ESSAYS

Legal Ethics in the Nineteenth Century: The "Other Tradition"

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Zealous advocacy. Hired gun. Adversarial process. These phrases and others are commonly used to describe the role of a lawyer in our system. At the heart of all of these is a very specific notion of the lawyer-client relationship. This relationship is central to our modern ideology of the legal profession and the lawyer's role in it. The idea is simple: a lawyer owes the highest loyalty to his client and, within established ethical bounds, must do his all for his client. The late Irving Kaufmann used to tell students at his bar review lectures that a lawyer "was not a bus, but a concert piano." He was not a bus because he did not have to take on all comers who had the fare; but he was like a concert piano because once he began to play, he had to respond totally to the pianist.

As central as the lawyer-client relationship is to the modern conception of a lawyer's role, it is just as controversial. Most nonlawyers simply cannot understand why a lawyer will behave so aggressively for his client, particularly when that client is unattractive or unpopular or accused of a heinous crime. As the American public watched the Menendez case, the Buittofucu case, and the O.J. Simpson case on television, the confusion and outrage over lawyer zealotry and the trial tactics which derived therefrom became even greater. But it is not just the general public that is so troubled by the extremes of lawyer advocacy on behalf of clients. Many members of the profession believe that the current centrality of the lawyer-client relationship and the value placed upon loyalty to the client does a disservice to the profession and to our system of justice. Just as the adversarial system and the concept of overwhelming loyalty to, and advocacy for, a client in that system has its proponents, so, too, does it have its detractors.

Perhaps foremost amongst those who have attacked the extreme vision of lawyer advocacy on behalf of clients is Professor Thomas Shaffer of the Notre Dame Law School. In a series of articles and books, he has

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argued for the reinsertion of the lawyer's personal morality into the lawyer-client relationship as a mitigating force to the notion of zealous advocacy.¹ He has grounded his arguments in a combination of religion and popular morality. He has also argued that the modern notion of the lawyer-client relationship is precisely that—a modern notion—and has argued that historically the normative view of a lawyer's obligation to his client has been far less extreme in its approach to zealotry than it is at the present day.² In constructing this historical view, Professor Shaffer has focused primarily on two sources, the works of David Hoffman and George Sharswood.³ But while these two nineteenth century jurists were quite influential in shaping the boundaries of the then prevalent view of the lawyer’s obligation to his client, many lawyers and nonlawyers wrote on the subject during this period. Their writings provide a fuller and richer perspective on this history. In the end, when one examines many of these little known nineteenth century sources, one discovers that Professor Shaffer is quite right and that the nineteenth century view of legal ethics differed greatly from our own.

It is rare that one can trace the exact source of a particular doctrine in the law. But the idea of zealous advocacy as the highest form of the lawyer-client relationship can be exactly dated and attributed. It first appears in the legal forum in a speech made before the House of Lords by Lord Henry Brougham.⁴ Lord Brougham was born in 1778 and practiced first at the Scottish Bar and moved to London to become a barrister in 1808.⁵ He became a member of Parliament soon thereafter and acquired a reputation as a first-rate trial lawyer. It was because of this that he was retained as defense counsel in one of the most celebrated


2. See generally Shaffer & Cochran, supra note 1.

3. See id. at 32-35.

4. The first edition of the speech is Henry Brougham, The First Part of Mr. Brougham's Speech in the Defense of Her Majesty Queen (Oct. 3-4, 1820), in Speeches of Mr. Brougham, Mr. Denman and Dr. Lushington; Containing the Defense of Her Majesty the Queen 3-58 (London, Thomas Masters 1820) [hereinafter Speeches]. It is noteworthy that the first appearance in part of this speech was in the form of a broadside, intended for popular consumption. See id.; see also Shaffer, Legal Ethics, supra note 1, at 204-06.

5. Brougham was a prolific author and statesman who went on to become Lord Chancellor of England and one of the most forceful proponents of legal reform.
trials of his era. Queen Caroline was accused of adultery against the King of England.6 The case was tried before the House of Lords. Brougham, as Caroline’s counsel, came under severe attack on the grounds that defending against the King was an act tantamount to treason and one which no patriot nor self-respecting British subject would undertake. In his opening statement to the House of Lords, Brougham established the basis for his defense of Caroline as well as for himself:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.7

Lord Brougham’s statement of a lawyer’s duty to his client was the most extreme view to that point ever expounded. It was contradictory to the medieval tradition of legal ethics and inconsistent with the view propounded by Blackstone in his Commentaries. It was also successful; the prosecution against Caroline was abandoned.

Brougham’s statements quickly became well-known, but they were not quickly approved. In fact, Brougham’s vision of zealous advocacy—one which might well have been expressed by the Simpson defense team—was rejected by many of his contemporaries. Indeed, in the United States, Brougham’s statements were attacked and viewed by contemporaries and successors as being utterly inappropriate.

The first published American treatment of legal ethics is found as an appendix to David Hoffman’s 1817 treatise on legal education, A Course of Legal Study, which was reissued in an expanded version in 1836.8 Hoffman was a Baltimore lawyer with an all-consuming interest in legal

6. Queen Caroline had long been estranged from her husband King George IV. She had been a long-time resident of Italy where, it was alleged, she had committed adultery. The best edition of the trial transcript is contained in MEMOIRS OF HER LATE MAJESTY QUEEN CAROLINE (J. Nightingale ed., London, J. Robins & Co. Albion Press 1820-22); a modern popular account of the trial is ROGER FULFORD, THE TRIAL OF QUEEN CAROLINE (1967).

7. SPEECHES, supra note 4, at 4. The most accessible source for this excerpt is MONROE H. FREEDMAN, UNDERSTANDING LEGAL ETHICS 65-66 (1990), which quotes from Trial of Queen Caroline 8 (1821). Professor William Hodes has analyzed this speech and put it into the fascinating context of the O.J. Simpson case. See W. William Hodes, Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind, 67 U. COLO. L. REV. 1075, 1104-08 (1996).

8. See generally DAVID HOFFMAN, A COURSE OF LEGAL STUDY (2d ed. Philadelphia, Thomas, Cowperthwait & Co. 1836); see also SHAFFER, LEGAL ETHICS, supra note 1, at 59-160; Maxwell Bloomfield, David Hoffman and the Shaping of a Republican Legal Culture, 38 MD. L. REV. 673 (1979); Thomas L. Shaffer, David Hoffman’s Law School Lectures, 1822-1833, 32 J. LEGAL EDUC. 127 (1982).
education, professionalism, and ethics. For several years, he operated a
law school in Baltimore that eventually failed for lack of students. His
most important contribution to legal ethics, however, is his Resolutions
in Regard to Professional Deportment published in the expanded 1836
version of A Course of Legal Study.9 Several of these treat the lawyer-
client relationship and its limitations.10 Far from embracing Lord
Brougham’s expansive view of the lawyer’s obligation to his client,
Hoffman takes a more restrictive view. In Resolution X, he declares that
a lawyer ought not put forth “frivolous or vexatious defenses” even
though his client desires him to do so.11 Resolution XI counsels the
young lawyer to advise a client to abandon a client’s case or claim which
“ought not, to be sustained.”12 He specifically rejects pushing such a
claim in hopes of reaching a better settlement.13 In Resolutions XII and
XIII, Hoffman counsels against a lawyer pleading the Statute of
Limitations or the incapacity because of minority of a client, if a client
can otherwise pay a valid debt.14 He refers to the use of such defenses
as “knavery.”15
Resolutions XIV and XV are, perhaps, the most significant.
Resolution XIV deals with civil cases, and Resolution XV deals with
criminal cases.16 In regard to the first, Hoffman states that a lawyer’s
conscience must remain a “distinct entity” from his client’s.17 He goes
on to say: “[I]f I am satisfied from the evidence that the fact is against
my client, he must excuse me if I do not see as he does, and do not press
it . . . .”18 In criminal cases, he states that when the evidence against
clients leaves “no just doubt of their guilt,” then the lawyer ought not
“impede the course of justice” through the use of ingenuity or “artifices
of eloquence” nor through the use of any influence the lawyer might
have.19 He argues that the lawyer’s duty is only to assure “a fair and
dispassionate investigation of the facts of their cause and the due
application of the law.”20
In all of these Resolutions, there is implicit the notion that the lawyer
must, in fact, exercise his own personal moral judgment in determining

9. Resolutions in Regard to Professional Deportment, in HOFFMAN, supra note 8, at 752-75.
10. See e.g., id., in HOFFMAN, supra note 8, at 755, 758 (Resolutions XIV and XVIII).
11. Id., in HOFFMAN, supra note 8, at 754.
12. Id., in HOFFMAN, supra note 8, at 754 (emphasis added).
13. See id., in HOFFMAN, supra note 8, at 754.
14. See id., in HOFFMAN, supra note 8, at 754-55.
15. Id., in HOFFMAN, supra note 8, at 754 (Resolution XII).
16. See id., in HOFFMAN, supra note 8, at 755-56.
17. Id., in HOFFMAN, supra note 8, at 755 (Resolution XIV).
18. Id., in HOFFMAN, supra note 8, at 754.
19. Id., in HOFFMAN, supra note 8, at 755-56.
20. Id., in HOFFMAN, supra note 8, at 756.
the extent to which he will go in representing a client. In so doing the lawyer becomes a sort of judge in each client's case, a notion from which Hoffman does not shrink as many modern ethicists would. And, of course, Hoffman's views quite clearly include an implicit rejection of Brougham's standard of advocacy as stated in his defense of Queen Caroline. Brougham's view of advocacy and the attorney's role in the lawyer-client relationship is amoral at best. Hoffman's view is imbued with morality from start to finish. Indeed, Professor Shaffer has characterized Hoffman's views as representing a "gentlemanly" approach to ethics.  

In 1834, Simon Greenleaf, a prominent Maine attorney, was appointed to the Royall professorship at Harvard Law School. He delivered his inaugural address on August 26, 1834. He took as his topic the importance of law and the legal profession to the new republic. Greenleaf views the role of lawyers in the national life as of paramount importance for it was lawyers who could both "obtain reparation for wrongs done" as well as "devise the means to prevent them." As part of this discussion, Greenleaf also considers the importance of the lawyer's character and his obligations to his clients.

The character of an upright lawyer shines with mild but genial lustre. He concerns himself with the beginnings of controversies, not to inflame but to extinguish them. He is not content with the doubtful morality of suffering clients, whose passions are aroused, to rush blindly into legal conflict. His conscience can find no balm in the reflection, that he has but obeyed the orders of an angry man. He feels that his first duties are to the community in which he lives . . . . I look with 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, to serve the worst passions of men . . . .

Greenleaf's advice to his listeners—the students at Harvard Law School—could not be clearer. They are men of conscience and must

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22. For Greenleaf's biography, see 1 Charles Warren, History of the Harvard Law School 450 (1970). Professor Al Konefsky of the Buffalo Law School has, for some years, been at work on a full biography of Greenleaf.


exercise their own moral judgment in carrying out their tasks as lawyers. They must not elevate their obligation to their client over their own independent moral judgment. Greenleaf, like Hoffman, sees the lawyer as the judge of his client's cause—and as his client's advisor in this cause:

[O]ur clients are not always the best judges of their own interests,—and that having confided these interests to our hands, it is for us to advise to that course, which will best conduce to their permanent benefit, not merely as solitary individuals, but as men connected with society by enduring ties.25

Greenleaf ties the extent of the lawyer's obligation to his client to the lawyer's own morality and, above all, to the oath that the lawyer swears upon becoming an attorney:

He is to deal faithfully with the merits and facts of the cause confided to his care; yet not pressing them beyond their intrinsic value, or the boundaries of justice. He has not sold himself to obtain, by right or wrong, a victory for his employer; but is engaged to see, that the cause is clearly and truly developed . . . . He is to perpetrate no falsehood;—he is to practise no chicaneary;—he is to take no advantage of the mistakes of his brethren . . . . He is not to forget, that while maintaining individual rights, he is also addressing the public . . . 26

The essence of Greenleaf's statements lies in this last quotation. Greenleaf speaks less of the details of practice and more of general ethical aspirations than does Hoffman. Nevertheless, Greenleaf and Hoffman both agreed on the basic issue that a lawyer must condition his acts on his own moral judgment and not based on his fidelity to his client.

Greenleaf also introduced a very significant element into the debate on lawyer ethics: the import of the lawyer's oath. Oaths were taken quite seriously in the eighteenth and early nineteenth century.27 They bound the taker before God and man. The lawyer's oath elevated the lawyer from being a private citizen to being a public official and, as such, gave the lawyer a whole new set of obligations. Professor Shaffer has suggested that the heightened ethics of Hoffman and his contemporaries derived both from their notion that lawyers were gentlemen and also from the ideals prevalent in the early republic.28 Greenleaf, in stressing the role of the lawyer's oath in shaping lawyer ethics, makes this latter point clear. As an office holder, a lawyer must be concerned with the public

27. There is a large literature on oaths. See generally J.E. TYLER, OATHS, THEIR ORIGINS, NATURE, AND HISTORY (London, Parker 1835); L. ENOCH, OBSERVATIONS ON LEGAL AND JUDICIAL OATHS (Philadelphia, J. Rakestraw 1846).
28. See SHAFFER & COCHRAN, supra note 1, at 32, 35.
welfare. Thus, a lawyer owed two loyalties—to his client and to the public. It would have been inconceivable to men of Greenleaf's generation, steeped in republican ideals, that individual welfare, even that of a client, might overcome public welfare. Thus, Greenleaf had no problem ideologically holding lawyers—as officeholders—to the moral dictates of their conscience and the needs of the public.

The Law Academy of Philadelphia was founded in 1783 with the mission to educate and maintain a high standard of learning and ethics of the bar.29 It had as its officers many of the leading legal luminaries of the city and state. Amongst its many activities, it sponsored periodic lectures on law. In 1839, Job Tyson, a Philadelphia lawyer and Vice-Provost of the Law Academy delivered a lecture on “The Integrity of the Legal Character” before the Academy.30 In the course of this lecture, Tyson, too, discussed the parameters of the lawyer-client relationship. Tyson believed that lawyers were of the highest importance to society. According to Tyson, a lawyer

stands, not only as a sentinel against the inroads of a political despot, and the scourge of public abuses, but he is the shield of private injuries and the assertor of legal retribution. He is interposed between the corrupt, incompetent and erring judge, and the wronged and trembling suitor. The avenger of the innocent, he visits upon the wrong-doer the penalties of the law, and protects the weak and defenseless from the overbearing hand of oppression and power.31

But Tyson, like Greenleaf, also recognized that lawyers, by virtue of their oath and office, also must recognize limits to their behavior:

[W]hile many practice the law as become the votaries of an elevated science, others degrade it into a pernicious and driving trade. It is indifferent to these men what may be the merits of a controversy, or which side they espouse; they ignobly pervert their oath of office, which enjoins fidelity to the interests of the client, into a pretext for sheltering him from the condign punishment of justice and law.32

Here, again, are echoes of Hoffman and Greenleaf and a firm rejection of the Brougham ethic. Lawyers, according to Tyson, must, as office

29. See William MacLean, Jr., The Law Academy and Early Legal Education in Philadelphia, in 4 PHILADELPHIA HISTORY 27, 27-36 (1935); see also CHARTER, CONSTITUTION AND BY-LAWS OF THE LAW ACADEMY OF PHILADELPHIA 1 (Philadelphia, Law Academy 1848) (“Preamble. The primary object of this institution is to afford the students of law and young members of the Bar, the means of improving themselves in legal and forensic accomplishments.”). For a typical speech before the Law Academy, see JOHN K. KANE, A DISCOURSE PRONOUNCED BEFORE THE LAW ACADEMY AT PHILADELPHIA, 26 OCTOBER 1831 (Philadelphia, Law Academy 1831), which deals with the theory of legislation and precedent’s value.


31. Id. at 8-9.

32. Id. at 10.
holders and oath takers, uphold a high standard of morality and cannot permit this to be weakened by their obligations to their clients. At the same time, Tyson admits that many lawyers do not live up to this ideal, but he chastises them for this failure.

Across the Atlantic, another lawyer published one of the more unusual treatments of legal ethics to appear during the century. This was Edward O’Brien’s *The Lawyer, His Character and Rule of Holy Life: After the Manner of George Herbert’s Country Parson.* O’Brien was an Irishman trained in the law in England. He was also university-educated at Trinity College, Cambridge. Most importantly, he was a devout Christian determined to interject religious and moral values into professional ethical guidelines. This volume was reprinted in Philadelphia in 1843. This rather odd-sounding pamphlet of just under one hundred pages is actually a somewhat learned disquisition on legal ethics. It goes into quite a bit more detail than Hoffman’s or Greenleaf’s work. The basic thrust of the book is that Brougham’s argument as to the ethical obligations of a lawyer, and that the lawyer’s duty not to make a moral judgment as to a client’s cause, are simply unacceptable.

O’Brien comments in the *apologia*, printed as a preface to the work, as follows:

“...The lawyer,” it is said, “is part of the machine of justice:”—Be it so:—He is still a man; and as a man is endowed with a sense of what is right and wrong, of what is true and false, of what is just and unjust, and being so endowed is bound to the utmost of his power to advance what is right, true, and just, and to oppose what is contrary to these.

These sentiments are carried on throughout the short work. O’Brien refers to the legal profession as a “calling,” a word pregnant with theological overtones. He follows the medieval tradition and considers that the lawyer’s knowledge and skills are a gift of God and a sign of grace; to prostitute these divine gifts by turning them to the defense of evil and unjust causes is a sin against God. Interestingly, O’Brien is one of the first modern theorists to endorse pro bono activity, for he

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34. See id. at 5-8.

35. See id.

36. Id. at 11.

37. Id. at 23.

38. See id. ("A lawyer is the servant of his fellow-men for the attainment of justice: in which definition is expressed both the lowliness and the dignity of his calling ..." (emphasis added)); see also id. at 24-25.
argues that a lawyer's "doors are ever open to the poor as well as the rich." 39

O'Brien is at his most interesting—and most eloquent—when he turns to the chapter in which he discusses a lawyer's duties. Here, he outlines a list of such duties as follows:

1. And first he makes it known that he will undertake the conduct of none but just causes; and here he esteems those causes alone to be just which under natural law, or positive laws, not contradicted by natural laws, do make such.

2. Secondly, the lawyer makes it known that he will not even in a just cause make use of unjust arts: he may not do evil that good may come, for real good he is assured may never grow out of evil, to him who works it: much less will he use unjust arts in an unjust cause. 40

In fact, O'Brien's pamphlet goes into quite detailed directions for particular situations. He has, for instance, a section on the ethical responsibilities of a lawyer when drawing pleadings, when advising on evidence, when consulting with clients. 41 In all of these sections, the basic message remains the same: the lawyer is not simply a mechanical extension of his client. Rather the lawyer is an independent creature who must exercise moral judgment at each stage in his service to his client and must always refuse to do that which is unjust or which might lead to injustice.

Back in the United States, William Porter delivered an oration before the Law Academy of Philadelphia on September 19, 1849. 42 In this oration, he addressed several crucial questions that he believed lay before the Academy and the profession as a whole. Porter addressed a related, but somewhat different, ethical question. Porter's concern was that lawyers were relying upon the technicalities and the subtleties of the law in order to avoid confronting the question of whether or not they were acting justly. 43 His answer to this was that the truly ethical lawyer would not do so, that the ethical lawyer must, at times, engage in subtlety or appeal to a technicality but only because that was a part of the law and, as such, must be followed. 44 But he did not accept the argument that such behavior must inevitably lead to injustice. Indeed, he enunciated the question in a rather bold and simple manner: "Can a lawyer, in every

39. Id. at 25.
40. Id. at 28-29.
41. See id. at 31.
43. See id. at 10-11.
44. See id. at 11-12.
case, act honestly and conscientiously?" His answer was a ringing affirmation. It would seem, therefore, that he did not accept Brougham's idea that a lawyer should use every artifice in the cause of his client, though he also was clearly not willing to go so far as O'Brien or Hoffman and explicitly make it a duty of each lawyer to make a moral judgment about his client's case.

In this same year of 1849, one of the leaders of the Philadelphia Bar, Charles Chauncey, died. His death was the occasion for the delivery of an oration by the Reverend Henry Boardman at the Tenth Presbyterian Church in Philadelphia on the subject of "The Importance of Religion to the Legal Profession." Boardman began his oration with the proposition—echoing de Tocqueville—that in the American republic no group of individuals enjoyed as high a status nor as influential a position as lawyers. He extrapolates from this observation that lawyers, therefore, bear a public trust that they must discharge properly. To do so, he believed, required that lawyers be pious and moral individuals and that they carry their personal morality into their professional lives, particularly in how they related to clients. He asks a series of questions as to how a lawyer should react when a client, inflamed and passionate about his cause, comes to the lawyer for help:

Are you to inflame still further their excited feelings by expatiating on their alleged injuries? . . . Are you with eager haste to assure them that the case admits of no compromise—that the law will award them with full redress, and they should be satisfied with nothing less? Are you to bring the cause into court, and employ all the arts of chicanery, such as brow-beating the witnesses, misquoting authorities, perverting the testimony, and appealing to the baser passions or the political prejudices of the jury—to conceal the merits of the question and secure a favorable verdict? This surely is not the treatment your clients have a right to expect from you.

Boardman insists that a lawyer must always exercise his conscience in representing a client. Here again, however, Boardman is not so strict as O'Brien, nor so strict as to destroy the adversarial nature of the legal process. Instead, he shows a remarkable knowledge of, and sensitivity to, the problems lawyers face, but without accepting the radical and, in his mind, amoral views of Brougham:

45. *Id.* at 19.
46. See *id*.
48. See *id* at 7-8.
49. See *id* at 8-9.
50. See *id* at 15-17.
51. *Id.* at 16-17 (emphasis added).
It is not meant by this that a lawyer is to assume the functions of a judge, and take both parties under his protection. He stands before the court as a representative of one of the parties, and he is bound to omit no legitimate means which may promise to benefit his client. He may suggest arguments which are not conclusive to his own mind: the court will allow them their due weight. He may seize upon technical informalities in the proceedings of the other side. He may avail himself of all advantages which the law will allow him for vindicating his client and baffling his opponent. But he may not bring into the conduct of his cause a malicious or vindictive spirit. He may not needlessly blacken the character of the opposing party. He must not impugn the veracity of witnesses, whose only fault has been their modesty or timidity. He must not seek to carry his cause by misrepresenting the facts, or by poisoning the minds of the court and jury against the antagonist client on personal or party grounds, aside from the merits of the issue on trial.\(^52\)

In short, Boardman’s position is quite simple: you may be an adversary, but there are limits to what an adversary may do and these limits are prescribed by common morality and a perception of the distinction between right and wrong.

In 1854, another American voice entered the fray on the ethics of the lawyer-client relationship. The original title of the work was *A Compendium of Lectures on the Aims and Duties of the Profession of the Law*.\(^53\) Its author was George Sharswood. Sharswood was a lawyer, judge, and professor of law at the University of Pennsylvania. His 1854 volume, which had originated as a series of lectures at the University of Pennsylvania, was intended to provide a basic guide to practice for young lawyers. It became immensely popular and, under several variations on the title *Legal Ethics*, went through numerous editions.\(^54\) A substantial portion of the book consists of a discussion of what Sharswood refers to as the lawyer’s duty of “fidelity to the client.”\(^55\) In this section of the book, Sharswood asks directly what the limits of the lawyer’s obligation to his client are when the “legal demands or interests of his client conflict with his [the lawyer’s] own sense of what is just and right.”\(^56\)

Sharswood begins his examination of this question by noting that a lawyer is not simply a client’s agent but also an officer of the court.\(^57\) He

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52. *Id.* at 18.

53. **George Sharswood, A Compendium of Lectures on the Aims and Duties of the Profession of Law** (n.p., 1854); see generally Shaffer, *Legal Ethics*, supra note 1, at 176.


55. Sharswood, supra note 57, at 81.

56. *Id.*

57. See *id.* at 83.
also notes that certain acts which would be repugnant in foro conscientiae (in the forum of the conscience) will be acceptable in a court of law.\textsuperscript{58} The example he adduces for this distinction is that of the Statute of Limitations.\textsuperscript{59} According to Sharswood, while it may be immoral to plead the Statute to avoid paying an otherwise valid debt, it would not be illegal.\textsuperscript{60} This distinction, absent from Hoffman’s Resolutions, marks an important turning point in the ethics of legal representation. Obviously, Sharswood is willing to accept that a lawyer may, in the interests of his client, act against morals so long as he does not violate the law.\textsuperscript{61}

Indeed, Sharswood goes on to point out that every “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 the judges, which can legitimately bear upon the question.”\textsuperscript{62} The presentation of these views Sharswood calls the “office of the advocate.”\textsuperscript{63} Indeed, Sharswood expressly excuses the lawyer from any moral responsibility for his client’s case.\textsuperscript{64} To do otherwise, Sharswood maintains, would be to make the lawyer his client’s judge.\textsuperscript{65}

At this point in his argument, Sharswood would appear to be much closer to Brougham’s views than to those of Hoffman. Hoffman quite clearly was unwilling to separate questions of law and morality and believed that a lawyer was responsible morally if he were to act in his client’s interest against morality. Indeed, Hoffman seems to have favored an approach that required the lawyer to judge the merits of his client’s case and to act according to that judgment. Sharswood, on the other hand, was willing to recognize the difference between law and morals and was, in general, unwilling to have the lawyer test a client’s case by his moral standards. The justification for Sharswood’s position has a very modern sound to it. To do other than he stated, Sharswood feared, would undermine the entire system of justice, usurp the judge and jury’s functions to the lawyer, and, in extreme cases, deny an individual the ability to have adequate representation.\textsuperscript{66}

Sharswood, in fact, expands upon this general view of the lawyer’s role. He was troubled by the notion that his position could provide an ethical justification for lawyers taking on all clients, regardless of the

\textsuperscript{58} See id.
\textsuperscript{59} See id.
\textsuperscript{60} See id.
\textsuperscript{61} See id. at 82-83.
\textsuperscript{62} Id. at 83.
\textsuperscript{63} Id.
\textsuperscript{64} See id.
\textsuperscript{65} See id. at 83-84.
\textsuperscript{66} See id. at 84.
merit of their cases, and taking them on, as he said, "with a view to one single end, success." Sharswood feared that such a reaction would lead to unrestrained advocacy and public outcry. He specifically rejects Brougham's view of a lawyer's duty to be unrestrained and holds Brougham's position to be against "cool reflection and sober reason." He also points out that a lawyer may not always make the proper judgment of the merits of a client's case and, therefore, implicitly rejects Hoffman's position. Sharswood sets out a middle ground and in so doing sets out four distinct cases: (1) when a lawyer acts as a criminal prosecutor; (2) when he acts as defense counsel; (3) when he is asked to represent a client in an "unjust claim"; and (4) when he is asked to represent a client in defending against what appears to be a just cause.

In the first case, that of criminal prosecution, he has an easy answer. Because there is never a professional obligation to voluntarily join in a criminal prosecution, if a lawyer believes such a prosecution to be unjust, he should stay away from it and leave it to the public prosecutor. As to criminal defense cases, Sharswood argues that a defendant in such an action should have the full benefit of the law and that his attorney ought to provide this, but not more. Indeed, in cases of appointed counsel, Sharswood argues that it is ethical for a lawyer to represent a client even though he believes him to be guilty. In the third case, defense of a civil action, Sharswood again believes that the need of clients for representation makes it necessary for lawyers to take on such cases, even though they may not agree with their client's cause. Once again, the reasoning behind this rule stems from Sharswood's belief that without lawyers, litigants would often be at a disadvantage because of wealth or knowledge and that by having lawyers both sides are equalized and a case may then be decided on the merits.

It is in regard to the fourth case, prosecution of a civil code, that Sharswood most closely approaches Hoffman and distances himself from Brougham. Sharswood argues that in cases where a client seeks a lawyer to prosecute a civil claim the lawyer is duty bound "to refuse to be concerned for a plaintiff in the legal pursuit of a demand, which

67. Id.
68. See id.
69. Id. at 87.
70. See id. at 89.
71. Id. at 90.
72. See id. at 93.
73. See id.
74. See id. at 90-91.
75. See id. at 92.
76. See id. at 95-96.
77. See id. at 96.
offends his sense of what is just and right."\textsuperscript{78} Sharswood urges the lawyer not to refuse lightly, but remains steadfast in his belief that in cases where the case is repugnant to the lawyer’s personal morality then the lawyer should refuse it.\textsuperscript{79} In support of this proposition, he cites a statement of Chief Justice Gibson that lawyers are not solely in the position of owing fidelity to a client but also are officers of the court bound by an “official oath.”\textsuperscript{80} Under this schema, a lawyer who was to prosecute an unjust claim for a client would be knowingly violating his obligation to the court.

Sharswood then goes on to discuss the celebrated \textit{Courvoisier} case, a capital case, in which the defense counsel knew that his client was guilty.\textsuperscript{81} Sharswood had already stated that every defendant deserved counsel. He uses this case as a means of refining this rule. Sharswood explains that while the client is entitled to legal representation, the lawyer should make only those arguments he knows to be true and fair and should neither use sharp practices, nor attempt to use his own reputation to help his client.\textsuperscript{82} In short, the client, according to Sharswood, is entitled to be defended using all of the arguments presented by the evidence, but no others.

Sharswood’s analysis of the duties owed by an attorney to his client have a modern ring to them. He chose a middle path between the extremes stated by Brougham and Hoffman. While he rejected the notion that a lawyer was, in effect, a “hired gun” owing loyalty only to his client, he also was unwilling to accept the extreme moralist view proposed by Hoffman. We may, perhaps, explain this based upon experience and context. Brougham’s statement was made in court in a defense of national import and for which the popular voice was against both client and lawyer. To some degree, Brougham was faced with a potential lynch mob. Hoffman, on the other hand, was an academic speaking to law students. We may well see in his extreme moralist views the beginnings of that isolation from and misunderstanding of practice that has so long marked the relationship between legal academics and legal practitioners. Sharswood, was speaking neither in the heat of battle nor solely as an academic (although his book began life as an academic lecture). Sharswood was an experienced and successful lawyer and jurist. He was quite interested in law reform as well. He clearly understood the pressures the justice system in its adversarial form placed upon lawyers. At the same time, his own sense of professionalism and morality, as well

\textsuperscript{78} \textit{Id.}
\textsuperscript{79} See \textit{id.}
\textsuperscript{80} \textit{Id.} at 96-97.
\textsuperscript{81} See \textit{id.} at 103.
\textsuperscript{82} See \textit{id.} at 104-05.
as his knowledge of the traditions of the bar, would not allow him to adopt either extreme view. Thus, he chose the middle road. And, as we shall see, this middle road was exactly in keeping with the general view of the lawyer-client relationship abroad in the profession of his day.

Two years after Judge Sharswood published his first edition, another Philadelphia lawyer published a two-volume work entitled *The Forum; or Forty Years Full Practice at the Philadelphia Bar.* The author, David Paul Brown, was a senior member of the Philadelphia Bar, knew Judge Sharswood and his writings, and wanted to provide the bar with a history as well as commentary on practice. *The Forum,* therefore, is a combination of bar memoir and practice handbook. In the second volume is contained a chapter entitled *Forensic Ethics and Etiquette.*

It is quite interesting, in the light of Sharswood's dependence upon the notion that a lawyer is an officer of the court that Brown begins his discussion of legal ethics with a discussion of the oath required of all lawyers in Pennsylvania. That oath required the lawyer to fulfill his office as lawyer with all fidelity to both the court and to his client. The obligation was shared. Brown then goes on to reject Brougham's view in words strongly reminiscent of those of Sharswood; in fact, Brown also quotes Chief Justice Gibson. But Brown and Sharswood are not in total agreement. Brown states in several places in his volume that should a lawyer be retained in a case which he discovers to be "dishonest" or "unsound," he "is bound to abandon the cause at once." This is a step that Sharswood was not willing to take. These remarks, however, would seem to be limited to civil cases. In criminal cases, Brown agrees with Sharswood that a defendant is entitled to be defended within the limits of the law and evidence. Brown goes further and makes what is now a familiar argument, that a criminal lawyer can rarely be certain that his client is guilty and that the finder of fact is the jury and of law, the

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83. See David Paul Brown, *The Forum; or Forty Years Full Practice at the Philadelphia Bar* (2d ed., Philadelphia, Robert Small 1856). Interestingly, these volumes were published initially by subscription (i.e., a number of lawyers agreed to purchase the volumes before they were printed). Among the subscribers were leading lawyers from Pennsylvania, New York, Tennessee, New Jersey, and even Mississippi. For the purpose of this Article, the most important section of the work is in volume 2, titled *Forensic Ethics and Etiquette.*

85. See id. at 26.
86. See id.
87. See id. at 29-30. Brown quotes Brougham and then states: "[I]f carried out to the extent suggested, [Brougham's words] make the advocate worse than a highwayman, and render him, under cover of the law, a virtual outlaw." *Id.* at 28.
88. *Id.* at 36; see also *id.* at 30 ("[A lawyer is bound to refuse a case that he believes to be dishonest, or to retire from it, the moment he discovers it to be so.").
89. See *id.* at 30-36.
judge.\textsuperscript{90} Thus, the criminal defense lawyer can ethically defend a client even though he \textit{believes} the client to be guilty.\textsuperscript{91}

In a later section of this same chapter, Brown has a most interesting, and rather equivocal treatment of the problem of defending against enforcement of a date through pleading the Statute of Limitations.\textsuperscript{92} He begins his argument sounding rather like Sharswood. He states that the Statute is a valid law.\textsuperscript{93} But he then looks to the purpose of the Statute to determine the ethics of its use.\textsuperscript{94} He says that the Statute is legitimated by reason because it is designed to protect parties against death, destruction, or the loss of documents, all of which may occur over the passage of time.\textsuperscript{95} But he then goes on to ask as to how a lawyer should plead when he knows that none of these has occurred and that the debt is valid and unpaid, but his client simply wishes to avoid his moral duty by recourse to the Statute.\textsuperscript{96} In such a case, Brown departs from Sharswood and states that "he had better not undertake the case."\textsuperscript{97}

Although Brown and Sharswood differ in small details, their general approach to legal ethics was quite similar and fell between the two poles established by Hoffman and Brougham. The evidence of these two practitioners at the middle of the nineteenth century provides strong indications of the prevailing view about legal ethics, at least among the elite urban bars. In fact, there is another source, less conscious and direct than these volumes, which suggests that these views were widely held throughout the American legal profession.

One of the least looked to and understood sources for the history of legal ethics in the United States are eulogies and memorial addresses given upon the death of a lawyer or judge. It was the habit in the United States from the eighteenth to the twentieth centuries that when a prominent person died, his funeral would feature a series of speakers who would not only reflect upon the deceased's personal characteristics but

\textsuperscript{90} See \textit{id.}

\textsuperscript{91} See \textit{id.} at 41. However, he also states:

Even in a criminal case, which is the severest test to which counsel can be subjected—though counsel may contend that the case for the prosecution is not made out by the evidence—they have no right to contend that presumptions may be built upon the evidence, which, although the evidence may possibly warrant them, the counsel know to be contrary to fact and truth.

\textit{Id.} at 39.

\textsuperscript{92} See \textit{id.} at 71.

\textsuperscript{93} See \textit{id.} at 71-72.

\textsuperscript{94} See \textit{id.}

\textsuperscript{95} See \textit{id.}

\textsuperscript{96} See \textit{id.}

\textsuperscript{97} \textit{Id.} at 72.
also upon his professional life and standing.\textsuperscript{98} It was also common that such speeches and memorial addresses be printed in pamphlet form, often with an engraving of the deceased as a frontispiece. These printed versions were distributed to family and friends and professional colleagues. In the case of lawyers, we often find printed versions not only of speeches actually given at the funeral, but also at memorial sessions held by bar associations and even courts.\textsuperscript{99} These addresses provide a rich source for determining normative ethical values for lawyers, for they often paint the deceased in ideal terms. Indeed, when one studies a large number of these speeches, one quickly sees that an "ideal type" of the lawyer emerges. Not surprisingly, this lawyer typology includes a substantial treatment of the lawyer-client relationship. Thus, by studying these speeches and memorial addresses it is possible to compare the ideal lawyer-client relationship as it is portrayed there with the lawyer-client relationship as it is discussed by Brougham, Hoffman, Sharswood, and Brown.

We may properly begin with one of the most famous printed eulogies of the nineteenth century, that of Supreme Court Justice Joseph Story on Chief Justice John Marshall.\textsuperscript{100} In telling of Marshall's approach to the law when he was a lawyer, Story notes that Marshall did not accept the idea of fidelity solely to a client.\textsuperscript{101} Instead, according to Story, Marshall felt a "deep responsibility, not to his client alone, but to the court and to the cause of public justice."\textsuperscript{102} Inherent in this concept is not only a rejection of Brougham's approach, but also the idea found in Sharswood and Brown that a lawyer is an officer of the court and owes equal loyalty to the justice system as to any individual client. Story stresses another aspect of Marshall's practice philosophy that is quite important in this context. Story tells his readers that Marshall eschewed any arguments except those that were "for the law, and with the law, and from the law."\textsuperscript{103} Here, again, is a statement in which is inherent the idea put forward by both Sharswood and Brown, that a lawyer ought not to make arguments based upon his own reputation or designed to incite the passions of the judge and jury. Instead, Sharswood and Brown both

\begin{itemize}
\item \textsuperscript{98} So common were such speeches that manuals with simple addresses were published during this period. \textit{See}, e.g., E.J. WHEELER, PULPIT AND GRAVE. A VOLUME OF FUNERAL SERMONS AND ADDRESSES (N.Y., Funk & Wagnall 1880).
\item \textsuperscript{100} \textit{See} JOSEPH STORY, A DISCOURSE UPON THE LIFE, CHARACTER, AND SERVICES OF THE HONORABLE JOHN MARSHALL, LL.D., CHIEF JUSTICE OF THE UNITED STATES OF AMERICA 5 (Boston, J. Munroe 1835).
\item \textsuperscript{101} \textit{See} id. at 62-63.
\item \textsuperscript{102} \textit{Id.}
\item \textsuperscript{103} \textit{Id.} at 63.
\end{itemize}
argued for—and Marshall lived by—the notion that a lawyer was bound to argue law soberly and in a dispassionate way so as to assure justice. This latter point is quite significant given the predilection of the day for oratory. Trial advocacy during this period was often seen as being predominantly oratory. Lawyers from Webster to Lincoln depended less upon the law and the facts dispassionately stated than upon excellent oratorical skills to sway a jury.104 Men like Story and Sharswood and Brown feared such displays, for they believed that arguments of this sort, though they might well win a case, would inevitably lead to injustice being done. Thus, the ideal lawyer was one who did not need to depend upon oratorical tricks, nor, indeed, to stoop to such measures. Instead, the ideal lawyer maintained a sober demeanor and argued the law and the law alone, as Story stressed that Marshall did.

This theme of sober argument based upon the law alone is further elaborated in another memorial, William Hinkling Prescott’s Memoir of the Honorable John Pickering, LL.D., published at Cambridge, Massachusetts, in 1848.105 Prescott was one of the greatest of America’s historians in the nineteenth century.106 His subject, John Pickering, was a Harvard graduate known for his profound learning in the law.107 Prescott, in his memoir of Pickering, echoes and elaborates upon Story’s ideal lawyer:

As a professional man, he had studied the law profoundly as a science, penetrating to those departments of it which are, for the most part, little consulted by the profession . . .

. . . .

As a lawyer, he stood high in the consideration of the community, and deservedly, for no man in the profession did more to elevate its character. At the bar, as everywhere else, his demeanor was courteous. His manner of addressing the jury was plain and impressive. He was well instructed in his case, and expounded with logical precision the legal principles that applied to

104. The role of oratory in the antebellum American legal profession needs to be studied. It is interesting to note that one of the period’s greatest orators, Rufus Choate, seems to have been one of Brougham’s strongest American supporters and according to his biographer “accepted and acted the doctrine [of Lord Brougham] with no qualification whatsoever.” Edward G. Parker, Reminiscences of Rufus Choate, The Great American Advocate 133 (N.Y., Mason Bros. 1860). It is interesting to speculate whether Choate may well have represented the Broughamian tradition in America, a tradition embraced by those who favored a more populist and less “scientific” approach to law and legal ethics.


106. Prescott is best known for his History of the Conquest of Mexico, first published in 1843. See generally Donald G. Darnell, William Hinkling Prescott (1975).

107. Pickering, interestingly, was, perhaps, better known as a scholar to his contemporaries than as a lawyer. See Charles Sumner, The Scholar, the Jurist, the Artist, the Philanthropist. An Address Before the Phi Beta Kappa Society of Harvard University 7 (Boston, Wm. T. Clamor 1846). In this study, the scholar was Pickering, and the jurist was Joseph Story.
it... He addressed the understanding, rather than the passions of his audience.
... He could not be brought to regard the law as a cunning weapon.108

In these discourses about Marshall and Pickering is contained the crucial idea that a good lawyer is not a demagogue nor willing to utilize "tricks" to win his case. The lawyer owes a duty to his client to plead the law, and no more. Certainly, he does not owe his client oratory designed to inflame the passions or tricks and wiles that made the law no more than a "cunning weapon."109 Again, this view is quite different from the one put forward by Brougham, although it does not require as much of the lawyer as did Hoffman.

A perspective on the lawyer-client relationship that more closely approaches that of David Hoffman than Sharswood and Brown is to be found in an anonymous memorial to James Louis Petigru.110 Petigru was one of the leaders of the Charleston, South Carolina bar during the antebellum period.111 He was well known for his learning and he trained many of the South's finest lawyers in his law offices. His anonymous eulogist stressed his ethical standards:

He never was a mere lawyer to his clients. He was a friend, and a sincere friend; and, when called on for his counsel, he never stopped at expounding the law, but placed before his clients the duties their positions required. With him, honor was worth more than property; and he frankly and freely counseled the course that high morals required his clients to pursue, irrespective of law... [H]e was ever assiduous to clear himself of any complicity with moral crime which the profession of law sometimes produces.112

This analysis of Petigru's ethical standards for law practice is far closer to Hoffman's than Sharswood's or Brown's. Like Sharswood, Petigru recognized the difference between law and morals, but he chose,

108. Prescott, supra note 105, at 23.
109. Here, again, we may advert to what appears to have been a rather strong split in the antebellum profession between those who favored oratory and those who took a more "scientific" and restrained view of legal practice. As noted, Rufus Choate was best known as an orator and supported Brougham's views. Webster, another great orator-lawyer of the period may also have fallen into this group. See Joel Parker, An Address to the Students in the Law School of the University of Cambridge 35-40 (Cambridge, J. Bartlett 1853) ("[A lawyer] may be required, at times, to insist that the rules of the law applicable to the case before the court furnish for human tribunals the equity and justice which must govern that case, and that all beyond must be left to the personal conscience of the parties... "). Is it possible that these orator-lawyers who favored the Broughamist doctrine represent an early "proto-populist" faction and that the more "scientific" lawyers represent an early "elitist" faction?
110. See Memorial of the Late James L. Petigru (N.Y., Richardson & Co. 1826).
111. For further discussion of Petigru, see James Louis Petigru: Southern Conservative, Southern Dissenter (1995).
112. Memorial, supra note 115, at 20-22. The image of the lawyer as a "friend" of his clients is one examined by Professor Shaffer in his book Lawyers, Clients, and Moral Responsibility. See Shaffer & Cochran, supra note 1, at 40-54.
apparently, like Hoffman, always to act according to morals rather than
twelve (or, at least, his eulogist would have us believe). The similarity
between Hoffman’s views and Petigru’s may be more than mere
coincidence. During the first half of the nineteenth century, the South
possessed a legal culture somewhat different from the North. Lawyers
in Charleston and Baltimore viewed themselves in a different light than
did lawyers in Philadelphia or Boston. The southern legal profession was
more literary and was more conscious of the role of the lawyer as
gentleman. This may well have been a holdover of the southern cavalier
tradition. Certainly, this difference affected the ethics of practice.
Gentlemanliness and gentlemanly morality were more important to the
southern lawyer. For instance, Hugh Swinton Legaré, another Charleston
lawyer and acquaintance of Petigru, once remarked that he followed the
ancient Roman, Cicero, as a role model in practice, even to the point of
being unwilling to take any legal actions to collect a fee due him. Thus,
what we may see in the more extreme ethics of Hoffman and
Petigru is a southern “aristocratic” influence which required these lawyers
to always follow morality even when it meant acting against or
withdrawing from the lawyer-client relationship. This is not to say that
this was a solely southern view; rather, it was a view that was, perhaps,
more predominant in the South.

Certainly, the evidence suggests that a full range of views from
Hoffman to Sharswood existed among the bar, but that all of the
Americans who wrote on the subject rejected Brougham’s views. Again,
this is not to say that the Americans did not understand that the limits of
the lawyer-client relationship and the lawyer’s obligations within it were
far from clear. S.L. Southard in his Discourse on the Professional
Character and Virtues of the Late William Wirt stated the problem in
clear terms:

There is . . . a and almost imperceptible narrow line, which is to be trodden by
the practitioner. It lies between the vigilant attention and ardent prosecution of
the client’s rights on the one side; and proper respect for, and submission to the

113. Southern legal culture was, in many respects, more literary and broad-based than northern
legal culture, although the North has had many literary lawyers. For instance, of Petigru, one
memorialist stated: “He was a classical scholar; a man of literary habits; a writer of taste and
elegance . . . .” MEMORIAL, supra note 115, at 17. On other members of the southern antebellum
bar who fit into this category, see M.H. HOEFFLICH, ROMAN AND CIVIL LAW AND THE DEVELOPMENT
literary lawyers, see generally ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE

114. See HOEFFLICH, supra note 113, at 67. Blackstone also adopted the Ciceronian view to a
degree, holding that it was unethical for a lawyer to sue his client for his fee, a rule held applicable
to English barristers until just recently.
court, and regard for the feelings of the opponent, on the other. It is a point, in our practice, less successfully reached than any other.\textsuperscript{115}

In the end, the question of the lawyer’s obligation to his client versus his obligation as an officer of the court became one of individual judgment and integrity. Some lawyers took the path laid out by Hoffman, even though it might cost them success. One such lawyer, apparently, was Charles Williams of Vermont. In an obituary notice published in 1854, Isaac Redfield noted of Williams the following:

> In one essential, cardinal excellence, his reputation, as a member of the bar, is perhaps worthy of special commendation to the members of the profession every where and at all times, since the temptations there to moral delinquencies, are so constant, and so specious often as to be difficult of detection, and not easily resisted when discovered. He was never suspected of carrying his case by mere management and chicanery. He chose to lose cases which he could not gain fairly.\textsuperscript{116}

If most lawyers did not live by Hoffman’s Resolutions or by Williams’s model, they also did not accept Lord Brougham’s notion that a lawyer should do anything he could do legally for his client. John P. Jones, another nineteenth century lawyer-author put it quite succinctly: “Industrious cunning, and the miserable arts of mean chicane, pandering to crime and prostituting justice, may give one practice, they can never give one honour.”\textsuperscript{117} Of course, there is in this quote also the recognition that all lawyers did not live up to the standards proposed by Sharswood and Brown, let alone Hoffman or Williams. But the aspirations were there, and they were aspirations that put a far greater moral burden upon the individual lawyer than did Brougham’s view of ethics. Indeed, these aspirations put a far greater moral burden on lawyers and saw them as far more dedicated to the office of lawyer and the system of justice than do our own ethical rules. In the moral universe of these lawyers, there was simply no room for the “hired gun.”\textsuperscript{118}

During the nineteenth century, as today, the question of legal ethics and particularly the lengths to which a lawyer would go in representing his client were of interest to a broader public than just the profession. One of the most interesting lay expositions of legal ethics published in

\textsuperscript{115} S.L. Southard, Discourse on the Professional Character and Virtues of the Late William Wirt 49 (Washington, Gales & Seaton 1834).

\textsuperscript{116} Isaac F. Redfield, Obituary Notices and Other Testimonials of Respect on the Occasion of the Death of the Hon. Chas. K. Williams, LL.D.: Formerly Chief Justice of the Supreme Court, and Afterwards Governor of the State of Vermont (Rutland, VT, G. Tuttle 1854).

\textsuperscript{117} John Pringle Jones, An Eulogium upon Antony Laussat, Esquire: Late One of the Vice-Provosts of the Law Academy of Philadelphia 15 (Philadelphia, Joseph & William Kite 1834).

\textsuperscript{118} See id.
the nineteenth century is a small pamphlet written by John Brookes and published at Cincinnati in 1849 under the title *The Legal Profession: Its Moral Nature and Practical Connection with Civil Society*.\(^{119}\) Brookes was a local clergymen and the occasion of his writing this piece was an invitation to speak before the Philomathesian Society at Kenyon College. The purpose of his speech was to explore the question of whether a man could practice law and remain morally upright or whether the practice of law necessarily forced a lawyer into immoral acts through his role of advocate.\(^{120}\) Brookes decided that lawyers could lead moral lives, though it might not be easy:

> Is it not a main part of the business of lawyers to pervert truth? Is not willful falsehood one of the essential features of their profession? If the charge insinuated in these questions were true, it would be condemnation absolute, and we could not, of course, utter a syllable in vindication of the Bar. But, while we must acknowledge that there is much in the public duties of the profession to tempt untruthful representation, or false coloring, we can perceive nothing which necessitates it. We certainly believe it to be possible for a lawyer to pass through his professional career with a veracity as little tainted as that of the mass of good men in other pursuits . . . .\(^{121}\)

This range of views of the lawyer-client relationship and the moral responsibility of lawyers within that relationship seems to have been maintained throughout the first three-quarters of the nineteenth century. The change came—the change that initiated the more modern view of the lawyer-client relationship—in the 1870s. This change brought with it a reinvigoration of Lord Brougham’s perspective on the relationship and the lawyer's duties within it. Once again, it is possible to identify both the context within which this change occurred and the lawyer who most clearly and earliest enunciated it. The context was the rise of a new type of law in the United States, what we now call corporate law, and the lawyer most responsible for popularizing the view was David Dudley Field.\(^{122}\)

The last quarter of the nineteenth century was a period in American history marked by the rise of the first great corporate amalgamations in railroads, in oil, and in steel. It was also the period in which the securities markets became a principal vehicle for financing new industrial enterprises. And it was the period of the first great “robber barons” who, through their force of will, ingenuity, and lack of morals, were able to build vast corporate conglomerates through the manipulation of markets

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120. See *id.* at 9-10.
121. *Id.* at 10.
122. See infra notes 123-28 and accompanying text.
and the laws pertaining to them. These robber barons, men like Jay Gould, Jim Fisk, and Jim Brady, were prepared to go to any lengths—including murder—to reach their corporate ends. They amassed vast fortunes in so doing. They also needed lawyers skilled enough to be able to manipulate the law, the courts, and the justice system as a whole so that they could carry on without impediment. Not surprisingly, given the large amounts of money at stake, these robber barons were easily able to find legal talent to serve their purposes. What is significant, however, is that many of the lawyers who served men like Gould and Fisk were not the dregs of the profession, or the back-room petitfoggers despised by men like Sharswood or Hoffman. Instead, they were often individuals of the highest professional standing. Chief among them was David Dudley Field.

Field’s work for Gould and Fisk and other robber barons of the late nineteenth century was immortalized in the work of Charles Francis Adams and Henry Adams titled *Chapters of Erie*.123 The portrait of Field contained therein is far from laudable. Indeed, Field was also attacked in some of the leading newspapers and magazines of the day for his work on behalf of the railroad moguls. These attacks touched a nerve. In a series of letters to Samuel Bowles, publisher of the *Springfield Republican* (Massachusetts), Field responded to his critics and set forth a reinvigorated version of Brougham’s vision of the lawyer-client relationship and of the lawyer’s overwhelming and singular obligation of fidelity to his client.124 Field’s dissertations on the lawyer-client relationship and the ethical obligations of lawyers within it is, to a large extent, the harbinger of the modern idea of zealous advocacy. Of course, Field’s view hearkens back to Lord Brougham and thus has the patina of antiquity, but, clearly, it draws its primary strength from the demands and rewards of the then newly emerging practice of corporate law.

In one of the letters to Field, Bowles pointed out that the issue of lawyer-client relations was not, in 1870, a thoroughly settled matter: "The province of professional duty to causes and clients, is, I believe, an open question among lawyers themselves. Even the principles of it have never been stated to general acceptance; but it is much easier to agree upon a principle than to decide upon practice under it."125 In answer to

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123. See generally CHARLES FRANCIS ADAMS & HENRY ADAMS, CHAPTERS OF ERIE AND OTHER ESSAYS (N.Y., H. Holt 1886).


125. Correspondence of Messrs. David Dudley and Dudley Field, of the New York Bar, with Mr. Samuel Bowles, of the Springfield Republican (1871), in ANDREW L. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 418 (3d ed. 1989).
this criticism, Field replied with a suggested general rule of ethics for lawyers: "[T]he lawyer, being intrusted by the 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." 126 Field reiterated in his letters that he had not lied or misled a court in the course of his representation of Fisk and Gould, in spite of the popular belief that he had done so. 127 What was important to Field was that, in his opinion, he was bound to represent his clients regardless of their actions or character and, furthermore, that he was bound to use all means possible—within the law—to further his clients’ cause as part of his representation. 128

There can be little doubt in anyone’s mind that David Dudley Field’s position was one that was to gain support during the succeeding decades. The idea of the lawyer as moral arbiter of his client’s case and the notion that a lawyer should act within severely defined limits in his representation of clients gave way to the demands of corporate and individual clients who wanted zealous advocacy not moral criticism from their attorneys. Professor Shaffer and other advocates for a more moralistic approach to the lawyer-client relationship bemoan this change and would see us move back to Hoffman’s or, perhaps, Sharswood’s views. 129 They attribute the movement away from this more moralistic perspective to a decline in public morality generally and a move away from the more stringent professional ideas of the nineteenth century. 130 They see the rise of corporate law practice as having a deleterious effect upon legal ethics and rightly point out that the state of things today was not always the way it was. 131

Certainly, knowing the history of views on the lawyer-client relationship and the obligations of representation can help us in assessing our current situation. Most lawyers and legal academics are unhappy at the excesses of zealotry they see in court today. 132 One constantly hears discussion of a decline in lawyer morality. It is common to see lawyers boast of their tenacity and willingness to fight "to the death" for their clients. Such comments are far more common than claims by lawyers

126. Id., in KAUFMAN, supra note 125, at 419.
127. See id., in KAUFMAN, supra note 125, at 419-21.
128. See id., in KAUFMAN, supra note 125, at 419-21.
129. See generally Shaffer, Adversary Ethic, supra note 1.
130. See id. at 713-15.
131. See id. at 705-07.
132. See, e.g., Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 STAN. L. REV. 589, 628 (1985) ("Reported cases and surveys reveal a striking incidence of overly zealous representation ranging from garden variety discovery abuse to suppression of evidence and complicity in fraud or perjury.").
that they will judge the merits of their clients' cases and act according to that judgment.

If, in fact, many of us do desire to return to the nineteenth century ideals of legal practice as set out by Sharswood and Brown and in the various eulogies and memorial speeches discussed above, then we must also realize that one of the principle reasons for the move away from such a view of legal ethics was lawyers' response to client demands. David Dudley Field, in defending his actions in regard to the Erie Railroad never was willing to admit that he was not required to represent Fisk and Gould. They had numerous other lawyers on retainer. He accepted them as clients because it meant business. In essence, much of the move away from lawyers as judges of clients' cases toward lawyers as unstinting zealous advocates for clients' cases derives from market pressures. For every lawyer who will exercise such moral judgment, there will be another who will not. This was as true in the nineteenth century as it is today. As John Jones noted, the basic choice was one between "honor" and "practice."\(^{133}\) The normative rule in the nineteenth century was that a lawyer should choose honor over financial success. Those who sought financial gain as a first priority were labeled pettifoggers or worse and were subjected to the scorn and contempt of their fellow lawyers and the general public. Peer pressure helped to maintain the ethical standards. Today, if we are to move back toward the nineteenth century model of legal ethics and of the lawyer-client relationship, we shall be able to do so only, I would suggest, if we can restore to the profession such a notion of honor and restore, as well, the peer pressure necessary to back it up. Without such a cultural change in the profession, I doubt we shall ever return to the views of Sharswood or Brown—let alone Hoffman—but instead shall live in the world of Brougham and Field where the market determines morality.

\(^{133}\) See generally Jones, supra note 117.