professional Deportment as the last subject (auxiliary subject IV), and listed 11 readings, to which Hoffman added brief notes summarizing the readings. Hoffman introduced the subject of Professional Deportment with a short essay, notable for its optimistic tone. The lawyer learned to engage in proper conduct once he was learned, for Hoffman equated the acquisition of “liberal

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⁴¹See Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 Md. L. Rev. 673, 677 (1979)(noting that in 1810, “[m]ost of the new practitioners were the sons of merchants or gentry”).
knowledge” with “honourable views.”

Four years later, 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. By 1836, when the second edition of *A Course of 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 Deportment, with some Rules for a Lawyer’s Conduct through life,” and the *Fifty Rules in Regard to Professional Deportment*. Hoffman’s “Observations on Professional Deportment” in note 18 was a largely melancholy statement regarding the legal profession. Note 18 reflected on the many “evil enticements” besetting the lawyer, which required him to follow only “those principles emphatically denominated honourable.” Within the eight printed pages of Note 18, Hoffman uses “honourable” and

42David Hoffman, *A Course of Legal Study* 327 (1817).


44David Hoffman, *A Course of Legal Study* 746-47 (2d ed. 1836); David Hoffman, *Hints on the Professional Deportment of Lawyers, with Some Counsel to Law*
“honour” 12 times, and the manner in which he returned to the topic suggests Hoffman saw professional honor slipping away. The Fifty Rules, which appear at the conclusion of the section on Professional Deportment, were an attempted antidote to “the debasement of professional mores that he perceived in the Jacksonian era.”

Baltimore was ruled by a small elite when Hoffman grew up, and as the youngest son of a successful merchant family, Hoffman’s family was part of that elite. By 1836, that era was gone. A Federalist and later a Whig, Hoffman

45 Maxwell Bloomfield, David Hoffman and the Shaping of a Republican Legal Culture, 38 Md. L. Rev. 673 (1979). The addition of Rules of Professional Deportment struck some type of chord within the 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.” The last paragraph of the review praised Hoffman’s material on “Professional Deportment.” The author indicated that “[u]pon a future occasion we design to make this division the text for a separate article.” F.J.T., Art. VII.—Hoffman’s Course of Legal Study, 15 Am. Jurist 321, 341 (1836). I have not been able to find any subsequent article.


47 See Maxwell Bloomfield, David Hoffman and the Shaping of a Republican Legal Culture, 38 Md. L. Rev. 673, 674 (1979).

“was the voice for educated elites who feared that the potential greatness of the Nation was being undercut by the common ways and broad democratic participation of the 1830s.” 49 The social stratification that was part of Hoffman’s youth had been displaced by a mania for equality; the bar was the last redoubt of the gentleman. 50 Attacks on the legal profession by the “lower


50 See Anthony Grumbler [David Hoffman], Miscellaneous Thoughts on Men, Manners and Things 323-24 (2d ed. 1841)(1837) (“if there be still remaining among us any elements that can be called aristocratic, they will be found no where so certainly, as among gentlemen in the legal profession”). See G. Edward White, The Marshall Court and Cultural Change, 1815-1835 20-27 (Abr. ed. paper ed. 1991)(noting social stratification and contending challenge of equality principle and concluding “equality principle, then, appears as both an energizing and a threatening force in early-nineteenth-century America”); Stephen M. Feldman, American Legal Thought from Premodernism to Postmodernism 68-70 (paper ed. 2000); Gordon S. Wood, Revolutionary Characters: What Made the Founders Different 259-60 (paper ed. 2006)(noting “Most of the 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’”). On the possibly deleterious quest for equality, see
orders,” Hoffman wrote in 1837, was an indirect tribute to the knowledge and virtue held by most lawyers. 51 The rise of public opinion 52 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.” 53 These changes seemed accompanied by a decline in respect for the law, personified not only by the actions of President Andrew Jackson, 54 but also in the rise of riots in the United

generally Alexis de Tocqueville, DEMOCRACY IN AMERICA (J. P. Mayer ed. George Lawrence trans. paper ed. 1988). See id. at 198 (“Democratic institutions awaken and flatter the passion for equality without ever being able to satisfy it entirely. This complete equality is always slipping through the people’s fingers at the moment when they think to grasp it, fleeing, as Pascal says, in an eternal flight”).

51 David Hoffman, MISCELLANEOUS THOUGHTS ON MEN, MANNERS AND THINGS 323 (2d ed. 1841)(1837). See also David Hoffman, HINTS ON THE PROFESSIONAL DEPORTMENT OF LAWYERS, WITH SOME COUNSEL TO LAW STUDENTS 60 (1846)(reprinting statement found in Miscellaneous Thoughts).


53 Alexis de Tocqueville, DEMOCRACY IN AMERICA 507 (J. P. Mayer ed. George Lawrence trans. paper ed. 1988). Tocqueville was one of the first to use the term “individualism.”

54 See Daniel Walker Howe, WHAT HATH GOD WROUGHT?: THE TRANSFORMATION OF AMERICA, 1815-1845 411 (2007)(noting 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, including Jackson’s unlawful execution of British subjects during his
States in the mid-1830s, numbering at least 53 in 1835, including one in Baltimore in August 1835.55

In 1836, when the second edition of A Course of Legal Study was published, Hoffman was 52 years old. By this time he had largely turned away from the legal profession and from the United States,56 possibly because he foresaw a future dominated by a despised Jacksonian democracy.57 Hoffman did not teach law at the University of Maryland after 1832, and officially resigned his position in 1836. His legal practice was largely moribund by then as well.58

55 See Daniel Walker Howe, WHAT HATH GOD WROUGHT?: THE TRANSFORMATION OF AMERICA, 1815-1845 431, 434 (2007)(listing number of riots reported in Niles’ Register, which ranged from 1 in 1830 to 53 in 1835 and riot in Baltimore, and noting that the Register did not record all riots).

56 See Bill Sleeman, Law and Letters: A Detailed Examination of David Hoffman’s Life and Career at 11-14, available at http://ssrn.com/abstract=680668 (on file with author)(noting Hoffman’s legal representation in reported cases end in the early 1830s and further noting battle with University of Maryland in 1832-33 led him to leave for England for some time). Hoffman began a literary career in the mid-1830s. See id. at 18-19.

57 See Daniel Walker Howe, WHAT HATH GOD WROUGHT?: THE TRANSFORMATION OF AMERICA, 1815-1845 485 (2007)(noting that “Party itself became a partisan issue in the presidential election year of 1836” and noting that Democratic Party convention controlled by Jackson was held in Baltimore in 1835).

58 Maxwell Bloomfield notes that “Hoffman did not give up his law practice completely
Baltimore itself had changed dramatically: Its population increased by 120% between 1810 and 1840, and was the second largest city in the United States by 1830.\textsuperscript{59} The democratizing tendencies of the Jacksonian era included democratizing the legal profession, which some, including Hoffman, saw as portending its debasement.\textsuperscript{60} As Hoffman wrote in 1837, he desired until 1847....” Maxwell Bloomfield, \textit{David Hoffman and the Shaping of a Republican Legal Culture}, 38 Md. L. Rev. 673, 685 n.47 (1979). Bill Sleeman’s investigation of Hoffman’s career indicates that the last reported case in which Hoffman is listed as counsel was in 1830, and that although Hoffman represented the owners of the wharf in Barron v. Baltimore at the state level, he did not represent them in 1833 when the case was heard and decided by the Supreme Court. \textit{See} Bill Sleeman, \textit{Law and Letters: A Detailed Examination of David Hoffman’s Life and Career} at 11-14, available at \url{http://ssrn.com/abstract=680668} (on file with author).

\textsuperscript{59}Its population was 80,620 in 1830, an increase of 73% since 1810. \textit{See} \url{http://www.census.gov/history/www/1830/010950.html} (last visited May 16, 2008). In the next ten years, Baltimore grew 25% larger in population, to 102,313. United States Census Bureau, 1840 Fast Facts, \url{http://www.census.gov/history/www/1840/010951.html} (last visited May 16, 2008). Philadelphia slipped to the fourth largest city, with 93,665. New Orleans was the third largest city. \textit{See id.} The nation’s population increased an average of 32% in each decade between 1899 and 1840.

\textsuperscript{60}See Emory Washburn, \textit{Art. III.—On the Legal Profession in New England}, 19 Am. Jurist 49, 52 (1838)(noting issue is whether legal profession will consist of “an enlightened, educated, independent body of men, or a host of self-constituted, noisy and narrow-minded pettifoggers”); \textit{id.} at 69-70 (railing against charges that the bar was a monopoly and part of an
that lawyers be ‘‘the most entrusted, the most honoured, and withal, the most efficient and useful body of men.’’ The ease of admission to the profession of law by 1840, when just one-third of the states required any preparation before entering the bar,\(^6\) allowed “pettifoggers” to bring the profession into disrepute.\(^6\) Hoffman, a believer in rule by the elite, viewed the mass of lawyers

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\(^6\)See Alfred Z. 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 8 (1983)(noting “[b]y 1840, there were apparently only nine university-affiliated law schools with a total of 345 students”).

\(^6\)See Perry Miller, THE LIFE OF THE MIND IN AMERICA 135-36 (1965); Roscoe Pound, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 238 (1953). For a similar view at the same time from New England, see Emory Washburn, Art. III.—On the Legal Profession in New
as unworthy of membership of the small group he believed possessed the right and duty to
govern. 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. The optimistic tone found in the introduction to

England, 19 Am. Jurist 49, 52 (1838)(noting the legal profession had to choose between “an
enlightened, educated, independent body of men or a host of self-constituted, noisy and narrow-
minded pettifoggers”). For a later and similar statement, see George Sharswood, A COMPEND OF
LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW 80 (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”).

64 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 “mere common lawyers”)
quoting David Hoffman, A COURSE OF LEGAL STUDY 679, 686 (2d ed. 1836).

65 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 are a number of references to honor in the Resolutions. See David Hoffman, HINTS
ON THE PROFESSIONAL DEPORTMENT OF LAWYERS, WITH SOME COUNSEL TO LAW STUDENTS 8
(1846)(“The most extensive legal acquirements, moreover, gained by the most methodical course
of reading, will not make an accomplished and efficient lawyers. The knowledge of and strict
adherence to professional deportment, are altogether essential to his honourable and permanent
success”); see id. at 25 (“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

25
Professional Deportment in the first edition of *A Course of Legal Study* was replaced by a pessimism in the second. 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.”

That Hoffman’s *Fifty Resolutions* in the second edition of *A Course of Legal Study* were more a call for regeneration rather than a representation of the ethical standards of a legal profession in the late 1830s and afterward may best be understood by assessing the response to

are the only effectual means of surmounting the difficulties of life, and reaping the benefits of wealth and of distinction”); *id.* at 32 (noting “honourable” obligations and principles of lawyers and legal profession); *id.* at 33 (demanding “honourable” deportment). Hoffman uses “honour” or “honourable” 12 times alone in note 18 on “Observations on Professional Deportment, with some Rules for a Lawyer’s Conduct through life.” *See id.* at 30-36. *See generally* Samuel Haber, *The Quest for Authority and Honor in the American Professions, 1750-1900* xii (1991)(noting honor accorded professions in late colonial period and that “[i]n the years roughly between 1830 and 1880, however, the professions came under a withering attack”); Robert A. Ferguson, *Law and Letters in American Culture* 201 (paper ed. 1984)(noting “egalitarian tendencies of the 1830s exacerbated hostility” of public to lawyer elite).

66“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....” David Hoffman, *A Course of Legal Study* 744-45 (2d ed. 1836).

the publications of Hoffman’s *Resolutions*. The 1817 edition of *A Course of Legal Study* was greatly praised in an extensive (33 pages) review by Justice Joseph Story in the Whig-oriented *North American Review*. The second edition, now two volumes and double the length of the first edition, including the *Fifty Rules in Regard to Professional Deportment*, received no review but merely a notice of its publication in the *North American Review*. Not unexpectedly, the *United States and Democratic Review* did not review the work either. The only lengthy review of the second edition of *A Course of Legal Study* is found in the Boston-based *American Jurist and Law Review*. In a 20-page review, only the last paragraph discussed Hoffman’s material on “Professional Deportment.” 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.” I have not found any such article. A year later, Hoffman published, under the pseudonym Anthony Grumbler, a book titled *Miscellaneous Thoughts on Men, Manners and Things*.72 *Miscellaneous Thoughts*


72 Anthony Grumbler [David Hoffman], *MISCELLANEOUS THOUGHTS ON MEN, MANNERS AND THINGS* (2d ed. 1841)(1837).
was reviewed in the *North American Review*, although the review largely consists of praise for Hoffman’s *Course of Legal Study*. The reviewer “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.”73 “If we were called upon to designate any signal 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.’”74 This praise appears offered in part because some of the *Miscellaneous Thoughts* of Hoffman’s 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.”75 Hoffman himself was 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....”76

In 1846, Hoffman was living in Philadelphia teaching at his Law Institution.77 That year

73 *Art. XI.—Critical Notices*, 45 N. Am. Rev. 482, 482 (1837).

74 *Art. XI.—Critical Notices*, 45 N. Am. Rev. 482, 482 (1837).

75 *Art. XI.—Critical Notices*, 45 N. Am. Rev. 482, 482 (1837).

76 See David Hoffman, *Hints on the Professional Deportment of Lawyers, With Some Counsel to Law Students* 5 (1846). See also David Hoffman, *A Course of Legal Study* iii (2d ed. 1836 repr. 1846)(stating in “Notice” dated May 1846 that second edition “was only very partially published”).

77 See David Hoffman, *Hints on the Professional Deportment of Lawyers, With
the second edition of *A Course of Legal Study* was reprinted. In addition, the same Philadelphia publisher offered a “new” book for sale from Hoffman, *Hints on the Professional Deportment of Lawyers, With Some Counsel to Law Students*. 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. 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. Consequently, Hoffman believed a work dedicated to Professional Deportment “might often prove useful” to young would-be lawyers. Although packaged as a new book, *Hints* simply reprinted the material on Professional Deportment found in the second edition of *A Course of Legal Study*.

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78 The publisher of both books was the Philadelphia company of Thomas, Cowperthwait & Co.

79 *See* David Hoffman, *Hints on the Professional Deportment of Lawyers, With Some Counsel to Law Students* 5 (1846).

80 *See* David Hoffman, *Hints on the Professional Deportment of Lawyers, With Some Counsel to Law Students* 8 (1846).

81 *Hints* reprinted pages 720-775 of the second edition of *A Course of Legal Study*. It
In 1846, the *American Jurist and Law Review*, the most jurisprudentially-inclined law review, no longer existed. The Philadelphia-based *American Law Magazine*, edited by George Sharswood, ceased publication in January 1846. 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. 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,”¹⁸³ I have found no evidence that it made any impression whatsoever. It simply disappeared.¹⁸⁴ The next year Hoffman did likewise, leaving the United States for England. He

also reprinted a section of MISCELLANEOUS THOUGHTS responding to vituperative attacks on the legal profession. See *Hints* at 60-62.


¹⁸⁴I have not found any reference to Hoffman’s *Hints* in my research of secondary
did not return until 1854, the year he died.\textsuperscript{85}

\textit{C. Lawyerly Zeal in the mid-19th Century}

The legal profession’s understanding of the duty to represent the client shifted between the 1836 \textit{Resolutions} and Sharswood’s 1854 \textit{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.\textsuperscript{86} He also cautioned lawyers from identifying too strongly with their client: “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.”\textsuperscript{87} For


\textsuperscript{87}David Hoffman, \textit{A Course of Legal Study} 746 (2d ed. 1836). \textit{See also id.} at 745 (“The success of the client is always that of the counsel; the interests and feelings of the latter become in a measure 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”).
Hoffman, the lawyer’s honor required him to keep his own conscience, and avoiding 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.” 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.’” Harvard Law Professor Simon Greenleaf, in his 1834 inaugural address, wrote, “I look pity on the man, who regards himself as a mere machine of the law;—whose conceptions of moral and social duty are all absorbed in the sense of supposed obligation to his client, and this of so low a nature as to render him a very tool and slave ....” 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.” The 1850 Code of Civil Procedure drafted for the state of New York (the Field Code) 

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88 David Paul Brown, 2 THE FORUM; OR, FORTY YEARS FULL PRACTICE AT THE PHILADELPHIA BAR 71-72 (2 vols. 1856).

89 David Paul Brown, 2 THE FORUM; OR, FORTY YEARS FULL PRACTICE AT THE PHILADELPHIA BAR 30 (2 vols. 1856).

90 Simon Greenleaf, A Discourse Pronounced at the Inauguration of the Author as Royall Professor of law in Harvard University (1854), reprined in THE GLADSOME LIGHT OF JURISPRUDENCE 134, 140 (M. H. Hoeflich ed. 1988).

includes an oath of attorneys in § 511.92 Appended as a note to this oath of attorneys is a condensed and edited version of Field’s 1844 essay. Field’s note continued to urge a limited duty of loyalty of lawyer to client. Rejecting as “unsound in theory, and most pernicious in practice”93 the claim that a client is entitled to “whatever the law can give him,”94 Field’s note concludes that a lawyer may not “overlook the moral aspects of the claim”95 made by his client in determining what course of action to take.


But Hoffman’s view of the lawyer as judge of the client’s cause was rejected beginning shortly after he wrote. Timothy Walker studied law under Samuel Howe in 1827-28 and after Howe’s death, under Joseph Story at Harvard in 1829-30.⁹⁶ Walker moved to Ohio and was the founding dean of the Cincinnati Law School in 1833 and editor of the *Western Law Journal* from 1843-1853.⁹⁷ His book, *Introduction to American Law*, was first published in 1837, and was “Designed as a First Book for Students.”⁹⁸ A popular work, it went through 11 editions, the last published in 1905. The first edition consisted of 40 lectures. The introductory lecture included a section (§ 7) on the “dignity of the profession.” Although 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.’”⁹⁹ Two years later, Walker gave a valedictory address “to the Graduates of the


⁹⁸Timothy Walker, *Introduction to American Law* title page (1837). Both Walker’s *Introduction to American Law* and Hoffman’s *A Course of Legal Study* were dedicated to Joseph Story.

⁹⁹Timothy Walker, *Introduction to American Law* 17-18 (1837). Walker recommended students interested in legal bibliography look at *A Course of Legal Study* in §
Law Class, in the Cincinnati College,” an address published in 1844 in the Walker-edited *Western Law Journal*.  

The third ingredient for professional success was integrity, necessary in part because the profession was “not reputed to have a very high standard of professional ethics.”  

A most difficult question was, “When a client has a bad cause, shall we prosecute it for him?” 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.”  

—Plan of these Lectures.” See id. at 20. In his review of *Introduction to American Law*, George S. Hilliard quoted § 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.” [George S. Hilliard], Art. VI.—Walker’s *Introduction to American Law*, 18 Am. Jurist 375, 388 (1838).  


would make lawyers their clients’ conscience-keepers, and require them to prejudge a cause by declining to undertake it.”

104 In 1846, the second edition of *Introduction to American Law* was published. Walker deleted § 7, placing some of his comments in that section into a new and final section of the book (§ 259), which constituted a variation of his valedictory address and possessed the same title. Walker wrote more expansively in this section than in the valedictory address about the lawyer’s moral duties. Walker had apparently thought more deeply about the issue of taking a client’s “bad cause” since his 1839 address. He now noted “two classes of cases”: the first was when the law was against the client; and the second was “when though the law may be with him, the abstract justice of the case appears to be against him.”

105 Walker reiterated his conclusion from 1839: “I have come to the conclusion, that no principle of moral obligation prohibits me from prosecuting his cause.”

106 Walker noted that the lawyer who prejudged a case might be wrong, for he was not infallible; that he was not the client’s

L. J. 542, 547 (1844).


105 Timothy Walker, INTRODUCTION TO AMERICAN LAW 664 (2d ed. 1846).

106 Timothy Walker, INTRODUCTION TO AMERICAN LAW 664 (2d ed. 1846).
“conscience keeper”; and most importantly, “[e]very man ... has a right to have his case fairly presented before the court.”\textsuperscript{107} This position did not mean, however, “that every thing is fair in litigation.”\textsuperscript{108}

Others also rejected Hoffman’s conclusions. In an 1843 essay, Peleg W. Chandler, a young (he turned 27 the month the essay was published) lawyer trained at the Law School at Harvard and founder and editor of the Boston-based \textit{Monthly Law Reporter}, asked, “[M]ust the lawyer, when thus applied to, first settle in his own minde, beyond the possibility of mistake, precisely where the truth and equity of the cause lies?”\textsuperscript{109} 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, in the management of it, 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.”\textsuperscript{110} Chandler was writing in response to several articles in the \textit{New York Observer} concerning the morality of the practice of law. He defended both 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?”\textsuperscript{111} Three years later, Chandler defended his earlier position, writing, “The proper

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\textsuperscript{107}Timothy Walker, \textit{INTRODUCTION TO AMERICAN LAW} 664-65 (2d ed. 1846).
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\textsuperscript{108}Timothy Walker, \textit{INTRODUCTION TO AMERICAN LAW} 665 (2d ed. 1846).
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\textsuperscript{109}[Peleg Chandler,] \textit{Legal Morality}, 5 Monthly L. Rep. 529, 530 (1843).
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\textsuperscript{110}[Peleg Chandler,] \textit{Legal Morality}, 5 Monthly L. Rep. 529, 530 (1843).
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\textsuperscript{111}[Peleg Chandler,] \textit{Legal Morality}, 5 Monthly L. Rep. 529, 531 (1843).
\end{flushleft}
place to try causes is before the properly constituted tribunal.”112 Chandler’s audience in the
Monthly Law Reporter was “workingmen of the profession,”113 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.114 Sharswood rejected


Chandler was also quoted without attribution in Perry Miller, THE LIFE OF THE MIND IN AMERICA 204 (1965). On Chandler, see H. W. Howard Knott, Chandler, Peleg, 3 DICTIONARY OF AMERICAN BIOGRAPHY 615 (Allen Johnson & Dumas Malone eds. 1933).

113Miscellany, 1 L. Rep. 55 (1838). See generally Maxwell Bloomfield, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876 142-44 (1976)(noting change in tone of lawyer’s magazines beginning in 1830s); Walter Theodore Hitchcock, TIMOTHY WALKER, ANTEBELLUM LAWYER 109 (1990)(noting Law Reporter viewed itself as “‘a practical journal of the law as it is. We trouble ourselves but little, perhaps too little, upon theories as to what it should be,’” and noting Western Law Journal imbued with the spirit of reform of the law).

114The Department of Law of the University of Pennsylvania was revived in 1850 with the appointment of District Judge George Sharswood as the sole professor. Sharswood’s first lecture was given on September 30, 1850, and by mid-1852, two other professors were appointed. On June 1, 1852, Sharswood was appointed Professor of the Institutes of Law. See Margaret Center Klingelsmith, History of the Department of Law, in UNIVERSITY OF PENNSYLVANIA: THE PROCEEDINGS AT THE DEDICATION OF THE NEW BUILDING OF THE DEPARTMENT OF LAW 213, 221-22 (George Erasmus Nitzsche comp. 1901).
Hoffman’s argument that a lawyer should never plead the statute of limitations.\textsuperscript{115} Sharswood began with the positivist notion that “the 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.”\textsuperscript{116} Using “mere notions of justice” rather than law to decide cases led to a discretion that “would constitute the most appalling of despotisms.”\textsuperscript{117}

\textsuperscript{115}George Sharswood, A Compend of Lectures on the Aims and Duties of the Profession of the Law 25-26 (1854)(noting the issue of pleading the statute of limitations). \textit{See also} George Sharswood, An Essay on Professional Ethics, 33 A.B.A. Rep. 9, 83-84 (5\textsuperscript{th} ed. 1907)(same).

\textsuperscript{116}George Sharswood, A Compend of Lectures on the Aims and Duties of the Profession of the Law 26 (1854). Sharswood used slightly different language in the revised edition. \textit{See} George Sharswood, An Essay on Professional Ethics, 33 A.B.A. Rep. 9, 82 (5\textsuperscript{th} ed. 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”).

\textsuperscript{117}George Sharswood, A Compend of Lectures on the Aims and Duties of the Profession of the Law 25 (1854). George Sharswood, An Essay on Professional Ethics, 33 A.B.A. Rep. 9, 82 (5\textsuperscript{th} ed. 1907). \textit{Cf.} John T. Brooke, The Legal Profession: Its Moral Nature, and Practical Connection with Civil Society 16 (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
Thus, even though the lawyer is an officer of the court, and not merely an agent of the party, “[t]he party has a right to have his case decided on the law and the evidence.” 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.” Sharswood’s understanding echoed that made by Philadelphia lawyer William Porter in 1849, in his address to the Law Academy of Philadelphia. Porter, a Vice-Provost of Cincinnati, not a lawyer.

118 George Sharswood, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW 26 (1854). George Sharswood, AN ESSAY ON PROFESSIONAL ETHICS, 33 A.B.A. Rep. 9, 83 (5th ed. 1907). Sharswood’s position was largely adopted by the legal profession at the time the Canons of Ethics were adopted. See Legal Ethics, 19 Green Bag 489 (1907)(criticizing those who argue a lawyer should not plead a statute of limitations); George P. Costigan, Jr., The Proposed American Code of Ethics, 20 Green Bag 57, 63 (1908)(same). Costigan was the editor of the first course book on American legal ethics. See George P. Costigan, Jr., CASES ON THE LEGAL PROFESSION AND ITS ETHICS (1917).


120 William Porter, THE INTRODUCTORY ADDRESS DELIVERED BEFORE THE LAW ACADEMY
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 he was the sole judge of his client’s cause.\(^{121}\) Not only was the lawyer not the judge of the client’s cause, for Sharswood, a client’s moral sensibility (or lack thereof) was not the lawyer’s concern. 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.”\(^{122}\)

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\(^{122}\)George Sharswood, A Compend of Lectures on the Aims and Duties of the Profession of the Law 26 (1854). George Sharswood, An Essay on Professional Ethics, 33 A.B.A. Rep. 9, 83-84 (5\(^{th}\) ed. 1907). See also Fred C. Zacharias & Bruce A. Green, Reconceptualizing Advocacy Ethics, 74 Geo. Wash. L. Rev. 1 (2005)(assessing Chief Justice John Bannister Gibson’s opinion in Rush v. Cavenaugh, 2 Pa. 187 (1845) concerning the extent of the lawyer’s duty to the client’s desires). In Rush, the court held that a lawyer was not required to pursue a claim contrary to the lawyer’s professional conscience. 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. Another Philadelphia lawyer, David Paul Brown, born in 1795, a generation before Sharswood (born in 1810), adopted
Although Hoffman, Sharswood and Field all noted the 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. 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.” A similar sentiment was offered by New York lawyer Richard Kimball in 1853: ‘A more

Gibson’s view of the lawyer’s role in a memoir published in 1856, two years after Sharswood’s lectures were published. See David Paul Brown, 2 THE FORUM; OR, FORTY FULL YEARS AT THE PHILADELPHIA BAR 29-30 (2 vols. 1856).


Lord Brougham’s famous statement was “an 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 expediency, 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 lot to involved his country in confusion” 2 TRIAL OF QUEEN CAROLINE 8 (1821) (James Cockroft & Co. 1874 reprint). Brougham’s statement was made during the divorce trial of King George IV, while defending the Queen. Before his arranged marriage to Queen Caroline, George had secretly “married” (it was apparently not a lawful marriage) a Catholic widow, Mrs. Fitzherbert, which would have made his position as King untenable as head of the Church of England. Brougham knew this, and his statement suggested a willingness to use this information in
monstrous doctrine, I do not hesitate to say, was never broached.”

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.” 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.”

The note by Field following § 511 offers a slightly different defense of his client. Other lawyers also rejected Brougham. See David Paul Brown, 2 THE FORUM; OR, FORTY FULL YEARS AT THE PHILADELPHIA BAR 28 (2 vols. 1856)(quoting and declaring “[t]hese principles ... can certainly never be approved by any just or reasonable man”); William Porter, THE INTRODUCTORY ADDRESS DELIVERED BEFORE THE LAW ACADEMY OF PHILADELPHIA, AT THE OPENING OF THE SESSION OF 1849-50 18 (1849)(same).


David Dudley Field, The Study and Practice of the Law, 14 Dem. 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. One ABA member of the debate concerning Canon 5, which discussed defending and prosecuting crimes, declared that if a man confessed to him his guilt, he was morally bound to make the confession known to the court to deal with. Discussion Upon Canons of Ethics, 33 A.B.A. Rep. 59-60 (1908). See also William H. Taft, Legal Ethics (II), 1 B.U. L. Rev. 233, 240 (1921)(stating lawyer “is not justified in rising and assuring the jury of the innocence of his client” in a criminal case when lawyer knows of client’s guilt).

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.”127 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.”128 The lawyer was also permitted to offer evidence of the circumstances of the case, and anything that would lessen the gravity of the client’s guilt: “But here the advocate should stop.”129 Hoffman believed the zeal owed 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, must less obliged, to use my endeavours to arrest, or to impede the court 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 cause ....\(^{130}\)

This quotation may be interpreted less restrictively than it initially appears. Hoffman believed “Law is a deep science” (34).\(^{131}\) A lawyer who used his forensic talents to engineer the acquittal of a guilty person betrayed the scientific basis of law. Hoffman argued “[a]ll reasoning should be regarded as a philosophical process—its object being conviction, by certain known and legitimate means.”\(^{132}\) An advocate who used “loud words,” “sarcasm and invective” was the antithesis of a lawyer knowledgeable about the science of the law.\(^{133}\) Instead, a lawyer drawing on the “artifices of eloquence” was a common lawyer whose actions failed to meet the standards of an honorable profession, the type of lawyer Hoffman inveighed against in his Resolutions. Hoffman’s view was intended to creates 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

\(^{130}\)David Hoffman, A COURSE OF LEGAL STUDY 756-57 (2d ed. 1836)(Resolution 15).


\(^{132}\)David Hoffman, A COURSE OF LEGAL STUDY 772 (2d ed. 1836)(48).

\(^{133}\)David Hoffman, A COURSE OF LEGAL STUDY 772 (2d ed. 1836).
the *facts* of the case.”

Hoffman’s unwillingness to press legal claims that “ought not, to be sustained,”\(^{134}\) represented an ethic joining private and public morality, an ethic consistent with a person comfortable with governance by an elite, including elite lawyers.\(^{135}\) That view of lawyering was reshaped even as Hoffman wrote it. Even the conservative position taken by David Dudley Field modified in part Hoffman’s conclusion. The third oath of the 1850 Field Code modified the duty of the lawyer to maintain only just causes: It required the lawyer “[t]o counsel or maintain such actions, proceedings or defences, only as appear to him legal and just, except the defence of a person charged with a public offence.”\(^{136}\)

Sharswood’s 1854 *Compend of Lectures* concluded that a lawyer had a moral duty 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.\(^ {137}\) Sharswood also accepted in part the

\(^{134}\)David Hoffman, *A Course of Legal Study* 754 (2d ed. 1836).


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 about 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 his guilt to a crime. That discussion had barely subsided when the most sensational murder case of the 19th 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. The defendant, a servant accused of killing his

32 A.B.A. Rep. 9, 91-92, 106 (5th ed. 1907). As a judge, Sharswood heard more civil than criminal cases. His eulogist George W. Biddle indicates he was widely read in criminal law. See George W. Biddle, A SKETCH OF THE PROFESSIONAL AND JUDICIAL CHARACTER OF THE LATE GEORGE SHARSWOOD 9 (1883). When he 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: PHILADELPHIA, 1800-1880 (1989). See also Perry Miller, THE LIFE OF THE MIND IN AMERICA 205-06 (1965)(noting article in the Southern Literary Messenger in 1858 concluding that “the Christian lawyer who defends a client he knows to be a culprit obeys ‘the cardinal rule of love to his neighbour, laid down specifically by the Saviour’”).
master, Lord William Russell, confessed his guilt to Phillips shortly before the second day of a three day trial but refused to plead guilty. Phillips continued to defend Courvoisier after informing one of the two trial judges of Courvoisier’s confession.138 Phillips later 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.”139

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 far better 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 in


a case where the truth is not clear. I say that the proof adduced is not conclusive of murder ...."\textsuperscript{140}

Sharswood emphatically defended Phillips’s actions.\textsuperscript{141} 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. It was not an after-the-fact commendation.\textsuperscript{142} Further, had Phillips impermissibly stated his belief in Courvoisier’s innocence?


\textsuperscript{141}See George Sharswood, \textit{An Essay on Professional Ethics}, 32 A.B.A. Rep. 9, 107 (5\textsuperscript{th} ed. 1907)(noting “as Baron Parke has so well expressed it, to use ALL FAIR ARGUMENTS ARISING ON THE EVIDENCE”).

\textsuperscript{142}Sharswood’s report of \textit{Courvoisier} is intended to exonerate Phillips from any charges of immoral or unethical behavior. George Sharswood, \textit{A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW} 40-44 (1854). George Sharswood, \textit{An Essay on Professional Ethics}, 32 A.B.A. Rep. 9, 103-07 (5\textsuperscript{th} ed. 1907). He does not quote the statement of Baron Parke until the end of his discussion, see id. at 107, and implies that Phillips used only the arguments based on the evidence. But Sharswood knows that critics of Phillips have fastened on to the speech given to the jury after the confession. He dismisses its importance by concluding that “[t]he language of counsel, on such occasion, 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.” \textit{Id.} at 104. Sharswood protests too much.
After Couvoisier 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.”  

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 ....” 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. 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. Second, as made clear by David J. A. Cairns, Phillips’s repeated questions of Mancer were a consequence of the Prisoners’ Counsel Act of

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143 See David Mellinkoff, *The Conscience of a Lawyer* 140 (1973) *quoting Chronicle* (London), June 22, 1840. The case ended on Saturday, June 20, 1840.

144 See David Mellinkoff, *The Conscience of a Lawyer* 140 (1973) *quoting The Times* (London), June 25, 1840. Cf. Mellinkoff, CONSCIENCE, at 193-94 *quoting Chronicle* (London), June 25, 1840 (defending Phillips’s action and declaring that failure to point out discrepancies, contradictions and omissions in evidence would have been a “gross violation of duty”)

Before the Prisoners’ Counsel Act, a person charged with a felony had no right to counsel in England. The Prisoners’ Counsel Act also gave to the defendant the right to a copy of any depositions of any witnesses taken before trial. 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.” 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. 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. The last word was the privilege of giving the final speech to the jury, a right highly prized and rarely


147 See David Mellinkoff, THE CONSCIENCE OF A LAWYER 73 (1973). “Dead” was crossed out in the deposition.

148 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.” See David J. A. Cairns, ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL, 1800-1865 191 (1998)(reprinting as Appendix 3 Phillips’s statement to the jury in Courvoisier). The other female servant was the cook Mary Hannell.
forfeited by English defense counsel. 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 which they did not have the benefit of either knowing what Sarah Mancer had said before the coroner, or hearing her explanation of it.” As the controversy raged in the press, Phillips, largely vilified for his actions, remained silent.

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. 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. 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. Phillips’s claims defending his honor generated a controversy about the ethics of

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152 See David Mellinkoff, The Conscience of a Lawyer 203 (1973) quoting Examiner (London), Nov. 3, 1849. See also id. at 193, quoting Examiner (London), Nov. 24, 1849 and
The attacks against Phillips were published in the United States in the January 26, 1850 issue of *Littell’s Living Age*, which reprinted articles from the *Examiner.*\(^{153}\) At the same time, the *Monthly Law Reporter*, in its January 1850 issue, published an essay titled, “Professional Conduct—The Courvoisier Case.”\(^{154}\) After averring, “Mr. Phillips, we are glad to say, has

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\(^{154}\) [Stephen H. Phillips], *Professional Conduct—The Courvoisier Case*, 12 Monthly L.
completely vindicated himself,” the Monthly Law Reporter published the exchange of letters between Warren and Phillips published on November 20, 1849 in The Times. At the end of the same issue, in its Miscellaneous Intelligence, the editor reprinted a defense of Phillips published in the London Legal Observer. 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 mind, implied that Charles Phillips’s conduct was unprofessional. The March 1850 issue of the Monthly Law Reporter continued to charge Phillips with misconduct in his defense of Courvoisier.

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


156[Stephen H. Phillips], Mr. Phillips and the Courvoisier Case, 12 Monthly L. Rep. 479 (1850).

The case may have been the most notorious murder case in 19th century America. 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 23rd, 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.

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159 Officials estimated that between 55,000 and 60,000 people attended the trial, usually in 10 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.
at trial as that of George Parkman.\textsuperscript{160} 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 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.\textsuperscript{161}

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

\textsuperscript{160}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’s as Parkman’s was criticized by legal commentators writing in the immediate aftermath of the case.

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 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 15 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.”

“A Member of the Legal Profession” offered the 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.”

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162 See Member of the New York Bar, A Review of the Webster Case (1850) quoted in Robert Sullivan, The Disappearance of Dr. Parkman 117 (1971).

163 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 (1850).
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. 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 the cause.” 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.” 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.”

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Sharswood’s defense of Charles Phillips’s conduct in his *Compend of Lectures* four years later is, like much of the *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.”¹⁶⁸ 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.”¹⁶⁹ The Appendix to Sharswood’s *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

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forthcoming evidence.” 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. 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 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.” 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. 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, 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.”

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. One of the compromises was the adoption of the Fugitive Slave Act of 1850. The Act barred testimony from the alleged fugitive and paid the commissioner hearing the matter $10 when the commissioner found proof was sufficient that the person was

173 Bellamy Storer, The Legal Profession: An Address Delivered Before the Law Department of the University of Louisville, Kentucky 16-17 (1856).

174 For some southerners, the work of the lawyers such as Webster, Clay and others 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.” A.O.P. Nicholson, Address Delivered Before the Two Literary Societies of the University of North-Carolina, June 1, 1853 (1853) quoted in Maxwell Bloomfield, American Lawyers in a Changing Society, 1776-1876 155 (1976).

175 Act of September 18, 1850, ch. 60, 9 Stat. 462.
the claimed fugitive slave and $5 when the commissioner found the proof was insufficient. It made no provision for a method of proof that the person detained was not a fugitive slave. Almost immediately after its adoption, slavecatchers 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. 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. When Thomas Sims’s rendition proceeding in 1851 led literally to a ringing of the Boston courthouse in chains, supporters of the Fugitive Slave Act rejoiced that the supremacy of the law had been vindicated, while its opponents exploited the symbolism of Marshal Tukey’s action.


On May 30, 1854, Congress adopted the Kansas-Nebraska Act, another attempt to defuse the slavery issue by calling for a vote by the inhabitants on the issue.\footnote{Act of May 30, 1854, ch. 59, 10 Stats. 277.} 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.\footnote{See Samuel Shapiro, \textit{The Rendition of Anthony Burns}, 44 J. Negro Hist. 34, 39, 42-43 (1959).} The courthouse was again ringed in chains.\footnote{See Samuel Shapiro, \textit{The Rendition of Anthony Burns}, 44 J. Negro Hist. 34, 39 (1959); Paul Finkelman, \textit{Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys}, 17 Cardozo L. Rev. 1793, 1823 (1996).} The commissioner, Edward Loring, issued the certificate of removal on June 2, 1854, despite appearing to have grounds to refuse to issue the certificate.\footnote{See generally Albert J. Von Frank, \textit{The Trial of Anthony Burns: Freedom and Slavery in Emerson’s Boston} (1998); Samuel Shapiro, \textit{The Rendition of Anthony Burns}, 44 J. Negro Hist. 34 (1959). \textit{See generally} Paul Finkelman, \textit{Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys}, 17 Cardozo L. Rev. 1793 (1996).} 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.\footnote{See Albert J. Von Frank, \textit{The Trial of Anthony Burns: Freedom and Slavery in Emerson’s Boston} 198 (1998)(listing number of military personnel).} The rendition of a fugitive slave from Boston was hailed as evidence of adherence to “SUPREMACY OF THE LAW SUSTAINED”).
the rule of law.\textsuperscript{186} In March 1855, despite the 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 “‘has lost the public confidence.’”\textsuperscript{187}

On September 30, 1850, George Sharswood’s first lecture at the newly revived Department of Law of the University of Pennsylvania was given, and his subject was the legal profession.\textsuperscript{188} Lecture I noted that “[p]eace and quiet are what we seek in society.”\textsuperscript{189} Both were

\textsuperscript{186}See Paul Finkelman, \textit{Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys}, 17 Cardozo L. Rev. 1793, 1821 (1996)(quoting May 27, 1854 letter of United States District Attorney Benjamin Hallett to President Franklin Pierce that proceeding was necessary because “[t]he law of the land cannot be trampled upon”); Samuel Shapiro, \textit{The Rendition of Anthony Burns}, 44 J. Negro Hist. 34, 49 (1959)(noting return of Burns to Alexandria, Virginia met with “a 100 gun salute” “‘in honor of the triumph of the law’”).


\textsuperscript{188}George Sharswood, \textit{LECTURES INTRODUCTORY TO THE STUDY OF THE LAW} 37 (1870).

\textsuperscript{189}George Sharswood, \textit{LECTURES INTRODUCTORY TO THE STUDY OF THE LAW} 17 (1870). 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 his \textit{Compend of Lectures} was revised between 1854 and his
in short supply nationally and locally in Philadelphia in 1850. The adoption of the Fugitive Slave Act just 12 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. The deadly anti-Catholic riots in 1844 and the volunteer fire company riots of 1849 were but two examples. Sharswood followed his statement on peace and order with a rejection of a 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 death in 1883, it seems likely that much of the language remained the same over time.


the community. Open resistance is treason.”\textsuperscript{192} 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 Presbyterian, and his proclamation of a religious duty to obey even bad laws was consonant with Presbyterian sermons of the time.\textsuperscript{193}

The \textit{Burns} rendition of 1854 was a further stark example 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. 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, 18% of the total population of the County of Philadelphia, had been born in Ireland.\textsuperscript{194} Forty percent of the

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\textsuperscript{192}George Sharswood, \textsc{Lectures Introductory to the Study of the Law} 17 (1870).

\textsuperscript{193}Ichabod S. Spencer, \textsc{Fugitive Slave Law: The Religious Duty of Obedience to Law: A Sermon, Preached in the Second Presbyterian Church in Brooklyn, Nov. 24, 1850} (M.W. Dodd: New York 1850)(noting religious duty to obey law even if law may be unwise and unconstitutional); Samuel T. Spear, \textsc{The Law-Abiding Conscience, and the Higher Law Conscience; with Remarks on the Fugitive Slave Question. A Sermon, Preached in the South Presbyterian Church, Brooklyn, Dec. 12, 1850} (New York 1850); John C. Lord, “\textsc{The Higher Law,}” in \textsc{Its Application to the Fugitive Slave Bill} (1851)(printing sermon preached at Central Presbyterian Church in Buffalo on Thanksgiving Day 1851).

\textsuperscript{194}Dennis Clark, \textsc{The Irish in Philadelphia} 29, 63 (1973).
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workforce of 59,903 persons consisted of German and Irish immigrants, up from just 10% in 1836.\footnote{Allen Steinberg, \textit{The Transformation of Criminal Justice: Philadelphia, 1800-1880} 15 (1989).} 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 fever” that raged from 1851 through 1854\footnote{Allen Steinberg, \textit{The Transformation of Criminal Justice: Philadelphia, 1800-1880} 18 (1989).} and the creation of homes for abandoned children (Catholic, Jewish, Negro, etc.) between 1853 through 1856.\footnote{Dennis Clark, \textit{Philadelphia 1876: Celebration and Illusion in Philadelphia, 1776-2076: A 300-Year Perspective} 54 (1975); \textit{id.} at 157 (noting that “[i]n the local politics of 1851, no issue was bigger than temperance”). A vote on prohibition in Pennsylvania failed at the ballot box in 1854 and the temperance movement soon thereafter tempered. \textit{Id.} at 159.}

In the midst of this uproar, on October 2, 1854, the 44-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.\footnote{See George Sharswood, \textit{A Compend of Lectures on the Aims and Duties of the Profession of the Law} 7 (1854); \textit{Judge Sharswood’s Preface to the Fourth Edition}, 32 A.B.A. Rep. 7 (1907); Edwin R. Keedy, \textit{George Sharswood—Professor of Law}, 98 U. Pa. L. Rev. 685, 692 (1950).} Sharswood graduated from the University of Pennsylvania at 18, and was admitted to the practice of law in December 1831 after a three-
year apprenticeship. He was appointed as an Associate Judge of the District Court in 1845, and in 1848 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, won unchallenged with the support of all parties, including Whigs and Democrats. In 1852, a Faculty of Law was instituted, and Sharswood was named Dean and Professor of the Institutes of Law. Unlike most elite Philadelphia lawyers in the mid-19th century, who were from the


202 Edwin R. Keedy, George Sharswood—Professor of Law, 98 U. Pa. L. Rev. 685, 687 (1950); Margaret Center Klingelsmith, History of the Department of Law in UNIVERSITY OF PENNSYLVANIA: THE PROCEEDINGS AT THE DEDICATION OF THE NEW BUILDING OF THE

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upper class, Sharswood was a member of the middle-class. Like many of them, he was a Presbyterian, and from all accounts a devout Presbyterian.

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.” 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

DEPARTMENT OF LAW 213, 222 (1901). The other two professorships were in Practice and Pleading and the Law of Real Estate Conveyancing and Equity Jurisprudence. Id.


204 See Thomas L. Shaffer, ON BEING AND CHRISTIAN AND A LAWYER 59 (1981)(noting Sharswood “was a Presbyterian Sunday-school teacher all during the most turbulent and exciting years of the revival of 1840-57”). See also Gary B. Nash, The Philadelphia Bench and Bar, 1800-1861, 7 Comp. Studies in Soc’y and Hist. 203, 215 (1965)(noting that lawyers in Philadelphia in both 1800-05 and 1860-61 were “Protestants, and especially Presbyterians and Episcopalians”).

205 George Sharswood, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE LEGAL PROFESSION 9 (1854). The second edition, published in 1860, revises the beginning, and these remarks are not present in that edition. See George Sharswood, AN ESSAY ON PROFESSIONAL ETHICS (2d ed. 1860).
of the great end of our being.”

Sharswood’s *Compend of Lectures* declaimed that “[g]ood men of all parties prefer to live in a country, in which justice according to law is impartially administered.” 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.” Sharswood was also a strong defender of property rights, a topic pro-slavery antebellum Democrats increasingly harped on in the 1850s. His politics were critically viewed


208 George Sharswood, *Lectures Introductory to the Study of the Law* 17 (1870).


in a September 2, 1861, diary entry by one Philadelphia lawyer: “He is an able lawyer, of unquestioned integrity & long experienced in a place for which he is well fitted by talents and knowledge, but he is a Democrat and on all party questions most intolerant & bigoted. He is supposed to be unsound on the subject of the war and no doubt has fully sympathized with the South.”211 Yet though Sharswood urged obedience to the positive law, not the higher law, he quotes the English philosopher William Whewell that the law “‘most perpetually and slowly tends towards the idea of justice.’”212 Sharswood’s hedging on the extent of zeal owed the client, and his hedging on other issues of ethics, such as contingent fees,213 suggests a dividedness in Sharswood. As noted by Maxwell 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.”214 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.215 Sharswood remained a Democrat, but was


212 George Sharswood, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW 20 (1870).

213 See George Sharswood, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE LEGAL PROFESSION 85-91 (1854)(discussing contingent fees and noting that he was less interested in lawfulness of contingent fees than in “the policy and morality of the practice”).


“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 & bigoted,” but dedicated his *Compend of Lectures* to his Whig preceptor Joseph R. Ingersoll, for whom he had a great deal of reverence and respect. As the title of his *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. 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


216I 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.” *See 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.” *See* Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 Geo. J. Leg. Ethics 241, 257 (1993). In my view, Sharswood’s 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.
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. President James J.
Buchanan, also a lawyer, noted at his inaugural address on March 4, 1857, the pending case of
_Dred Scott v. Sandford_. 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

happily, 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.

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, and law and lawyers

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217 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).

218 19 How. (60 U.S.) 393 (1857).

219 Don E. Fehrenbacher, _The Dred Scott Case_ 313 (1978) quoting IV Messages and
Papers of the Presidents 2962 (James D. Richardson, ed., 11 vols. 1913).

220 See Brian McGinty, _Lincoln & 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).
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 sufficient 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. A side-by-side comparison, found in *Gilded Age Legal Ethics*, shows this reliance. For example, Provision 8 of the Code of Ethics requires lawyers to “uphold the honor, maintain the dignity, and promote the usefulness of the profession.” Canon 29 asks lawyers to “uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.” 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.

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. For example, the 1850 Field

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


223 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).

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.”225 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 1907.226 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.”227 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.”228 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 prohibited from delaying “any man’s

225Comm’ers on Practice and Pleadings, THE CODE OF CIVIL PROCEDURE OF THE STATE OF

226See Report of the Committee on Code of Professional Ethics, 31 A.B.A. Rep. 676, 714-
15 (1908)(reprinting oath of attorneys of state of Washington as Appendix D).

567, 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. See id.

228Comm’ers on Practice and Pleadings, THE CODE OF CIVIL PROCEDURE OF THE STATE OF
cause for lucre or malice.”

ABA Canon 30 declared that a lawyer who accept an engagement had a “duty to insist upon the judgment of the Court as to the legal merits of his client’s claim.” 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

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229 See Final Report of the Committee on Code of Professional Ethics, 33 A.B.A. Rep. 567, 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.” This was instead addressed by the ABA in Canon 18.

permits,” incline to Sharswood’s position. On the whole, however, the remarkable aspect of the ABA Canons was their consonance with mid-19th century views of legal ethics. 

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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. When the courtroom dustup was settled, the “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.” In mid-1869, Gould and Fisk attempted to use the Erie Railway to gain control of the Albany and Susquehanna Railroad. In the fall, Gould attempted to corner the gold market. Field, continuing to act as a lawyer (but not, as Field later defended himself, as either the sole

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233 A popular history of the Erie takeover war is John Steele Gordon, The Scarlet Woman of Wall Street: Jay Gould, Jim Fisk, Cornelius Vanderbilt, and the Birth of Wall Street (1990). The classic and contemporaneous account is found in Charles F. Adams, Jr., The Erie Railroad Row, 3 Am. L. Rev. 41 (1868) and Charles F. Adams, A Chapter of Erie, 109 N. Am. Rev. 30 (1869). These articles and others, including an article by Henry Adams, The New York Gold Conspiracy, were collected and published as Charles F. Adams, Jr. and Henry Adams, A Chapter of Erie and Other Essays (1871).


236 See Henry Adams, The New York Gold Conspiracy in Charles F. Adams, Jr. & Henry Adams, Chapters of Erie 100 (1871). This essay was originally published in 1870 in the Westminster Review.
counsel or even official counsel in all instances) to both, was loudly condemned for his actions.\textsuperscript{237} 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.\textsuperscript{238} 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.\textsuperscript{239}

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

\textsuperscript{237}See, e.g., Michael Schudson, \textit{Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles}, 21 Am. J. Leg. Hist. 191, 196-97 (1977)(listing some criticisms, including that of judge that Field and Thomas Shearman engaged in conspiracy to elect directors by use and abuse of legal process and editorial of New York Times implying Field was not an honest lawyer). Criticisms made at the time are cited below.


of the pettifoggers.” When Field complained to Bowles about the characterization, Bowles


Calling Field “king of the pettifoggers” was about as insulting as Bowles could be to someone who became a lawyer in the 1820s. See Emory Washburn, Art. III.—On the Legal Profession in New England, 19 Am. Jurist 49, 52 (1838) (noting in 1838 legal profession had to choose between “an enlightened, educated, independent body of men or a host of self-constituted, noisy and narrow-minded pettifoggers”); Timothy Walker, Introduction to American Law 662-63 (2d ed. 1846) (“Were I to concentrate in a single word whatever I can conceive of despicable in our profession, it would be pettifogging”); George Sharswood, A Compend of Lectures on the Aims and Duties of the Profession of the Law 80 (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”). See generally Perry Miller, The Life of the
wrote back, and included a copy of an editorial in the paper accusing Field of “prostituting the law.”

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. 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: First, Field’s debating points both attempt to

MIND IN AMERICA 135-36 (1965)(noting claim by elite lawyers in 1830s that pettifoggers brought profession “into contempt by their avarice and incompetence”).


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.”

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. 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 was

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245 Compare David Dudley Field, Dudley Field and Samuel Bowles, *The Lawyer and His Client* 9 (1871) (reprinting letter of David Dudley Field to Samuel Bowles dated January 5, 1871 including statement “I do not assent to the theory of Brougham that the lawyer should know nobody but his client”) with David Dudley Field, *The Study and Practice of the Law*, 14 Dem. Rev. 344, 347-48 (1844) (concluding that Brougham’s argument “to our view a more revolting doctrine scarcely ever fell from any man’s lips. We think it unsound in theory and pernicious in practice”).
responsible “not for his clients, not for their causes, but for the manner in which he conducts their causes.”246 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.”247 In an apparent attempt to craft a 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 since the passage of the Prisoner’s Counsel Act in 1836.248 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.”249 In 1844, Field


249 See Andrew L. Kaufman, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 434
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.” 250 Field followed that statement with
a rejection of the latter proposition: the advocate was forbidden “to overlook the moral aspects of
the claim.” 251 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.” 252 Bowles’s lack of expertise led most lawyers, as George
Martin notes, to conclude “Field won the exchange.” 253


George Sharswood made the similar claim with regard to criminal defense in his 1854 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 (1854).


252 David Dudley Field, Dudley Field and Samuel Bowles, The Lawyer and His Client
10 (1871). See also Andrew L. Kaufman, Problems in Professional Responsibility 434

253 George Martin, Causes and Conflicts: The Centennial History of the
Association of the Bar of the City of New York 56 (1970). See e.g., Albert Stickney, The
Second, the Field-Bowles debate was the beginning, not the end 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 28, 1871 article.\textsuperscript{254} Francis Barlow, a 36-year old lawyer, wrote three long letters printed in Horace Greeley’s *New York Tribune* between March 7-9, 1871, letters later published in pamphlet form as *Facts for Mr. David Dudley Field*.\textsuperscript{255}

\begin{footnotesize}
\textit{Lawyer and his client}, 112 N. Am. Rev. 392, 396 (1871)(concluding “And it must, it would seem, be admitted that Mr. Bowles does not make a very strong case”); \textit{More About Legal Morality}, *The Nation*, February 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”).


\textsuperscript{255} Gen. Francis C. Barlow, \textit{Facts for Mr. David Dudley Field} (1871). A subtitle was “Supplement to Field’s and Bowles’ Correspondence.” Barlow was a major general in the Civil War. See George Martin, \textit{Causes and Conflicts: The Centennial History of the Association of the Bar of the City of New York} 57 (1970).
\end{footnotesize}
Albert Stickney, just 28 years old, wrote a 30-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.\(^{256}\) 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.”\(^{257}\) 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 (published March 9, 1871), 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 the propriety of Field’s actions.\(^{258}\) 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.”\(^{259}\) Field went so far as to publish a letter from George Sharswood

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\(^{256}\) Albert Stickney, *The Lawyer and his client*, 112 N. Am. Rev. 392 (1871). In the same issue was Charles F. Adams’s *An Erie Raid*.

\(^{257}\) David Dudley Field, Dudley Field and Samuel Bowles, *THE LAWYER AND HIS CLIENTS* 18 (1871).

\(^{258}\) Gen. Francis C. Barlow, *FACTS FOR MR. DAVID DUDLEY FIELD* 24 (1871).

\(^{259}\) Gen. Francis C. Barlow, *FACTS FOR MR. DAVID DUDLEY FIELD* 34-35 (1871).
intended to justify his conduct. In May 1871, a defense of Field by George Ticknor Curtis was published. Curtis’s lengthy (over 100 printed pages) and turgid defense of all of Field’s actions concerning the attempted takeover of the Albany & Susquehanna led to his conclusion that “no just imputation of professional impropriety rests upon [Field and his partners] on account of any such act or advice.” Curtis initiated his investigation after an April 10, 1871 request of “an intimate friend of Mr. David Dudley Field.” His introductory note to the published defense is dated May 10, 1871. What is astonishing about the Field-Barlow debate is that a 65-year lawyer,

260 Gen. Francis C. Barlow, FACTS FOR MR. DAVID DUDLEY FIELD 70 (1871)(noting publication of letter but not its location or date). I have been unable to find the published letter, and the reference by Barlow does not indicate the extent to which Sharswood’s letter exculpated Field.

261 George Ticknor Curtis, AN INQUIRY INTO THE ALBANY & SUSQUEHANNA RAILROAD LITIGATIONS OF 1869, AND MR. DAVID DUDLEY FIELD’S CONNECTION THEREWITH 101 (1871). George Martin notes the almost “unreadable” article, see George Martin, CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 60 (1970), which I think was part of the point.

262 George Ticknor Curtis, AN INQUIRY INTO THE ALBANY & SUSQUEHANNA RAILROAD LITIGATIONS OF 1869, AND MR. DAVID DUDLEY FIELD’S CONNECTION THEREWITH 2 (1871). There is no indication that Curtis was intentionally biased, see George Martin, CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 60 (1970), but all inferences made by Curtis favored Field.
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 corroboration and vindication.

George Sharswood’s 1854 *Compend of Lectures* equated personal 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.”

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 Rules of Professional Deportment*, 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 notes in a March 20, 1871 letter that “[a]s concerns Mr. Field,

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263 See George Sharswood, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE LEGAL PROFESSION 94 (1854)
I shall take care that his conduct is investigated before a body of men who cannot be deceived by small tricks and petty invasions.”264 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. But Barlow and others persisted, and in extraordinary meeting of the Association in December 1872, Field demanded a hearing and then defended his conduct “in one of the longest and certainly one of the liveliest speeches ever heard at an Association meeting.”265 He defended on two grounds: first, his accusers both ignorant and corrupt; second, his actions were justified as professionally proper by “twelve lawyers and judges.”266 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.”267 Both sides demanded a report from the committee and in early 1873, the Association “exonerated Field.”268 A decade later, the Association asserted the

264 Gen. Francis C. Barlow, FACTS FOR MR. DAVID DUDLEY FIELD 68 (1871).


authority to investigate the conduct of all lawyers in New York City, whether members of the Association or not.  

The effort to continue to “professionalize” 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. With admission to the practice of law largely nonexistent in most states even in 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. Id. at 100-01.

269 Michael J. Powell, FROM PATRICTION TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION 144 1988).


271 See William Thomas, LAWYERING FOR THE RAILROAD: BUSINESS, LAW, AND POWER IN THE NEW SOUTH 7-8 (1999)(noting Jones’s position and rise of corporate lawyering in south 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 a continuity in the history of the profession, was one approach.

When the Alabama State Bar Association adopted its Code of Ethics in 1887, it adopted 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 defense as the law of the land permits.” 272 This was asserted by Sharswood in 1854 as part of the duty of an honorable attorney. 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.” 273 Within the space of 20 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 20th century. The focus of the ABA was on the lawyer’s right to decide whether to represent a person accused of a crime, obliterating the claim of the duty to represent the criminally accused, even those who the lawyer knew were guilty of the offense. 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 system.274 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.

274 *See also Forensic Ethics*, THE NATION, January 26, 1871, at 56, 56 (noting duty of lawyer both to client and to administration of justice).
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 19th century, complaints about the shift of law from a profession to a business were regularly published at the turn of the century.\textsuperscript{275} A number of lawyers writing at the end of the 19th and beginning of the 20th centuries emphasized the duty of the lawyer to remain independent of the client, a consequence of the lawyer’s status as an “officer of the court.”\textsuperscript{276} Additionally, a number of lawyers wrote books and articles assailing the shift of law from a profession to a business, and looked toward a return to that golden age.\textsuperscript{277} 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.”\textsuperscript{278} The materialist conduct of lawyers was criticized in a June 1905 speech at Harvard University by President Theodore Roosevelt\textsuperscript{279} and by Louis D. Brandeis in a speech given in May.\textsuperscript{280} Later that year, the

\textsuperscript{275}See, e.g., George F. Shelton, \textit{Law as a Business}, 10 Yale L.J. 275 (1901).


\textsuperscript{278}George F. Shelton, \textit{Law as a Business}, 10 Yale L.J. 275, 276 (1901).

\textsuperscript{279}Theodore Roosevelt, \textit{Address at Harvard University (June 28, 1905)}, in 4 Theodore Roosevelt, \textit{PRESIDENTIAL ADDRESSES AND STATE PAPERS} 407, 419-20 (1910)(criticizing lawyers for aiding the wealthy at the expense of the public interest).
life insurance scandal in New York drew more unwanted attention to the conduct of lawyers.\footnote{See Louis D. Brandeis, \textit{The Opportunity in the Law}, 39 Am. L. Rev. 555 (1905) (publishing in the July-August issue a May 4, 1905 speech to Harvard Ethical Society).} 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,\footnote{See Morton Keller, \textit{The Life Insurance Enterprise, 1885-1910: A Study in the Limits of Corporate Power} 245-64 (1963). 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 \textit{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, \textit{Causes and Conflicts: The Centennial History of the Association of the Bar of the City of New York} 1870-1970 198 (1970).} 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.”\footnote{Henry St. George Tucker, \textit{Address of the President}, 28 A.B.A. Rep. 299, 383-88 (1905).} In August 1906, the Committee reported that a code of ethics was feasible and practical.\footnote{Proceedings, 28 A.B.A. Rep. 132, 132 (1905).} 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.

III. THE MARCH TO MODERNITY

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

Justice Stone’s criticism of the Canons in 1934 reflected a popular sentiment of the time. A 1928 article in *Harper’s Magazine* noted a “popular lack of faith in the honesty and the integrity of the legal profession” caused in part because the Canons were “largely a manual of polite behavior for lawyers.” 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 to business and to the life of the community within which the lawyer functions.”

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288 Morris Gisnet, *A Lawyer Tells the Truth* 14 (1931). See also Norman Thomas,
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.”\textsuperscript{289} 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.\textsuperscript{290} 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

\textit{Introduction} to 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.

\textsuperscript{289}Alexander L. Schlosser, “LAWYERS MUST EAT” 21 (1933). \textit{See also id.} at 52.

clarification. Any changes, however, that may be made should have as their purpose the more faithful reflection of the prevailing views among right-thinking lawyers.”

At the same time, the ABA’s Special Committee on Canons of Ethics, in recommending its own abolition, noted the “substantially universal approval” 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.”

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.”


\[\text{Report of the Special Committee on Canons of Ethics, 61 A.B.A. Rep. 797, 799 (1936).}\]


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.” Members of the ABA urged greater professionalism through the teaching of legal ethics in law schools, and recommended that states include legal ethics as a bar examination topic.  

high-minded community; and if you find anywhere a corrupt legal profession, you find it in the midst of a corrupt and corrupting people.” David Dudley Field, *The Study and Practice of the Law*, 14 Dem. Rev. 344, 346 (1844). See also Orrin N. Carter, *Ethics in the Legal Profession* (Part 1), 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.


296 See *Report of Standing Committee on Professional Ethics and Grievances*, 54 A.B.A. Rep. 397, 399 (1929)(recommending legal ethics be a required law school course but noting no agreement to such by Association of American Law Schools); *Association’s Work at Memphis*
Summarized, 15 ABA J. 740 (1929)(reporting approval of proposal “making Professional Ethics part of compulsory course in law schools”). See also Bernard C. Gavit, Legal Ethics and the Law Schools, 18 ABA J. 326 (1932)(discussing drive to make legal ethics subject of instruction in law schools). See also Susan K. Boyd, The ABA’S FIRST SECTION: ASSURING A QUALIFIED BAR 41 (1993)(noting 75% 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 Report of the Committee on Legal Education and Admission to the Bar, 29 A.B.A. Rep. 349, 377 (1897)(“Your Committee has under consideration the desirability of instruction in the legal and moral duties of lawyers”) 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”); Teaching Legal Ethics in Law Schools, 2 Am. L. Sch. Rev. 377 (1910)(listing 32 law schools where legal ethics taught as part of a regular course and 28 schools where legal ethics given in one or more lectures and 60 schools where legal ethics not taught).

See Proceedings of American Bar Association, 58 A.B.A. Rep. 93, 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 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).
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, 36 of 49 jurisdictions required some period of study before applying for admission to the bar, with 28 requiring three years of preparation. 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.” And once a member of the bar, the absence of any mandatory bar associations in 1920 made the process of disbarment difficult. The ABA noted

298 Alfred Z. Reed, Training for the Public Profession of the Law 92 (1921).

299 Alfred Z. Reed, Training for the Public Profession of the Law 409 (1921).

the difficulty of disbarring 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.\textsuperscript{301} Ten years later, the situation was largely unchanged. Columbia Law School Dean Young B. Smith noted that in 1929-30, “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.\textsuperscript{302}

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

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\textsuperscript{301}See 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 (1908)(“The one further thing noticeable about the Codes of the various State Bar Associations, 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).

\textsuperscript{302}Young B. Smith, Law Schools and Lawyers, 18 A.B.A. J. 480, 481 (1932).
courts having jurisdiction of disciplinary proceedings against lawyers."\textsuperscript{303} Even so, the Standing Committee on Professional Ethics and Grievances urged the ABA leadership to appoint a special committee to investigate the supplementation and amendment of the Canons of Ethics.\textsuperscript{304} The 1924 call for amendments and supplements to the Canons of Ethics led to the adoption by the ABA in 1928 of 13 additional Canons.\textsuperscript{305} 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 (Canon 33), dividing fees (Canon 34), control of the lawyer’s work by a lay intermediary (Canon 35), accepting compensation from others without the client’s consent (Canon 38), and the impropriety of a lawyer paying for the expenses of the litigation (Canon 42). The ABA’s supplemental Canons approached ethical issues as requiring limits of particular business methods, methods adopted more often by non-elite lawyers


\textsuperscript{304} Report of the Standing Committee on Legal Ethics and Grievances, 49 A.B.A. Rep. 466, 468 (1924).

and law firms than by elite lawyers who comprised much 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 by then-ABA President Lewis F. Powell, only two Canons were added to the Canons of Ethics. In 1933, the ABA added Canon 46, titled “Notice to Local Lawyers,” and amended several original Canons. 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. Other than repeated amendments of Canon 27 concerning Law Lists, 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. The question is, if the Canons were an anachronism by the 1930s, how did they last through the 1960s?

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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 lawyers 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. 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.”

The formation of the National


310 Robert H. Jackson, An Organized American Bar, 18 ABA J. 383, 386 (1932). Jackson’s allusion was particularly 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. Blaustein and Porter compared the number of complaints to the Chicago Bar Association in the 1920s with complaints in the 1930s and 1940s. They found that complaints rose from an average of 375 in the 1920s to a high of 952 in 1933-34 and retreated to an average of 174 between 1942-48. See Albert P. Blaustein and Charles O. Porter, THE AMERICAN LAWYER: A SUMMARY OF THE
Conference of Bar Examiners (NCBE) in 1931 was intended in part to use the bar examination to control “overcrowding” in the profession.\footnote{See Philip J. Wickser, \textit{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 becoming more so”); \textit{Editorial}, 1 B. Examiner 211, 211 (1932)(“The present situation emphasizes the overcrowded condition of the bar”); \textit{Overcrowded Occupations}, 2 B. Examiner 267 (1933)(reprinting July 15, 1933 editorial in Saturday Evening Post lamenting overcrowded legal profession). \textit{See also} Susan K. Boyd, \textit{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”).} In the first issue of the \textit{BAR EXAMINER}, a publication 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.\footnote{See Some Random Thoughts about the Lawyer-Population Tables, 1 B. Examiner 255 (1932).} In 1933, Professor Herschel Arant, in his \textit{Foreword} to his \textit{Cases and Materials on The American Bar and Its Ethics},\footnote{Herschel W. Arant, \textit{CASES AND MATERIALS ON THE AMERICAN BAR AND ITS ETHICS} (1933).} 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.”314 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 admitted annually as are needed.”315 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,316 the response of several bar

314 Herschel W. Arant, Cases and Materials on the American Bar and Its Ethics iii-iv (1933). As noted in the Bar Examiner, the percentage of successful bar examinees declined from 52.7% in 1928 to 46.4% in 1930. See Will Shafroth, Bar Examiners and Examinees, 1 B. Examiner 1, 4 (1931). By 1932, the overall passing rate nationwide was down to 45%, see Will Shafroth, The 1932 Bar Examination Statistics, 2 B. Examiner 210, 210 (1933), which the author called “severe.”

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

316 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”); Lloyd K. Garrison, Results of the Wisconsin Bar Survey, 8 Am. L. Sch. Rev. 116, 118 (1936). See also Lloyd K. Garrison, The Problem of Overcrowding: A Call for Imagination, Experimentation and Organization, 16 Tenn. L. Rev. 658 (1941). A trenchant analysis attacking the overcrowded thesis on grounds of ethnic discrimination and as contrary to the democratization of the bar is Francis T. Shea, Overcrowded?—The Price of Certain Remedies,
associations was to point to surveys suggesting overcrowding had caused lawyer income to fall precipitately.\textsuperscript{317}

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%.\textsuperscript{318} 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.\textsuperscript{319} 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 39% in 1930 to a high of 47% in 1939.\textsuperscript{320} Nationally, the percentage of persons admitted to the

\textsuperscript{317}See Report of the Special Committee on the Economic Condition of the Bar, 62 A.B.A. Rep. 869, 872 (1937)(repeating conclusion of 1936 report of 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. Garrison left the Committee, and by 1940 the Committee noted that its feeble efforts were indefinitely stalled by the eruption of World War II.

\textsuperscript{318}See Will Shafroth, Bar Examiners and Examinees, 1 B. Exam. 1, 4 (1931).

\textsuperscript{319}The data are constructed from annual reports on bar examination statistics published in the BAR EXAMINER. See, e.g., Admissions to the Bar, 7 B. Exam. 56-60 (1937).

\textsuperscript{320}These data were assembled from annual reports on bar examination statistics published
bar through the diploma privilege exceeded 10% only twice during the 1930s, and ordinarily ranged from 5-9%.\footnote{321} 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.\footnote{322}

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 office study,\footnote{323} and in 23 jurisdictions graduates of law schools not approved by the ABA

\footnote{321}These data were assembled from annual reports on bar examination statistics published in volumes 1-10 of the \textit{BAR EXAMINER}. Part of this decline in bar passage rates may be attributed to discrimination against Jews, who between 1930 and 1934 made up 80\% of new bar admissions in New York City. \textit{See} Robert W. Gordon, \textit{The American Legal Profession, 1870-2000} \textit{in III THE CAMBRIDGE HISTORY OF LAW IN AMERICA} 78 (Michael Grossberg and Christopher Tomlins eds. 2007).

\footnote{322}These data were assembled from annual reports on bar examination statistics published in volumes 1-10 of the \textit{BAR EXAMINER}.

were ineligible to take the bar examination. 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. By 1939, 39 states, the District of Columbia and the territory of Hawaii had adopted laws requiring

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324 See Progress in Admission Standards, 8 B. Examiner 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 and including Maryland, which adopted two year requirement later in 1939 effective for students entering law school on June 1, 1941 or later). By 1947, only Arkansas, Georgia, Mississippi and Louisiana did not require two years of pre-law college work. See Robert Stevens, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s 217 n.9 (1983). At least 15 jurisdictions barred entry to the legal profession through an apprenticeship by 1947. See id.

325 See Alfred Z. Reed, Legal Education, 1925-1928, 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. See 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).
applicants to the bar to have completed two years of college work before entering law school.\textsuperscript{326} 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.\textsuperscript{327} By 1939, total enrollment in law schools was 34,539,\textsuperscript{328} a decline of over 25%. The decline in the number of law students reflected in part the decline of the unapproved law school. In 1928-29, 70 law schools met the standards set forth in 1921 by the ABA’s Root Committee, just 40\% of the total number of law schools.\textsuperscript{329} In 1937, the majority of law students were enrolled in ABA-approved schools.\textsuperscript{330} Five years earlier, just 33\% of all law students were enrolled in ABA-approved schools.

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\item \textsuperscript{326} See \textit{Maryland Is the Forty-First State}, 8 B. Examiner 57 (1939)(noting adoption by Maryland of two-years of study in college, 36 credit hours, for students entering law school on June 1, 1941 or later); see also \textit{Progress in Admission Standards}, 8 B. Examiner 15, 40 (1939).
\item \textsuperscript{327} See 1932 \textit{Annual Review of Legal Education} 28 (1932).The \textit{Annual Review of Legal Education} was a publication of the Carnegie Foundation for the Advancement of Teaching. The editor was Albert Z. Reed, author of \textit{Training for the Public Profession of the Law} (1921).
\item \textsuperscript{328} See \textit{Continued Decline in Law School Enrollment}, 10 B. Exam. 11 (1941).
\item \textsuperscript{329} 1926-1927 \textit{Annual Review of Legal Education} 11 (1928).
\item \textsuperscript{330} James Grafton Rogers, \textit{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
\end{itemize}
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of all law students had been enrolled in law schools that met ABA standards. The number of law schools appears to have peaked at 204 in 1934, of which 88 met ABA standards. In 1939, 180 law schools existed, of which 102 met ABA standards.

Finally, 40 states had adopted by 1939 the Root Committee recommendation that training in law be three years of full-time education. 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

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331 See 1932 ANNUAL REVIEW OF LEGAL EDUCATION 28 (1933).
332 1935 ANNUAL REVIEW OF LEGAL EDUCATION 31 (1935). The 1934 Annual Review listed 199 law schools, but the count by a different editor a year late indicated five schools were inadvertently omitted. See id.
333 1939 ANNUAL REVIEW OF LEGAL EDUCATION 10 (1939).
334 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”).
Both increased legal professionalism, and one could be used in place of the other to achieve that professionalism.

The onset of American entry into World War II beginning in early 1942 rapidly emptied American law schools of its students. The ABA’s Special Committee on the Economic Conditions of the Bar, created in January 1937 in response to the cry of overcrowding, did very little after Dean Lloyd Garrison left the Committee. It finally went out of business in 1945, for lawyers no longer seriously claimed the bar was overcrowded. As of March 1, 1948, only 159 law schools were in business, of which 111 were ABA-approved. 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

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337 *See House of Delegates Proceedings*, 70 A.B.A. Rep. 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.” *See Report of the Special Committee on the Economic Condition of the Bar*, 67 A.B.A. Rep. 248, 250 (1942).

1954. Finally, fifteen jurisdictions prohibited law office study to prepare for admission to the bar by 1947.

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.”

A. Introduction

Not only were big law firms untroubled in 1960, the ordinary American lawyer prospered. Lawyers were confident that they had a leading role to play in American society,

339 See Richard L. Abel, AMERICAN LAWYERS 278-79 (Table 21) (1989). The post-World War II high was 13,641 in 1950. It was not until 1958 that the number of admitted members to the bar again exceeded 10,000. See id. at 279.


341 Marc Galanter and Thomas Palay, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 20 (paper ed. 1993). Galanter and Palay are well aware of the shortcomings of the legal profession in 1960, including the paucity of minority and female lawyers. See also Mary Ann Glendon, A NATION UNDER LAWYERS 17-22 (paper ed. 1996)(quoting Galanter and Palay and agreeing with “golden age” conclusion). Prof. Glendon was a member of the Class of 1961 at the University of Chicago Law School; 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”).
and others told them so.\textsuperscript{343} The effort to create Law Day was one example of this confidence, as was the ABA’s effort to create World Peace through Law.\textsuperscript{344} Lawyers dismissed critics of the legal profession as either misguided or envious, and reacted with surprise at expressions of

\textsuperscript{342}However, a constant complaint from lawyers, including in the late 1950s and early 1906s, was that doctors earned much more than lawyers, in part because too many lawyers were members of the profession. \textit{See, e.g.}, John C. Satterfield, \textit{The American Bar Association Takes a Look at the Economic Status of the Legal Profession}, 44 ABA J. 156 (1958)(“The alarming failure of the legal profession to maintain an economic status comparable to that of other professions, businesses and skills, and commensurate with the rising cost of living, has caused President Charles S. Rhyne to appoint a Special Committee to study the economic condition of the Bar in the United States”).

\textsuperscript{343}\textit{See} Talcott Parsons, \textit{A Sociologist Looks at the Legal Profession in ESSAYS IN SOCIOLOGICAL THEORY} 370 (revised ed. 1954)(reprinting paper given at University of Chicago Law School on December 4, 1952). Parsons’s essay was a largely favorable assessment of the profession.

\textsuperscript{344}\textit{See} Charles S. Rhyne, \textit{World Peace through Law}, 83 A.B.A. Rep. 624 (1958)(printing President’s Annual Address). 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. \textit{See} Charles S. Rhyne, \textit{World Peace Through Law: What’s Happening}, 63 ABA J. 224 (1977).
mistrust of the profession by a minority of the public. The profession’s sense of role and status were 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.”345 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 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)346 offers insight into the 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 10 years during Elkins’s reign, some associates waited more than two decades for the call, and in the late 1950s Elkins halted the

345 Mary Ann Glendon, A NATION UNDER LAWYERS 24 (paper ed. 1996).

promotion of associates to partner.\textsuperscript{347} 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.\textsuperscript{348} In other cities the length of time to partnership in large law firms was about 10 years during the 1950s, but shortened to about 7 years by the end of the 1960s.\textsuperscript{349} Robert Nelson’s study of Chicago lawyers found that the partnership track lessened beginning in 1950. He found the length of time to partner ranged from 7.5 years during the 1950s to 5.64 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, and lawyers spent two to three years as non-equity partners before obtaining an ownership percentage in the firm.\textsuperscript{350} In other cities the length of time on the partnership track lengthened beginning in the mid- to late 1970s. A 1985 survey of 150 medium and large law firms indicated that the length


of time to partner increased by 20% since 1975. 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 was predicted by large law firm partners. Bar admissions reached 13,641 in 1950, but declined to 10,976 in 1952. It wasn’t until 1964 that more persons were admitted to the bar. A study in 1965 indicated that billable hours for associates ranged from 1400-1600 and from 1200-1400 for partners.

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. During this time, the demand for the work lawyers performed outstripped supply. In the 1940s, the demand for legal services increased 86%, while supply increased 12%. In the 1950s, demand increased by 76% and supply by 35%. Lawyer

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353 See Richard L. Abel, AMERICAN LAWYERS 278-79 (Table 21) (1989).


355 See Richard L. Abel, AMERICAN LAWYERS 160 (1989). B. Peter Pashigian suggests that the number of lawyers in the 1950s was “close to long-run equilibrium,” and suggests that is why the real income of lawyers did not substantially exceed the equilibrium income then. Pashigian concluded that demand outstripped supply in the 1960s. See B. Peter Pashigian, The Number and Earnings of Lawyers: Some Recent Findings, 1978 Am. B. Found. Res. J. 51, 73.
income rose. 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.\textsuperscript{356} There is some evidence that, as earnings rose, the number of hours billed by lawyers declined during the 1960s through the early 1970s.\textsuperscript{357}

By the mid-1970s, however, a slowing economy and a rapidly increasing supply of lawyers reduced the surplus capital held by lawyers.\textsuperscript{358} Partner income stalled, with one survey indicating that although large law firm partners earned 78\% more in 1986 than in 1976, inflation rose 93\% during that time.\textsuperscript{359} Partners also billed more hours just to maintain their income.\textsuperscript{360}

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  \item \textsuperscript{357}Marc Galanter and Thomas Palay, \textit{Tournament of Lawyers: The Transformation of the Big Law Firm} 56 (paper ed. 1993)(citing Paul Hoffman, \textit{Lions in the Street} 130-31 (1973)).
  \item \textsuperscript{359}Marc Galanter and Thomas Palay, \textit{Tournament of Lawyers: The Transformation of the Big Law Firm} 52 (paper ed. 1993)(citing survey of Altman & Weil).
\end{itemize}
1995 survey reported that associates in 15 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. As noted in a 1982 article in Fortune magazine, “margins in the legal business are under severe pressure.”

The thesis of this section is that 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.” 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 the profession rather than the public. When the Model Rules of Professional Conduct were drafted in the late 1970s, the competition for lawyer

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

services had increased, leading to a legal ethics code premised on a very different structure. As noted by Professor Murray L. Schwartz 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.”364 The drafting of the Code, then, was a lost opportunity for the profession; the golden age, like Camelot, was gone, and remembered 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.”365 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, and Economics of the Profession and the Organized Bar. The reports on Professional Ethics were 10 in number. One Survey report on


365 House of Delegates Proceedings, 71 A.B.A. Rep. 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.” House of Delegates Proceedings, 69 A.B.A. Rep. 456 (1944). See Survey of the Legal Profession: Its Scope, Methods and Objectives, 39 ABA J. 548, 548 (1953). Although the ABA funded the Survey in part, the regular Progress Reports emphasized the independence of the Council from any ABA or other interference with its findings. See id.
Professional Ethics, published in 1951 in the Virginia Law Review, evaluated responses to a questionnaire about the adherence to the Canons by lawyers.\textsuperscript{366} 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.”\textsuperscript{367} The author, a practicing lawyer for over 40 years, believed that the number of violations of the Canons was less than 50 or even 25 years earlier.\textsuperscript{368} The Survey also included a 1952 book, \textit{Conduct of Judges and Lawyers}, by Orie Phillips and

\begin{itemize}
  \item \textsuperscript{366} Robert T. McCracken, \textit{Observance by the Bar of Stated Professional Standards}, 37 Va. L. Rev. 399 (1951).
  \item \textsuperscript{368} Robert T. McCracken, \textit{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”).
\end{itemize}
Philbrick McCoy.\textsuperscript{369} 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.”\textsuperscript{370}

Unrelated to the \textit{Survey} was the publication in 1953 of Henry S. Drinker’s book \textit{Legal Ethics}.\textsuperscript{371} Drinker was a longtime chairman of the ABA’s Standing Committee on Professional Ethics and Grievances, and \textit{Legal Ethics} was trumpeted as the first book on legal ethics since Sharswood’s 1854 \textit{Compend of Lectures}.\textsuperscript{372} \textit{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 been materially relaxed or the essential provisions altered; nor need they be.”

Finally, a summary of the work of the Survey was published by the University of Chicago Press in 1954, titled *The American Lawyer*. 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.”

In May 1956, a Special Committee of the American Bar Foundation was asked to study the Canons of Ethics. 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. The final report of the Special Committee was issued on June 30, 1958. The report concluded that “the present Canons of Professional Ethics of the American Bar

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376 See Philbrick McCoy, *The Canons of Ethics: A Reappraisal by the Organized Bar*, 43 ABA 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.*
Association do not provide adequate standards of professional conduct for members of the Bar, “377 and recommended a sweeping revision of the Canons. 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. 378 It is unclear why the Special Committee’s Report was largely buried by the ABA. James Shepherd suggested in a December 31, 1959 letter that noting came of the Special Committee’s Report because the project ran out of money and the Special Committee reached an impasse over Canon 35.379 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

377 See REPORT OF THE SPECIAL COMMITTEE OF THE AMERICAN BAR FOUNDATION ON CANONS OF ETHICS 96 (June 30, 1958).

378 See 82 A.B.A. Rep. 90, 91 (1957)(listing members of American Bar Foundation Special Committee on Canons of Ethics); 83 A.B.A. Rep. 96, 96-98 (1958)(listing all Special Committees of American Bar Foundation which does not include committee on Canons of Ethics). The publication of the Special Committee’ Report in June 1958 is likely why the Committee was essentially disbanded.

379 Letter of Ja[me]s L. Shepherd, Jr. to William P. Roberts, December 31, 1959, A. James Casner Papers, Harvard Law School Special Collections, Box 3, Folder 8. Shepherd was the chairman of the ABA’s Standing Committee on Professional Ethics when he wrote this letter.
the ABA during the drafting of the Code of Professional Responsibility during the 1960s. An additional reason may be the release two weeks later of the *Joint Conference on Professional Responsibility* statement.\(^{380}\)

### D. Joint Conference on Professional Responsibility

The Joint Conference’s *Report*, released on July 14, 1958 and published in the December 1958 issue of the *ABA Journal*,\(^{381}\) 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.”\(^{382}\) 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.”\(^{383}\) Professionalism required that the lawyer “cannot rest

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\(^{383}\) *See Professional Responsibility: Report of the Joint Conference*, 44 ABA J. 1159, 1159
content with the faithful discharge of duties assigned to him by others. His work must find its
direction within a larger frame." \(^3\) 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.” \(^4\) The Joint
Conference Report then divided the lawyers’ role into three major areas: as advocate and
counselor; as designer of a framework giving direction and form to collaborative effort; and as
servant to the public. \(^5\)

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 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. 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 1959-60. The other powerful ABA insider was Harvard Law School Professor A. James Casner, who joined the Unauthorized Practice Committee in 1949, and who was a member of the Joint Conference. Randall served as co-chairman of the ABA half of the Joint Conference. Five members representing the AALS were


388 See *State Delegates*, 73 A.B.A. Rep. 13 (1948). Each state had one delegate to the ABA, and one interested in 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.

389 See 74 A.B.A. Rep. 38 (1949) (listing Casner as member of the Standing Committee on the Unauthorized Practice of Law); 77 A.B.A. Rep. 41 (1952) (listing Casner as one of five members appointed by the ABA to the Joint Conference).
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.\textsuperscript{390}

The initial draft statement of the professional responsibilities of the lawyer was written in late September 1953 by Elliot Cheatham, a Columbia Law School professor known for his work on legal ethics.\textsuperscript{391} Fuller looked at Cheatham’s draft and began anew. His “Second revised draft,” dated August 5, 1954, was an incomplete draft but similar in many ways to the finished product published in 1958.\textsuperscript{392} One important statement of this draft that survived through the finished product was Fuller’s explanation of the value of representing “unpopular causes,” sent to the members of the \textit{Joint Conference} shortly after the conclusion of the Joseph McCarthy-led hearings investigating alleged protection of Communists in the Army, hearings in which the


\textsuperscript{391}See Letter of Elliott E. Cheatham to Lon L. Fuller, September 21, 1953, in Lon L. Fuller Papers, Harvard Law School Special Collections, Box 2, Folder 8. Cheatham was not a member of the Joint Conference, although his Columbia colleague Harry Jones was.

\textsuperscript{392}Second revised draft, 8-5-54, Lon L. Fuller Papers, Harvard Law School Special Collections, Box 1, Folder 1.
protections by lawyers of others from vicious and scurrilous attacks became prominent. Fuller’s Second revised draft explained that, even when a cause was unpopular for a good reason, “It 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.” Otherwise, “confidence in the fundamental processes of government is diminished.” Fuller additionally explained that zeal as a courtroom advocate in behalf of client’s interests was

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393 A popular history of the Army-McCarthy hearings is found in William Manchester, The GLORY AND THE DREAM: A NARRATIVE HISTORY OF AMERICA, 1932-1972 700-16 (paper ed. 1975). 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. 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?” See id. at 713-16.

394 Second revised draft, 8-5-54, Lon L. Fuller Papers, Harvard Law School Special Collections, Box 1, Folder 1, at 17-18. The language is identical to the published version. See Lon L. Fuller and John D. Randall, Professional Responsibility: Report of the Joint Conference, 44 ABA J. 1159, 1216 (1958).

necessary because “partisan advocacy is essential to the integrity of the adjudicative process itself.” It was “an indispensable part of a larger ordering of human affairs.”

On May 2, 1955, Fuller’s Proposed Final Draft was sent to the members of the Joint Conference. 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.” 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.”

396 See Second revised draft, 8-5-54, Lon L. Fuller Papers, Harvard Law School Special Collections, Box 1, Folder 1, at 5. This language was rephrased in the published version as, “In 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 and John D. Randall, Professional Responsibility: Report of the Joint Conference, 44 ABA J. 1159, 1160 (1958).

397 Second revised draft, 8-5-54, Lon L. Fuller Papers, Harvard Law School Special Collections, Box 1, Folder 1, at 5. See Lon L. Fuller and John D. Randall, Professional Responsibility: Report of the Joint Conference, 44 ABA J. 1159, 1161 (1958)(same).


400 Second revised draft, 8-5-54, Lon L. Fuller Papers, Harvard Law School Special
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,” 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. Crotty had both valid and odd suggestions.


402 Crotty was orphaned as a teen, and spent his years while attending the University of California as the “custodian” (his word) at the Chabot Observatory. He spent a year at Harvard as a graduate law student before joining the firm in 1923. *See* Jane Wilson, *Gibson, Dunn & Crutcher, Lawyers: The Early Years* 425-28 (1990). *See* Letter of Homer Crotty to L.L. Fuller, May 20, 1955, A. James Casner Papers, Harvard Law School Special Collections, Box 37, Folder 9 (dissenting from Proposed Final Draft in 10 page letter). *See also* Lon L. Fuller to
regarding the issue of professional responsibility, which led to the two-year delay in obtaining an agreement of the Joint Conference.\footnote{403} 

The \textit{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, such as labor unions, hiring counsel for its members, more effort should be spent on understanding the varied and various roles played by the lawyer in the administrative regulatory state. The \textit{Report} also drew attention to the relationship between the lawyer and society, and spoke with both reason and passion about the morality of the adversary

Maurice T. Van Hecke, October 10, 1956, in Lon L. Fuller Papers, Harvard Law School Special Collections, Box 8, Folder 7 (noting “draft I sent you represents about the fourth revision, and it was accepted by everyone except Homer Crotty”).


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system, and, as noted above, about the importance of defending an unpopular cause even when that “unfavorable public opinion of the client’s cause is in fact justified.” In discussing the importance of representing a client whose cause was “in fact unjustified,” Fuller noted that English cab rank system was not available to remove the possible taint of association for an American lawyer. Thus, a lawyer’s decision to represent a client with an unpopular cause remained “a matter of individual conscience.” But the legal profession as a whole possessed “a clear moral obligation with respect to this problem.”

As noted by Professor John DiPippa, “we see Fuller’s concern for process and the morality embedded in it” 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 is also prominent in the Report. Shortly after the Proposed Final Draft was sent to the Joint


408 See Lon L. Fuller, THE MORALITY OF LAW 5 (rev. ed. 2d ed. 1969)(“Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom”).
Conference, Fuller gave a speech to the American Institute of Electrical Engineers on *The Philosophy of Codes of Ethics*. 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.” 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.” In addition, a code had to avoid totalizing ethics, or face the banality of declaring a “mush of platitudes.”

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409 L. L. Fuller, *The Philosophy of Codes of Ethics*, 74 Elec. Eng’g 916 (1955). The speech was given on June 27, 1955, about seven weeks after he completed the Proposed Final Draft (May 2, 1955). It 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*, posthumously published at 92 Harv. L. Rev 353 (1978), which concerned the broad issue of social ordering. This essay was finished in 1957. See Robert S. Summers, LON L. FULLER 10 (1984). Echoes of *The Forms* courses throughout the 1955 Proposed Final Draft and the 1957 Second Proposed Final Draft that became the 1958 *Report*.


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.\textsuperscript{413} It did so.\textsuperscript{414} 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 in 1964 to draft a Code of Professional Responsibility.

\textit{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.”\textsuperscript{415}

In mid-1964 ABA President Lewis F. Powell appointed a Special Committee on the Evaluation of Ethical Standards (“Wright Committee”) to draft rules intended to replace the Canons.\textsuperscript{416} The reasons for the call remain elusive. One reason may have been the drafting of

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\textsuperscript{413}See Letter of Lon L. Fuller to John D. Randall, July 10, 1958, A. James Casner Papers, Harvard Law School Special Collections, Box 37, Folder 10, at 1; Letter of Lon L. Fuller to A. James Casner, October 15, 1958, A. James Casner Papers, Harvard Law School Special Collections, Box 37, Folder 10.


\textsuperscript{416}The Wright Committee’s initial charge was to report on the “adequacy and
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. A second reason may be the insular world of elite practitioners at the time. John Randall, the co-chairman of the Joint Conference with Lon
effectiveness of the present Canons of Professional Ethics.” See Report of the Board of
thought of starting out to rewrite de novo the ethical standards of the legal profession.” See
appointment of a 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 incoming address on August 14, 1964). The Wright Committee’s initial
call was to study the Canons of Ethics should be modified. A study of Wall Street lawyers
published that same year suggested that the increase in large firm lawyers would lead to the
question “whether the canons of ethics designed for a different day are adequate for the current
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.

417 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 ABA J. 709, 709 (1972). See also Interview of Sherman
S. Welpton, Jr. by Olavi Maru (Nov. 3, 1976), at 8, in American Bar Foundation Program on
Oral History.
Fuller, was a member of the committee that drafted amendments to the Code of Trial Conduct. John Randall considered but did not on a suggestion that he focus on ethics in his term as ABA President. Sherman Welpton, 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 Harvard Law School and the only person to serve in both the Joint Conference and the Wright Committee. He was in 1960 a member of the ABA Standing Committee on Professional Ethics. The chairman of that Committee, James L. Shepherd, Jr., noted that the American Bar Foundation was then considering a revision of the Canons. The

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418 Welpton graduated from the University of Nebraska College of Law in 1931. See Interview of Sherman S. Welpton, Jr. by Olavi Maru (Nov. 3, 1976), at 1, in American Bar Foundation Program on Oral History. 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; Sherman S. Welpton, Jr., Genesis of the Code of Trial Conduct, 58 ABA J. 709, 709 (1972). See also http://www.unl.edu/scarlet/v12n04/v12n04record.html (last visited June 16, 2008)(online edition of University of Nebraska School of Law Scarlet alumni publication).

419 See Interview of Sherman S. Welpton, Jr. by Olavi Maru (Nov. 3, 1976), at 7, in American Bar Foundation Program on Oral History (on Randall’s presence in committee).

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.”  

Finally, a decision of the Supreme Court, issued four months before Powell’s call, Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar. The Brotherhood “in order to assist the prosecution of claims by injured railroad workers or by the families of workers killed on the job the Brotherhood maintains in Virginia and throughout the country a Department of Legal Counsel which recommends to Brotherhood members and their families the names of lawyers whom the Brotherhood believes to be honest and competent.”  

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

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422 377 U.S. 1 (1964). The opinion was released on April 20, 1964.

423 Id. at 2.
court 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 the Brotherhood. It did not help that Virginia 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. Powell, a lawyer in Richmond, would have been well aware of the Virginia State Bar’s actions and the responses of the Supreme Court.

Even as the members of the Wright Committee, chaired by Arkansas lawyer Edward Wright, met to discuss their initial approach to their evaluation, they worried about the Court’s Brotherhood decision, none more so than A. James Casner. Casner was former member of the ABA’s Committee on the Unauthorized Practice of Law, 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. The Opinion prohibited a lawyer-accountant from practicing both law and accounting.


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.\footnote{ABA Comm. on Prof’l Ethics and Prof’l Responsibility, Formal Op. 305 (1962).} For Casner, maintaining the divide between lawyers and accountants and lawyers and trust officers was important and needed to be reflected in the code.\footnote{See Meeting of Special Committee on Evaluation of Ethical Standards, American Bar Association, December 3-4, 1964, at 5, A. James Casner Papers, Harvard Law School Special Collections, Box 102 (reporting in transcript letter of A. James Casner to John F. Sutton, Jr. of November 29, 1965).} Indeed, one 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.\footnote{See Memorandum re Work of Special Committee on Evaluation of Ethical Standards, November 16, 1964, at 3-4, A. James Casner Papers, Harvard Law School Special Collections, Box 25, Folder 1 (noting “[t]he present Canons produce a heavy negative effect. Thou shall not do this and thou shall not do that. 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?”).}
Members of the 12-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.\textsuperscript{429} Casner’s particular approach was to restructure the Canons by dividing them in ten parts, from 47 Canons of Ethics. By October 1965, the “second draft” of Reporter John F. Sutton, Jr. contained 12 Canons,\textsuperscript{430} which was subsequently whittled to ten. At that time, Edward Wright, the chairman of the 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 cam 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.”\textsuperscript{431}

\textsuperscript{429}See A. James Casner Papers, Harvard Law School Special Collections, Box 25, Folder 1. See also Interview of John Floyd Sutton, Jr., by Olavi Maru (Dec. 20, 1976), at 3, in American Bar Foundation Program on Oral History (noting that after Wright committee members sent in their suggestions they realized they need “professional help” at which point he became involved). The members of the Special Committee were also inundated with letters from interested practitioners.

\textsuperscript{430}See Interview of John Floyd Sutton, Jr., by Olavi Maru (Dec. 20, 1976), at 5, in American Bar Foundation Program on Oral History.

\textsuperscript{431}See Interview of Edward L. Wright by Olavi Maru (Oct. 28, 1976), at 8, in American Bar Foundation Program on Oral History. See also Interview of Sherman S. Welpton, Jr. by Olavi Maru (Nov. 3, 1976), at 13, in American Bar Foundation Program on Oral History (noting
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. Their enthusiasms were tempered after a letter was sent by Geoffrey Hazard, 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.” 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, the Wright Committee first presented a tentative draft in October 1968 to a select group of 550, and a preliminary draft on Special Committee decided in late 1968 that ten canons seemed too much like the Ten Commandments and so combined two canons leaving nine).


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 at the reporter for Kutak Commission, which replaced the Code of Professional Responsibility with the ABA’s Model Rules of Professional Conduct.


See Interview of Edward L. Wright by Olavi Maru (Oct. 28, 1976), at 10, in American Bar Foundation Program on Oral History. Accord Interview of Sherman S. Welpton, Jr. by Olavi
January 15, 1969 to 20,000. After receiving “hundreds” of comments, a final draft was presented on July 1, 1969. The ABA adopted the proposed Code of Professional Responsibility at its annual meeting in 1969, supplanting the Canons.

The Code of Professional Responsibility was deeply influenced by the Joint Conference Report. It cited the Joint Conference Report 20 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.” The Code was divided into three parts in the following order: “Axiomatic” Canons, Ethical Considerations “aspirational in


character” and Disciplinary Rules “mandatory in character.” Including in the Code both aspirational and mandatory elements embodied Fuller’s understanding of the dual understanding of the morality duty and the morality of aspiration. Avoidance of a stress upon “peremptory


440 See Interview of John Floyd Sutton, Jr., by Olavi Maru (Dec. 20, 1976) at 4, in American Bar Foundation Oral History Program (describing tripartite format communicated to 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 So. Tex. L. Rev. 303, 333 (1996). 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 of David Warrington to Michael Ariens, May 30, 2008 (on file with author). Thus, private conversations between the two could have been taken place on a regular basis. 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 proposed Code at any time. Professor William Simon suggests that Fuller created the categorical restrictions of the Code. William H. Simon, Ethical Discretion in
rules” as “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.⁴⁴¹ 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 put in a separate document.⁴⁴² A draft of the Code was sent to approximately 500 lawyers in October 1968, along with a separate document called “Ethical Considerations Underlying the Code of Professional Responsibility.” The response 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.⁴⁴³ The specific idea for including the Ethical

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.

⁴⁴¹ See Interview of John Floyd Sutton, Jr., by Olavi Maru (Dec. 20, 1976) at 4, in American Bar Foundation Oral History Program (noting tripartite format was suggested by him at first meeting with Wright Committee in early 1965); Letter of John F. Sutton, Jr., to Wright Committee Members, October 14, 1965, A. James Casner Papers, Harvard Law School Special Collections, Box 25, Folder 5, at 2.

⁴⁴² See Interview of John Floyd Sutton, Jr., by Olavi Maru (Dec. 20, 1976), at 13, in American Bar Foundation Program on Oral History.

⁴⁴³ See Interview of John Floyd Sutton, Jr., by Olavi Maru (Dec. 20, 1976), at 14, in
Considerations as part of the Code may have been Sherman Welpton’s. 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.” The Joint Conference Report was heavily cited in Canon 7, “A Lawyer Should Represent a Client Zealously within 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.”

444 See Interview of Sherman S. Welpton, Jr. by Olavi Maru (Nov. 3, 1976), at 13-14, in American Bar Foundation Program on Oral History (stating “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 of John Floyd Sutton, Jr., by Olavi Maru (Dec. 20, 1976) at 4, in American Bar Foundation Oral History Program (noting “[m]y 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 statement ought to be completely separated from, and not be any part of, the enforceable penal provisions”).


446 Code of Professional Responsibility, EC 7-1 (1969), in Report of the Special Committee
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.”

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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.” 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.”

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Canon 7 of the 1969 Code of Professional Responsibility also reflected an understanding of zealousness traceable back 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 character of the


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cause he prosecutes, but only for the manner in which he conducts it.” 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, 43 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. Just five years later, ABA President William B. Spann, Jr., created a Special Commission to assess “all facets of legal ethics.” By 1979, even Wright Committee Reporter John Sutton, noting “[t]he adoption process

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450 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 Western L. J. 542, 547 (1844).


[of the Code] was essentially a political one,“ urged “a substantial review and revision of the Code.” What happened?

Sutton noted the Code’s inadequacy stemmed from the “reluctance of lawyers to depart from old, familiar standards.” 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 United States Supreme Court.” 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 that “[i]n 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.”\(^457\) This disjunction was known and understood by Sutton\(^458\) 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. But as criticism of the Code increased, 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.”\(^459\) To picket on Law Day was a statement of a belief in power of the rule of law. The 185 young New York lawyers believed their actions could aid in perception of the Code’s regressive position on group legal services.


\(^458\) In an oral history interview given on December 20, 1976, Sutton openly noted, “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”). Interview of John Floyd Sutton, Jr., by Olavi Maru (Dec. 220, 1976), at 7, in American Bar Foundation Program on Oral History.

changing the system of administration of justice, a belief in what was possible that would
dissipate within a handful of years. The call to the legal profession by some of its members to
reject complacency and look to a better system of justice was a cry of the heart.

F. Anxiety and the Model Rules

A legal historian writing in 1975 of an earlier era called the period 1968-74 “terrible
years” and a “‘coming apart’” of legitimate authority in American institutions, including law and
the legal profession. 460 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. 461 The Department of Justice
filed an antitrust suit against the ABA over several provisions in the Code. 462 In 1973, ABA-

460 Jerold S. Auerbach, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN
AMERICA xii (paper ed. 1976). These statements are taken from the Preface, written in 1975.
“Coming Apart” was the title of an instant history of the 1960s by William L. O’Neill. See
paper ed. 1978).

461 See David R. Brink, Who Will Regulate the Bar?, 61 ABA J. 936, 937 (1975)(“‘[If]
Watergate has not tarnished the image of lawyers, at least it has acutely intensified public
consciousness of questions of legal ethics and professional responsibility”). 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”).

462 See Justice Department and Other Views on Prepaid Legal Services Plans get an Airing
approved law schools had, for the first time, filled all their seats for incoming students.\textsuperscript{463} 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.”\textsuperscript{464} In a special report on education, \textit{Business Week} claimed that “the outlook for lawyers is grim,” and, noting a Labor Department forecast, predicted an oversupply of 200,000 lawyers by 1985.\textsuperscript{465} The Department of Labor predicted that there would be about 14,500 jobs awaiting the additional 30,000 lawyers graduating in 1974.\textsuperscript{466} The Task Force reiterated this prediction and noted the fact that the increase in the

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\textit{before the Tunney Subcommittee, 60 ABA J. 791, 792-93 (1974); Justice Department Continues Its Contentions that the Houston Amendments Raise Serious Antitrust Problems, 60 ABA J. 1410, 1410-14 (1974).}
\end{flushright}


number of lawyers between 1966-70 was 12%, while the increase in population was only 3.2%.\footnote{467}{Report of the Task Force on Professional Utilization, 97 A.B.A. Rep. 818, 826 (1972).} 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.”\footnote{468}{Report of the Task Force on Professional Utilization, 97 A.B.A. Rep. 818, 835 (1972).} In 1975, minimum fee schedules were held unconstitutional by the Supreme Court.\footnote{469}{Goldfarb v. Virginia State Bar, 421, U.S. 773, 788 (1975)(striking county bar association schedules on commerce clause grounds).} The Department of Justice shortly thereafter filed an antitrust complaint against the ABA concerning its ban on advertising,\footnote{470}{See Lawrence Walsh, The Annual Report of the President of the American Bar Association, 62 ABA J. 1119, 1120 (1976)(noting filing of antitrust case by Justice Department).} and in late June 1977, the Supreme Court held a violation of the free speech clause a ban on all lawyer advertising.\footnote{471}{Bates v. State Bar of Arizona, 433 U.S. 350 (1977).} In December 1977, the Federal Trade Commission announced an investigation into the legal profession.\footnote{472}{See F.T.C. goes public on lawyer probe, 64 ABA J. 959 (1978).} One critic writing in 1978 noted, “[s]ince 1973, American lawyers have taken an awful beating.”\footnote{473}{Jethro K. Lieberman, CRISIS AT THE BAR 35 (1978).} In economic terms,
Richard Posner noted, “the price of legal services fell (in real, that is, inflation-adjusted, terms), rather than, as popular and professional opinion alike supposes, rose, between 1970 and 1985.”474

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,”475 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.”476 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.”477


477 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 id. at 47, 50 (“Although several of the Disciplinary Rules have been criticized as mere subterfuge to fortify the position of the most
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.\textsuperscript{478} In the \textit{ABA Journal} itself, an article titled \textit{The Myth of Legal Ethics} disapprovingly concluded, “The Code of Professional Responsibility, as the Canons of Ethics before it, is a treasure trove of moral platitudes.”\textsuperscript{479}

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.”\textsuperscript{480}

One area of misplaced priorities was found in Canon 7, concerning zealous representation. Harkening back to the cab rank rule, Morgan noted that the Code permitted a lawyer to refuse to handle a matter for any reason.\textsuperscript{481} This understanding was not consonant with either the Joint Conference \textit{Report} or the 1887 Alabama Code of Ethics; it was, however, one of the defining

prominent law firms—such as those prohibiting advertising and soliciting clients—they are generally rigorous, designed ‘to avoid even the appearance of impropriety’


\textsuperscript{481} Thomas D. Morgan, \textit{The Evolving Concept of Professional Responsibility}, 90 Harv. L. Rev. 702, 735 (1977)(citing EC 2-25 and noting in accompanying footnote contrast with English system of “cab rank”).
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, zeal ousness and client confidences to the public’s interest in “just and expeditious results.”

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.” 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.” 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

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483 L. Ray Patterson, Wanted: A New Code of Professional Responsibility, 63 ABA J. 639, 639 (1977). See also Robert J. Kutak, The Law of Lawyering, 22 Washburn L. Rev. 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.

Illinois in the 1860s,” “never applicable in the real world,” and a “hodgepodge.”485 Others criticized the litigation-centric focus of the Code,486 a limitation that both the Joint Conference Report and the American Bar Foundation’s Special Committee had taken pains to avoid.

The Code, as Morgan had 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.487

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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 lawyering”\textsuperscript{488} 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;”\textsuperscript{489} 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 not’s” 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


\textsuperscript{489} “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.” Oliver Wendell Holmes, Jr., \textit{The Path of the Law}, 10 Harv. L. Rev. 457, 459 (1897).
Code’s *Discussion Draft*. The Model Rules, eventually adopted by the ABA in 1983 after significant revision (including a tightening of the reasons permitting a lawyer to disclose a client confidence), was a legal document. At the 1982 midyear meeting of the ABA, the Kutak Commission’s recommendation that the Model Rules follow a “restatement” format was debated by the House of Delegates. Robert Kutak explained that the Code “did not fully meet the needs of the individual lawyer,” and had created “considerable confusion.” In addition to eliminating confusion, a restatement format “would prevent the ad hoc development of new rules.” The ensuing discussion was spirited, and a substitute retaining the format of the Code was offered. It failed, and the House approved without further debate the Commission’s recommendation. Even the official name of the Kutak Commission reflected this bias in favor of law: it was called

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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.” 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 eight factors listed in the rule.

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 Rules within five years. In 1997, however, the ABA created an “Ethics 2000” Committee

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498 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.” *See* ABA Model Rule 1.5 (2006) *in* **PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES, 2006-2007 ABRIDGED EDITION** 131 (2006). The eight factors remained.

499 *See* Informational Report of the Special Committee on Implementation of the Model
to evaluate and amend the Model Rules.\textsuperscript{500} No “overhaul” was undertaken, but none was intended. 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.\textsuperscript{501} But


\textsuperscript{501} \textit{See} Mark Hansen, Model Rules Rehab: House Tackles Tough Issues as Ethics Debate Begins, ABA J., Oct. 2001, at 80 (noting “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 beat went on: The focus of the ABA was the law of lawyering,502 and continued fine-tuning of that law was the order of the day and decade.503 Joining the ABA in drafting a restatement of the law of ethics was the inventor of the Restatement, the American Law Institute, which adopted its Restatement 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.

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

the federal government over the regulation of lawyers in the aftermath of Enron is subject of an article in progress, “Playing Chicken”: An Instant History of the Battle Over Exceptions to Client Confidentiality.

502Prof. Hazard is the co-author of a very successful reference work so titled. See Geoffrey C. Hazard, Jr. & W. William Hodes, THE LAW OF LAWYERING (3d ed. 2006).

exemptions,” on “purely utilitarian grounds,” “to the ethical canons which govern men in the ordinary dealings of life.” 504 “He is not simply the counsel of 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.” 505 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. For example, the phrase “officer of the court” is nearly eliminated from the Model Rules. 506

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 ....” 507

504 See Forensic Ethics, THE NATION, January 26, 1871, at 56, 56.

505 See Forensic Ethics, THE NATION, January 26, 1871, at 56, 56.

506 A rare finding is in current Comment [2] to Model Rule 3.3: “This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.”

Chamberlayne’s century-old cry still resonates. The retreat to law in the Model Rules of Professional Conduct was intended to avoid the problem of morals and ethics. The Model Rules have not done so. The fondness for codes leads to ever more 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 amendments, modifications and supplements. But lost in this fetish for particularity is purpose. Do lawyers remain part of a purposive and public profession? As noted by Professor Debra Lyn Bassett, “the 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.”

But, “[d]espite the historical and Model Rule references, neither the Model Rules nor the general practice of law are geared toward law as a public profession.”

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. Newly minted $160,000 lawyers may find happiness, although anecdotal and empirical evidence doesn’t provide much optimism. The standard citation to the


509 Debra Lyn Bassett, Redefining the “Public” Profession, 36 Rutgers L.J. 721, 723 (2005).

unhappiness of lawyers in their chosen profession is now nearly a decade old, and remains quite popular.\footnote{Patrick J. Schiltz, \textit{On Being a Happy, Healthy, and Ethical Member of an Unhappy, and Unethical Profession}, 52 Vand. L. Rev. 871 (1999). A Westlaw search for citations lists 202 citations as of June 20, 2008.}