The Myth of Civic Republicanism:
Interrogating the Ideology of Antebellum Legal Ethics

Norman W. Spaulding[1]

Working Draft
forthcoming in Fordham Law Review ethics symposium:
The Legal Profession: Looking Backward

---

[1] Acting Professor of Law, University of California, Boalt Hall (School of Law). J.D., 1997, Stanford Law School; B.A., 1993, Williams College. I am deeply indebted to Alice Youmans, head reference librarian at Boalt Hall, for her tireless assistance in marshalling some of the more obscure historical sources reviewed for this article. I am also grateful to _ for invaluable research assistance.

Introduction

> Another common trait of myths is the manifest impossibility of many of the events being described. Fifty-headed monsters, shape-changing deities, talking animals, descents to the underworld, and chariot-drawn flights through the sky all testify to myth's characteristic concern with experiences beyond the normal or the natural . . . .[2]

> Now the difference between legend and history is in most cases easily perceived by a reasonably experienced reader. . . . Their structure is different. . . . [Legend] runs far too smoothly. All cross-currents, all friction, all that is casual, secondary to the main events and themes, everything unresolved, truncated, and uncertain, which confuses the clear progress of the action, and the simple orientation of the actors, has disappeared . . . . Legend arranges its material in a simple and straightforward way; it detaches it from its contemporary historical context, so that the latter will not confuse it; it knows only clearly outlined men who act from few and simple motives and the continuity of whose feelings and actions remains uninterrupted. . . . To write history is so difficult that most historians are forced to make concessions to the technique of legend.[3]

The argument of this article is that the morally activist concept of lawyering so often said to prevail among nineteenth century civic republican legal elites is more mythical than real. Contemporary scholars attracted to this morally robust idea of law practice (scholars I have elsewhere called "role critics"[4]) have made "concessions to the technique of legend" in reporting the history and ideology of antebellum law practice. These concessions have suppressed a rich and exceedingly complex antebellum debate – "friction," to borrow again from Auerbach – on the definition and justifiability of the lawyer's role. Not only has this debate been suppressed, but the context which gave rise

[2] T.V.F. Brogan, THE NEW PRINCETON HANDBOOK OF POETIC TERMS 198 (1994).
[3] Erich Auerbach, MIMESIS: REPRESENTATION OF REALITY IN WESTERN LITERATURE 19-20 (1953).
[4] *See* Norman W. Spaulding,*Reinterpreting Professional Identity* , 74 U. COLO. L. REV. _ (2002).

to the debate and the array of motives that made the debate so lively have been pushed off the horizon of analysis. Above all, "inconvenient facts" have too often been ignored.[5]

Why, for instance, should we believe that law practice and ideology became more zealous, more client-centered and more amoral when the profession moved *away* from the courtroom and into the boardroom? One can argue, as role critics have, that the temptation of handsome fees implicit in the rise of corporate capitalism after the Civil War provoked a self-interested sacrifice of independence and public morals in the profession, but, according to their own account of contemporary practice, courtroom advocacy is the provenance of zeal and amoral temptations.[6] Moreover, we know from early nineteenth century law practice that, although fees were small relative to later corporate practice, trials were a grand spectacle – in many parts of the country they were a primary form of public entertainment. And this was the age of oratory, when young lawyers made and old lawyers sustained their careers by prevailing in trial using the arts of eloquence.[7] Might not fame, or at least the prospect of establishing a reputation upon which later work and public office could be gained, have tempted lawyers to zeal then as much as a large retainer did during the industrial revolution?

And why should we assume that civic republicanism is fundamentally inconsistent with adversarial advocacy? Virtuous self-restraint might require a lawyer to sacrifice a good fee by refusing to take or withdrawing from an unjust case, but might it

---

[5] Max Weber, *Science as a Vocation*, in H.H. Gerth & C. Wright Mills, FROM MAX WEBER 147 (1958).
[6] *See* David Luban, *The Adversary System Excuse*, in Luban, THE GOOD LAWYER 104 (1984).
[7] *See* Lawrence Friedman, A HISTORY OF AMERICAN LAW 312-14 (1985) ("Few lawyers could afford to stray . . . far from litigation. Courtroom advocacy, both East and West, was the main road to prestige, the main way to get recognized as a lawyer or leader of the bar. . . . [And] there is no doubt about the oratorical athletics. The great courtroom masters really poured it on."); *see also id*. at 309 ("The flamboyance, tricks, and courtroom antics of 19th-century lawyers were more than a matter of personality; this behavior created reputation; and a courtroom lawyer who did not impress the public and gain a reputation would be hard pressed to survive.").

not also require a lawyer to sacrifice popular esteem (and future business) by defending an apparently guilty and publicly despised client in order to ensure a fair trial, or by helping a client prevail under an arguably unjust law so that the rule of law will be respected in a society riven by competing conceptions of what justice requires?

When the concessions to legend are pierced and the historical context brought into relief, a dramatically different account of antebellum law practice and ideology emerges. Far from a vision of law practice that galvanized the profession, or even professional elites, morally activist civic republicanism operated as an ideal – a deeply contested, often self-serving, and, on the facts of law practice from the time, somewhat abnormal and unnatural ideal. And this ideal vied for dominance with a conception of lawyering defined by commitment to zealous, client-centered service and profound skepticism about the lawyer's capacity to act as a moral judge of his clients' ends.[8]

To say that contemporary scholars have mythologized the concept of civic republican lawyering, however, is not to say that we can do without professional mythology, without attempts to use reassuring narratives drawn from professional history to resolve the fundamental contradiction between law and justice at the heart of the lawyer's role. While they surely were not fifty-headed monsters, our professional deities – the legal elites of the post-revolutionary generations who helped breath life into the constitution, the union, and the common law – were indeed (and remain) shape-changing and hydra-headed, capable of supporting radically different narratives about the profession and its self-conception. But it is just this "manifestly impossible" fact about

[8] I use the male pronoun when the paper makes historical references because law practice in the nineteenth century was generally restricted to men. *See* Bradwell v. Illinois, 83 U.S. 130 (1873).

the history of legal ethics which we must interrogate and embrace if we are to have *histories* of the profession rather than just myths.

Part I of this essay gives the rough outlines of what Robert Gordon has aptly called the "declention thesis" – the profession's long fall from civic republican grace to the norm of amoral advocacy – and role critics' attempt to redeem professional honor by arguing for a return to morally activist lawyering on civic republican terms.[9] Part II examines the work of David Hoffman and George Sharswood – the two major nineteenth century figures relied upon by role critics to demonstrate the historical prevalence of morally activist civic republican legal ethics. In this section, I challenge role critics' claim that Hoffman and Sharswood's views on the role are consistent with each other and representative of a civic republican consensus on moral activism.

Part III surveys the major law periodicals of the early nineteenth century and exposes the lively debate on the lawyer's role contained therein. I argue that although Hoffman and Sharswood were well known at the time and studied by postbellum bar code drafters, they were hardly the only legal elites who weighed in on the definition and scope of the lawyer's role. They may not even represent the dominant antebellum view: the periodical literature reveals that the concept of client-centered, ethically neutral lawyering was not only well-recognized in public discourse, but defended far less apologetically than it is today. Part IV examines anecdotal and biographical information about prominent lawyers and law practice in order to suggest that client-centered lawyering was a common practice that fit contemporary articulations of the professional

[9] *See* Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 48-68 (1988) (both defining and voicing skepticism about the declention thesis); *see id*. at 51 (contending nevertheless that "the rhetoric of decline has captured something real"); Gordon (1983) 99 (noting that late 19th century legal elites were already openly lamenting professional "decline"); Gordon (1984) 61-62 (same).

ideal. I conclude by urging deeper inquiry into nineteenth century law practice and ideology and by suggesting what implications may be drawn from evidence that the question of the definition, justification, and habitability of the lawyer's role has always been contested.

I. The Declention Thesis

A. Fall from Virtue

Role critics generally contend that the profession moved from a "justice-centered conception" of professional responsibility to an amoral "client-centered conception" in response to the demands of corporate capitalism at the close of the nineteenth century.[10] The narrative offered to account for the moral bankruptcy of the profession today is thus most often presented by role critics in the genre of fall and redemption.[11] Prior to the rise of corporate capitalism, they argue, the profession was characterized by a number of distinctive traits. Organizationally, the bar was weak, lacking any unified institutional structure. It was also diffuse (regulated informally at the local level), and dominated literally by the apprentice system and solo or small partnership general practice, figuratively by the spectacle of courtroom advocacy and statesmanship. Ideologically, the profession was defined by civic republicanism and faith in natural law. Thus not only was law thought to have moral content accessible to reason and principled elaboration, the lawyering role was thought to be uniquely dedicated to the service of law so

[10] Davis & Elliston, ETHICS AND THE LEGAL PROFESSION 26 (1986); Papke, *The Legal Profession and Its Ethical Responsibilities: A History*, in ETHICS AND THE LEGAL PROFESSION 31, 35 (1986).
[11] *See, e.g.*, Anthony Kronman, THE LOST LAWYER 1, 11-23, 165-314 (1993) (defining and describing the decline of the nineteenth century lawyer-statesman ideal).

conceived. A lawyer was therefore personally responsible for promoting justice, not just his client's interests.[12]

This special role for the lawyer reflected a transition from classical republican principles (which assumed *all* citizens are capable of virtuous action) to a version of republicanism that assumed the need for governance by an elite class of citizens willing to carry the burden of virtuous governance in a nation otherwise committed to self-interested pursuits.[13] As Russell Pearce has observed:

> In the period following the American Revolution, a number of political thinkers lost confidence in traditional republicanism's promise that the people as a whole would rise above self-interest to virtue. These thinkers came to believe that "the people were perverting their liberty" and their power with self-interested pursuits. . . [They] sought the solution to this dilemma in a modified for m of republicanism. While advocating a government of "limited powers subject to elaborate checks and balances . . . intended to limit majoritarian excesses," they sought a virtuous political elite. Building on the elitist strand of republicanism, which had preferred the political leadership of landed gentry and professionals, they found in these two groups the capacity for disinterestedness necessary to virtue and the realization of the common good.[14]

Lawyers, in particular, came to center stage as "'the ex oficio interpreters of our national credo.' [They] controlled the judicial branch and dominated the legislature and the

---

[12] *Id*. *See also* Papke in ETHICS AND THE LEGAL PROFESSION (1986), James Willard Hurst, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS (1950), Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise:1870-1920*, in Gerald L. Geison, PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 82-85 (1983) (describing the Whig-Federalist "these nobiliaire" of law and lawyers as "a mediating figure in society between the wealthy and the masses, between the excesses of commercial acquisition and leveling democratic politics").

[13] For a discussion of classical republicanism, see G. Edward White, THE MARSHALL COURT AND CULTURAL CHANGE, 18150-1835 49 (1991). On classical republican antipathy to lawyers, see *id*. at 79 ("Classical republican ideology was more sanguine about the presence of law in a republic than about the characteristics of representatives of the legal profession. One of the ideals of classic republicanism was 'simplicity,' a word that was intended to signify a lack of pretension . . . and a repudiation of decadent or corrupt symbols of privilege. Lawyers . . . were reminiscent of the luxurious and sinister world of monarchs and courtiers that republican government was designed to forestall."). On the place of civic republican ideology in revolutionary and post-revolutionary American culture, see J.G.A. Pockock, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); Gordon S. Wood, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969); Bernard Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967).

[14] Russell G. Pearce, *Lawyers as America's Governing Class: The Formulation and Dissolution of the Orignial Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 385-86 (2001) (quoting _).

executive."[15] And, in the formulation of the nineteenth century author most often cited by role critics to initiate the civic republican narrative, lawyers were to be committed, above all else, to virtuous service. "[W]hat is morally wrong," David Hoffman wrote, "cannot be professionally right."[16]

With the rise of corporate capitalism, each of the structural elements of law practice came under pressure and began to change: republicanism gave way to libertarianism and laissez faire thought; natural law theory gave way to positivism and formalism[17]; the lawyer as statesman and courtroom advocate gave way to the lawyer as counselor and corporate board member[18]; solo firms gave way to "law factories"[19]; the apprentice system gave way to law school training by the socratic method[20]; general practice gave way to specialization[21]; and local, informal regulation of lawyers' conduct gave way to bar associations and national, uniform codes of professional conduct.[22] At the center of these changes, role critics contend, were the needs of emerging corporate capitalists to frame their economic interests and transactions in the legitimating language of the law, and, concomitantly, the needs of elite lawyers performing this task to organize

---

[15] Pearce (2001) 387.
[16] Pearce (2001) 388 (quoting Hoffman).
[17] *See* William Simon, THE PRACTICE OF JUSTICE 30-34 (1998); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WISC. L. REV. 29.
[18] *See* Margali Sarfatti Larson, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 170 (1977); Hurst (1950); Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEG. HIST. 191, 201 (1977); Gordon (1984) 59, 61.
[19] *See* Wayne K. Hobson, *Symbol of the New Profession: Emergence of the Large Law Firm, 1870-1915*, in Gerard W. Gawalt, THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 1, 5 (1984); Larson (1977) 170; Schudson (1977) 192; *see also* Gordon (1983) 72 (describing "symbiotic relationship" between growth of "the modern law school and the corporate law firm").
[20] Hurst (1950) 368-72; Larson (1977) 171.
[21] Schudson (1977) 201; Hurst (1950).
[22] Kronman, LOST LAWYER; Gordon (1988); Gordon (1984); Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 703-04 (1988). Each of the structural transitions is well documented in standard historical treatments of the rise of the legal profession. *See* Warren, Pound, Hurst, Friedman, Chroust. What is distinctive in role criticism (especially when compared with the Whiggish accounts of Warren, Pound and Chroust) is the view that these transitions are indicative of professional decline.

and frame their efforts in a legitimating professional ideology. As Thomas Shaffer puts it:

> [T]hose who were exploiting North America found they needed legal help, both because they got into trouble and because the legal forms for transactions, for raising money, and for insulating commercial behavior from the influence of government, were not adequate to what the business barons wanted to do. And this, of course, produced a professional moral agenda: On what terms would lawyers be enlisted in the business enterprise?
> . . . .
> [C]omplicity with the robber barons became an issue for the organized bar in such a way as to account not only for the moral issue and to answer the moral issue, but also for the existence of the organizations that considered the issue and formulated principles to deal with it. Until this issue about complicity [with corporate capitalism] became prominent, there was not an organized legal profession in anything like the sense in which lawyers talk about the organized bar today. *Bar associations were formed around the issue of what bar associations should say about the lawyers who both formed the bar associations and served the robber barons*.[23]

Shaffer adds that before "the issue of complicity with rapacious business surfaced," the legal profession was "almost unorganized," and "the general position among vocal American lawyers . . . was 'republican' – that is, a lawyer felt himself responsible for what his clients did with his advice and assistance."[24] But as lawyers came to the aid of capital, they proclaimed the "adversary ethic" – emphasizing the principles of ethical neutrality and client-centered service. Thus "'[t]he Bar' in America did not have a clear

[23] Thomas Shaffer, *The Profession as a Moral Teacher*, 18 ST. MARY'S L.J. 195, 222-23 (1986) (emphasis added); *see also* Larson (1977) 169-70 ("Partisan legal expertise was, and still is, chiefly needed by the propertied classes and chiefly available to them. . . . [E]lite lawyers used their skills to articulate the legal framework needed by the new business system. To the corporate economy, lawyers contributed specific tools (such as the equipment trust certificate and the trust receipt), institutional models (such as the corporation), and patterns of action for adapting financial and price structures to a national market. . . . [H]is mastery of largely uncharted fields and his clients' respect for his opinions gradually led the business lawyer into extralegal decision-making and economic planning."); Andrew L. Barlow, Coordination and Control: The Rise of Harvard Univ. 1825-1910 215, 244 (Ph.D. diss. Harvard Univ. 1979) (cited and discussed in Gordon (1983) 77. *But see* Gordon (1983) 81, 93, 110 (discounting instrumental theories of lawyers' complicity with corporate capital and arguing instead that the primary good lawyers produced for the interests of corporate capital was an ideology that helped insulate it from the nascent regulatory state); Gordon (1984) 53 ("the lawyer's job is selling legitimacy").
[24] Shaffer (1986) 223.

corporate existence until it defined itself as not responsible for what clients do."[25] For Shaffer and other role critics, this move to the adversary ethic rendered the modern organized legal profession, "from the first, a compromised moral teacher."[26] The moment of professionalization (efforts at uniform role definition and regulation) was also the moment of fall.

Sociological role criticism bolsters this historical claim by arguing that just as corporate capitalism provided the material foundation for the emergence of the modern legal profession on terms that emphasized insulation from moral scrutiny, the underlying, if not conscious, logic of professionalization was to protect lawyers' monopoly on access to legal services – to insulate the profession from both the market and the state. Moving away from the claim that professions are altruistically motivated and perform an important social function by mediating between the interests of capital and the public,[27] post-functionalist sociologists emphasize the rather telling nexus between the defining

---

[25] *Id*. *Cf*. Gordon (1984) 65-66 (noting that the decline of the civic republican ideal actually provoked at least two alternatives to the client-centered vision of the lawyer as "apolitical technician": the "institutionalized schizophrenia" of client-centered private practice combined with public service, and a "reactionary" vision combining faith in corporate concentration, property rights and individualism).

[26] *Id*. *See also* Shaffer (1988) 701, 703-08; Simon (1978) 33; Gordon (1988) 51 ("declention thesis"); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1314 (1995); L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 948 (1980); Schudson (1977) 208; *Cf*. Pearce (2001).

[27] The original functionalist statement is Emile Durkheim, PROFESSIONAL ETHICS AND CIVIC MORALS 5-13 (1957). *See also* Philip Elliott, THE SOCIOLOGY OF THE PROFESSIONS 6-9 (1972) ("Emile Durkheim . . . suggested that the division of labor in society was itself functional for the maintenance of social cohesion. . . . His hope was that the occupational group would develop like the family, but on a larger scale. It was to occupy a mid-point, between the State and the family in the social structure. . . . Durkheim thought that occupational corporations would create a moral and communal order to counter the anomie of industrial society. Others saw in professionalism, and the ideal of altruistic service, a method of achieving similar ends. . . . Particular stress in the inter-war period was laid on the contrast between business and the professions. This was a contrast between economic self-interest and altruistic service for limited rewards, between the profit motive and professional ethics.").

For criticism of functionalism see Elliot Freidson, *The Theory of the Professions: State of the Art*, in Dingwall & Lewis, THE SOCIOLOGY OF THE PROFESSIONS 19, 26 (1983); Dietrich Rueschmeyer, *Professional Autonomy and the Social Control of Expertise*, in Dingwall & Lewis, THE SOCIOLOGY OF THE PROFESSIONS 42 (1983). *See also* Nelson & Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in Nelson, Trubek & Solomon, LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 180-82 (1992).

traits of the professions (socially recognized expertise and freedom to self-regulate) and their material interests (controlling the supply of and competition for professional services). Secure profit and prestige are the basic professional goals on this account, asserted expertise and self-regulation the means:

> To insure their livelihood, the rising professionals had to unify the corresponding areas of the social division of labor around homogeneous guarantees of competence. The unifying principles could be homogeneous only to the extent that they were universalistic – that is, autonomously defined by the professionals and independent, at least in appearance, from the traditional external guarantees of status stratification. Thus, the modern reorganization of professional work and professional markets tended to found credibility on a different, and much enlarged, monopolistic base – the claim to sole control of superior expertise.[28]

The profession was thus compromised not only by service to corporate capital and adoption of the adversary ethic, but also by its rent-seeking efforts to ensure that only members of the profession prescribed standards of entry, practice and discipline.[29] Insulated from and yet profoundly impacting public morality, the market and the state, the profession was free to pursue personal gain through the maximization of clients' interests.[30]

---

[28] Larson (1977) 9,13; *see also* Eliot Friedson, *The Theory of the Professions: State of the Art*, in Dingwall & Lewis, THE SOCIOLOGY OF THE PROFESSIONS 19 (1983); Nelson & Trubek, LAWYER'S IDEALS/LAWYERS PRACTICES; Richard Abel, AMERICAN LAWYERS 40-126, 226-33 (1989) (arguing that lawyers seek to control supply and demand for legal services to enhance status and earning power); Abel & Lewis, 2 LAWYERS IN SOCIETY: THE COMMON LAW WORLD 23 (1988); Abel, *The Rise of Professionalism*, 6 BRIT. J. L. & SOC'Y 82, 86-89 (1979).

[29] Larson (1977) 168.

[30] Gerald Auerbach documents a disturbing strain of elitism in the history of the bar's late 19th and early 20th century professionalism project. *See* Auerbach, UNEQUAL JUSTICE 4-5 (1976) ("Stratification enabled relatively few lawyers, concentrated in professional associations, to legislate for the entire profession and to speak for the bar on issues of professional and public consequence. . . . [Professional elites] wielded their power to forge an identity between professional interest and their own political self-interest."); *see also* Larson (1977) 173.

Post-functionalist sociology also accounts for role critics' suspicion that the organized bar's promise of professional redemption through public service (i.e., pro bono work and law reform) was merely a symbolic, rationalizing gesture of the ideology of advocacy – a promise only as serious as necessary to stave off public intervention in professional life. For role critics, true redemption lies not in mollifying acts of public service at the margins of an otherwise unapologetically client-centered profession, but rather in a fundamental redefinition of role on the republican terms said to dominate before the rise of corporate capital. *See* Section IB.; *see also* Gordon (1988) 97 (describing professional ideal of law reform combined

The watershed date for role critics is 1870.[31] The industrial revolution was under way; Langdell took the deanship at Harvard and introduced the case method while propounding a formalist theory of law; the Association of the Bar of the City of New York was formed (soon to be followed by the American Bar Association in 1878); and the business counselor began to replace the advocate in elite law practice.[32] The transition is personified for role critics in figures like David Dudley Field who, after 1870, not only plays an infamous role in defending the first robber barons in the railroad wars and Boss Tweed in the New York City corruption scandals, but also openly reverses his stance on the moral obligations of the lawyer when public scorn turns him into an icon of professional moral bankruptcy.[33]

Even writers who appear to fall outside the standard discursive domain of role criticism have accepted the basic framework of the declention thesis. Thus in an article revealing the vigorous debate over justice-centered and client-centered ethics in the drafting of the 1908 ABA Canons of Professional Responsibility, Susan Carle contends

---

with adversary ethic as schizophrenic); Pearce (2001) (detailing ambitions of professionalism project); Abel []. The codes, from this vantage, appear more as instruments for preserving professional monopoly and status than as any guarantee of probity. Morgan, 90 HARV. L. REV. 702 (1977); Luban, LAWYERS AND JUSTICE 158 n.7 (1988).

[31] *See, e.g.,* Hoeflich (1999) 814-17; Gordon (1984) 54; Gordon (1983) 62; Schudson (1977) 193 ("I want to suggest that by the 1870's leading American lawyers were coming to espouse a responsibility to their clients as their primary and even exclusive moral obligation as lawyers.") (citing Mark DeWolfe Howe, *Review of Robert T. Swaine,* THE CRAVATH FIRM AND ITS PREDECESSORS, 60 HARV. L. REV. 839 (1947)). *But see* Pearce (2001) 407 (thoughtfully arguing that the descent into the narrow adversary ethic is not complete until 1960, but otherwise endorsing the view that the profession gradually shifted away from civic republicanism in the decades after 1870).

[32] On the formation of the A.B.C.N.Y., see Schudson (1977) 202; Gordon (1984) 56.

[33] *See, e.g*., Pearce (2001). On Field's reversal, see A.P. Sprague & Titus Munson Coan, SPEECHES, ARGUMENTS AND MISCELANEOUS PAPERS OF DAVID DUDLEY FIELD, Vol. 1, 489,497, 541, 545; Vol. 2, 349; Vol. 3 403 (1890); Michael Schudson (1977) 193; Charles F. Adams, Jr., and Henry Adams, CHAPTERS OF ERIE (1956). See also Hoeflich (1999) 815-16; Gordon (1984) 56-57 (observing that professional organization/reform movement was partly animated by the elite corporate bar's desire for "a cure for their own condition").

that this debate was only possible after a paradigm shift broke the profession out of its civic republican mold at the end of the nineteenth century:

> By the last quarter of the nineteenth century, the doubts . . . acknowledged on the duty-to-do-justice issue had grown into a full-scale 'paradigm shift' in legal ethics thinking, at least within the more cosmopolitan sectors of the bar. Influenced by new jurisprudential models that began to replace a religiously motivated jurisprudence, legal ethics thinkers began to endorse the view that justice would emerge as a matter of course from the working of the system, and that the lawyer, as one player in this system, should concern himself solely with playing his role as an advocate in order for this process to work effectively.[34]

B. Redemption Through Moral Activism

For role critics, the declention thesis runs straight up to contemporary law practice. Modern ethical codes and professional ideology are dominated by the concept of amoral, zealous advocacy, they charge, and this very conception of the role is to blame for the internally and externally degraded state of the profession. Internally, lawyers are said to be alienated by the demands of their role, mortified by the sort of person lawyering turns them into. Externally, they are reviled for contributing to the moral delinquency of their clients and for failing to meet even the diminished public duties the profession still espouses.[35]

The solution, role critics insist, is to shift from the adversary ethic back to a principle of personal accountability akin to the nineteenth century justice-centered vision

---

[34] Susan Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 23 LAW & SOCIAL INQ. 1, 13 (1998); *see also* William H. Rehnquist, *The Lawyer-Statesmen in American History*, 9 HARV. J. L. PUB. POL'Y 537, 554 (1986); Mark J. Osiel, *Lawyers as Monopolists, Aristocrats, and Entrepreneurs*, 103 HARV. L. REV. 2009, 2038, 2046 (1990) (reviewing Abel and Lewis, LAWYERS IN SOCIETY (1988)). Carle adds that the paradigm shift "corresponded roughly with the introduction of positivism and scientific models of the legal system in American jurisprudence" that enabled ethicists to "disavow[] any . . . connection between law and morality." *Id*. at 13. *Cf*. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEG. ETHICS 241 (1992) (arguing that the 1908 Canons imported civic republican values).

[35] For a summary of role critics' claims regarding contemporary practice, see Spaulding, 74 U. COLO. L. REV. _ (2002).

of the role. Here the normative social function of morally activist civic republicanism crystallizes into mythic form and even folk heroism. In arguing for what he calls the "Lysistratian prerogative" (the lawyer's right and duty "to withhold services from those of whose projects he disapproves" on moral grounds[36]), David Luban invokes Abraham Lincoln's famous admonition to a client in his Springfield law practice:

> Yes, we can doubtless gain your case for you, we can set a whole neighborhood at loggerheads; we can distress a widowed mother and her six fatherless children and thereby get you six hundred dollars to which you seem to have a legal claim, but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you. You must remember that some things legally right are not morally right. We shall not take your case, but we will give you a little advice for which we shall charge you nothing. You seem to be a sprightly, energetic man; we would advise you to try your hand at making six hundred dollars in some other way.[37]

Lincoln's decision empitomizes, for Luban, the role of the virtuous lawyer operating according to a principle of moral accountability. And lawyers responsible for the ends their clients pursue, Luban continues, will necessarily become "moral activists."[38]

Similarly, William Simon invokes both David Hoffman's 1836 *Resolutions in Regard to Professional Deportment* and George Sharswood's 1854 *Essay on Professional Ethics* to support his argument that "[l]awyers should take those actions that, considering

---

[36] Luban, *The Lysistratian Perogative: A Response to Stephen Pepper*, 1986 AM. BAR FOUND. RES. J. 637, 642.
[37] *Id*. at 637.
[38] Luban, LAWYERS 160. *See also id.* at 154, 169, 174 ("Anything except the most trivial peccadillo that is morally wrong for a nonlawyer to do on behalf of another person is morally wrong for a lawyer to do as well. The lawyer's role carries no special privileges and immunities"; "I do not see why a lawyer's decision not to assist a client in a scheme the lawyer finds nefarious is any different from . . . other instances of social control through private noncooperation"; "[N]othing permits a lawyer to discard her discretion or relieves her of the necessity of asking whether a client's project is worthy of a decent person's service.").

the circumstances of the particular case, seem likely to promote justice."[39] Simon observes that

> [t]he Dominant View has never been unchallenged within the legal profession, and it seems not to have become dominant until the late nineteenth century. The most prominent view in the late eighteenth and early nineteenth centuries emphasized public responsibility and complex normative judgment in a manner resembling the view I argue for . . . .[40]

Robert Gordon also explicitly locates his ideal of independence for lawyers ("the notion that. . . [t]he loyalty purchased by the client is *limited*, because a part of the lawyer's professional persona must be set aside for dedication to public purposes") in "the traditional 'republican' ideal of the lawyer's public role."[41]

Needless to say, the argument to revive lawyers' public accountability as a remedy for structural flaws in the adversary ethic gains special force by linking it to a lost tradition. Redemption through moral activism appears both more plausible than other alternatives, and more necessary, once tied to the ideology of heroic lawyer-statesmen who fought the revolution, framed the constitution and worked to save the union. The call for moral activism gains, in short, the normative force of myth – all the more powerful because clothed in the fabric of the real.

---

[39] Simon, PRACTICE 138. *See also* Kenny Hegland, *Quibbles*, 67 TEX. L. REV. 1491, 1494-95 (1989) (invoking Hoffman and agreeing with Simon's purposivism at least with respect to means a lawyer employs for her clients).

[40] Simon, PRACTICE 63 (quoting Hoffman and Sharswood). *See also* Luban, LAWYERS 10 (invoking Hoffman).

[41] Gordon (1988) 13-14. *See also*, Kronman, LOST LAWYER 123-147; Rhode, *Ethical Perspectives*, _ STAN. L. REV. _ (_); Shaffer (1988) 701 n.18 ("'Republican' legal ethics refers to legal ethics that came from the two generations of American lawyers who fashioned a common-law jurisprudence for America from colonial legal practice and the communitarian idealism of our revolution. . . . An example of principle in republican legal ethics . . . is the republican lawyer's reluctance to plead, against civil actions, defenses that do not address the merits of the plaintiff's claim – for example, statutes of limitation, the claim of infancy, or the Statute of Frauds") (citing Hoffman and Sharswood); Patterson (1980) 969; Alan Goldman, _, 138-39 (1980). There are other role critics who do not specifically invoke the republican ideal in arguing for moral activism. Gerald Postema, *Moral Responsibility in Professional Ethics*, in ETHICS AND THE LEGAL PROFESSION 158, 171-72 (1986); Richard Wasserstrom, *Lawyers as Professionals*, in ETHICS AND THE LEGAL PROFESSION 115, 122 (1986).

II. The Hoffman-Sharswood Nexus

To pierce this myth, we must begin with the figures role critics have used to build it. Role critics rely almost exclusively on the work of David Hoffman of Baltimore, and George Sharswood of Philadelphia, to show the prevalence of a morally activist republican ethic in early and mid-nineteenth century thought. Both men merit closer examination.[42]

A. David Hoffman: Civic Republican or Moral Extremist?

Hoffman published his fifty *Resolutions on Professional Deportment* as part of a two volume Course of Legal Study . First published in 1817, the book sets out an extended, heavily annotated syllabus of readings to prepare the young lawyer for law

[42] At least one historian, in an explicit attempt to bolster Shaffer's claims, has pushed beyond Hoffman and Sharswood in an effort to show that civic republican ethics enjoyed a broader base, see M.H. Hoeflich, *Legal Ethics in the Nineteenth Century: The Other Tradition*, 47 KAN. L. REV. 793, 794 (1999), and a handful of scholars have at least passingly noted that there is evidence running counter to the morally activist civic republican ethic. *See* Papke in ETHICS AND THE LEGAL PROFESSION 35 ("As early as the 1830s, some lawyers argued that the profession's primary ethical responsibility was loyalty to the will of clients") (citing editors of The Law Reporter and, interestingly, George Sharswood); Pearce (1992) 249 (acknowledging that "[a]t the forefront of debate within and outside the profession were questions regarding whether law was a business or a profession and whether a lawyer should serve as a 'hired gun' for clients") (citing Bloomfield and Miller); Pearce (2001) 392-93 ("Although dominant among the legal elite, the republican notion of lawyers was not the only conception of the American lawyer's role. . . . Even many 'rank and file' lawyers viewed themselves in practical terms that denied the distinction between a business and a profession, the foundation of the lawyer's governing class role."); Schudson (1977) 206 n.29 (noting that "[i]n the 1830's and 1840's there were voices within the legal profession on both sides of the question of the lawyer's obligation to his client," but emphasizing that client-centered lawyering was "by no means settled 'tradition' in antebellum America"). Hoeflich, however, relies on a relatively narrow base beyond Hoffman and Sharswood: lawyers predominantly from Philadelphia (where the holdover of Quaker values may have impacted elites' attitudes on law practice); clergy, whose views on the morality of law practice are, to say the least, predictable; and eulogies for lawyer statesmen, in which the discourse is likely to have been more generous, more aspirational and less objective than other more dispassionate fora for discourse on the subject of law and morality. The passing acknowledgement of other authors such as Papke, Pearce and Schudson has served more to the strengthen their own arguments for the dominance of civic republicanism than to make way for a serious consideration of the evidence undercutting that ethic. As Section III details, it was not merely "rank and file" lawyers or Jacksonian rabble-rousers who defended the adversary ethic, but legal elites – prominent lawyers, scholars and judges, some of whom were trained by proponents of the "governing class" ideology.

practice.[43] The republican thematics of the book are unmistakable. First, Hoffman embraces the concept of the lawyer as a virtuous citizen entrusted with the highest tasks of governance.[44] Working from the premise that "[l]aw as a moral science is without doubt based . . . on the soundest systems of moral philosophy and metaphysics," the book begins not with common law or an introduction to legislation, but rather with an ambitious set of readings in moral and political philosophy.[45] "To be great in the law," he contends, "it is essential that we be great in every virtue,"[46] and so the Course of Study is structured not simply to train competent lawyers, but to form good men. Invoking the republican principles of Roman orators, Hoffman adds:

> If the opinion of Qunitillian, Cato, Longinus and others among the ancients, be correct, that no one can be an orator who is not a good man, it may be applied with still more force to the lawyer, whose vocation is the protection of the injured and the innocent, the defence of the weak and the poor, the conservation of the rights and prosperity of the citizen, and the vigorous maintenance of the legitimate and wholesome powers of government, whose vocation, in the language of justice Blackstone, "is the science which distinguishes the criterions of right and wrong; which teaches to establish the one, and prevent, punish, or redress the other; which employs in its *theory* the noblest faculties of the soul, and exerts in its *practice*, the cardinal virtues of the heart . . . ."[47]

---

[43] David Hoffman, A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY (1817). "Extended" is actually an understatement. The Course begins with the Bible, and Hoffman expected the full course would require no less than 6-7 years to complete – all before entering an office apprenticeship. At a time when courts admitted lawyers with little or no formal training, Hoffman's course was radically ambitious, though not inconsistent with the views of other legal elites who advocated prescribed periods of study and liberal education prior to admission to the bar. *See* Anton-Herman Chroust, 2 THE RISE OF THE LEGAL PROFESSION IN AMERICA 173-223 (1965) (detailing late eighteenth and early nineteenth century approaches to training for the practice of law). The trend appears to have begun in earnest with James Kent's *Introductory Lecture to a Course of Law Lectures*, delivered at Columbia College in 1794. Indeed, Hoffman's work reads like a remarkably close elaboration of the principles for university law training Kent sets out in his Introductory Lecture. *See* 3 COLUM. L. REV. 330 (1893) (reprinting Kent's Introductory Lecture).

[44] On the republican view of virtue, see White, MARSHALL COURT 53.

[45] I COURSE 103.

[46] I COURSE 26.

[47] I COURSE 26. *See also id.* at 27 ("Quintillian . . . is firmly of the opinion . . . not only that an orator ought to be a good man, but that no one can be an orator unless he be such. He urges, therefore, that 'morality should be the orator's favorite study, and he should be thoroughly acquainted with the whole discipline of honesty and justice . . . "); II COURSE.610, 740. *See also* Kent, 3 COLUM. L. REV. 338-39.

Virtue is so essential to Hoffman because he believes the lawyering role is defined by the solemn obligation to exercise moral judgment. Lawyers, according to his view, are to restrain their clients from pursuing an unjust cause even if that means usurping the role of judge and jury. Indeed, at least three resolutions explicitly endorse the view of the lawyer as judge of his client's cause.

In Resolution 12, Hoffman writes, "I will never plead the Statute of Limitations, when based on the *mere efflux of time*; for if my client is conscious he owes the debt; and has no other defence than the *legal bar*, he shall never make me a partner in his knavery."[48] He adds in the next resolution, "although . . . the law has given the defence, and contemplates . . . to induce claimants to a timely prosecution of their rights . . . *I shall claim to be the sole judge* (the pleas not being compulsory) of the occasions for their proper use."[49]

Resolution 14 claims more broadly that, in civil cases, the lawyer must disregard a client's wishes if the lawyer decides the case is factually, legally or morally wanting:

> *My client's conscience, and my own, are distinct entities: and though my vocation may sometimes justify my maintaining as facts, or principles, in doubtful cases, what may neither be one or the other, I shall ever claim the privilege of solely judging to what extent to go.* In civil cases, if 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; and should the principle also be wholly at variance with sound law, it would be dishonorably folly in me to incorporate it into the jurisprudence of the country, when, if successful, it would be a gangrene that might bring death to my cause of the succeeding day.[50]

[48] II COURSE 754 (emphasis original).
[49] II COURSE 754-55 (emphasis original) (in the omitted text, Hoffman simply adds that he will not plead infancy as a defense to a contract his client presently possesses the ability to pay).
[50] II COURSE 755 (emphasis added).

Finally (and less controvercially, relative to the contemporary law of lawyering[51]), in Resolution 31, Hoffman emphasizes the lawyer's duty to express his full moral and legal judgment when asked for opinions:

> All opinions for clients, verbal, or written, shall be *my opinions*, deliberately and sincerely given, and never *venal and flattering offerings to their wishes, or their vanity*. And though clients sometimes have the folly to be better pleased with having their views confirmed by an erroneous opinion, than their wishes or hopes thwarted by a sound one, yet such an assentation is dishonest and unprofessional. Counsel, in giving opinions, whether they perceive this weakness in their clients or not, should act as *judges*, responsible to God and to man, as also especially to their employers, to advise them soberly, discretely, and honestly, to the best of their ability – though the certain consequence be the loss of large prospective gains."[52]

Hoffman thus would insist on pressing his personal judgment regarding a client's proposed course of action even where the client seeks an exclusively legal opinion. Indeed, a strict line between the two does not exist for him. And his willingness to sacrifice pecuniary gain for a higher good is the quintessence of republican virtue conceived as an "ideology of restraint."[53]

Hoffman's exhortation for lawyers to play a judicial role is also implicit in a number of other resolutions.[54] The resolution on criminal defense is particularly noteworthy for its denunciation of zealous advocacy:

> When employed to defend those charged with crimes of the deepest dye, and the evidence against them, whether legal, or moral, be such as to leave no just doubt of their guilt, I shall not hold myself privileged, much less obliged, to use my

---

[51] *See* ABA Model Rule of Professional Conduct 1.4.
[52] II COURSE 764 (emphasis original).
[53] The phrase is adapted from G. Edward White. *See* White, MARSHALL COURT 50 (arguing that republican "ideology was essentially one of restraint. The concept of virtue subordinated individual self-interest to the good of society as a whole . . . .").
[54] *See, e.g.*, Resolution 10 (should withdraw if client insists on "captious requisitions, or frivolous and vexatious defences"); Resolution 11 (should "promptly advise client to abandon" a claim or defense if "after duly examining the case" lawyer believes it "cannot, or rather ought not, to be sustained"); Resolution 33 ("What is wrong, is not the less so for being common. . . . What is morally wrong cannot be professionally right, however it may be sanctioned by time and custom"; advising lawyer not to shrink from own moral convictions).

> endeavors to arrest, or to impede the course of justice, by special resorts to ingenuity – to the artifices of eloquence – to appeals to the morbid and fleeting sympathies of weak juries, or of temporizing courts – to my own personal weight of character – nor finally, to any of the overweening influences I may possess, from popular manners, eminent talents, exalted learning, etc. *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 honorable profession; and indeed, to no intervention beyond securing to them a fair and dispassionate investigation of the facts of their cause, and the due application of the law: all that goes beyond this, either in manner or substance, is unprofessional, and proceeds either from a mistaken view of the relation of client and counsel, or from some unworthy and selfish motive, which sets a higher value on professional display and success, than on truth and justice, and the substantial interests of the community*.[55]

Here, as elsewhere for Hoffman, moral probity is definitive of the role and the client's interests are unequivocally subservient to the interests of justice.

Like other republican legal elites, Hoffman also believed that law should be conceived and taught as a science and that only such an approach would ensure the production of lawyers qualified to play their special role in society. "Law," he argued, is "the system which regulates the moral relations of man . . . . How restricted, therefore, is thatview which estimates jurisprudence in the light of a mere collection of positive rules and institutions! . . . If law be a science and really deserve so sublime a name, it must be

---

[55] II COURSE 755-56 (emphasis added). The idea of a lawyer defeating the conviction or due sentence of a person in cases of moral turpitude was clearly abhorrent to Hoffman – he could not resist elaborating:

> Such an inordinate ambition, I shall ever regard as a most dangerous perversion of talents, and a shameful abuse of an exalted station. The parricide, the gratuitous murderer, or other perpetrator of like revolting crimes, has surely no such claim on the commanding talents of the profession, whose object and pride should be the suppression of all vice, by the vindication and enforcement of the laws. Those, therefore, who wrest their proud knowledge from its legitimate purposes, to pollute the streams of justice, and to screen such foul offenders from merited penalties, should be regarded by all, (and certainly shall be by me,) as ministers at a holy altar, full of high pretension, and apparent sanctity, but inwardly base, unworthy, and hypocritical – dangerous in the precise ratio of their commanded talents, and exalted learning.

Id. at 756-757.

founded on principle, and claim an exalted rank in the empire of reason . . . ."[56] The lawyer restricted to desultory reading and memorization of decisional law in a law office would never, Hoffman warns, reach the principles fundamental to high level legal analysis and so essential to sound argument on the extension of common law to American conditions and the elaboration of the constitution: "How intimately are the sciences connected, and how much mistaken is the idea entertained by many in this country, that the lawyer (whose province is reasoning,) can attain to eminence, though he restricts his inquiries within the visible boundaries of his peculiar science, chiefly as it is found in the treatises of municipal law. . . . [I]f a lawyer has the ambition to aim at the most elevated rank in his profession, he must carry his researches much beyond the vulgar limits of municipal law."[57] As Joseph Story emphasized in his review of the first edition of Hoffman's book,

> when the question is about forming able advocates, wise judges, and perspicatious lawgivers, it is plain that this ordinary education will do no longer. When the file affords no precedent; when we are to travel out of the record; when the index presents no case in point, we are obliged to revert to first principles, and spin for ourselves that thread of ingenious deduction, which is not ready made to our hands. It is this kind of legal education that our author contemplates . . . ."[58]

Hoffman was so enthralled with the promise of law, scientifically conceived, that he argues students will be drawn to a higher standard of conduct by the sheer force of their studies: "We believe that, in most cases, *enlarged knowledge and noble studies* exercise so happy an influence on those who have addicted themselves to them, that

---

[56] I COURSE 24-25; *see also* Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 680 (1979). On the various antebellum approaches to law, scientifically conceived, see Howard Schweber, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth Century American Legal Education*, 17 L. & HIST. REV. 421 (1999).
[57] I COURSE 104. *See* Gordon (1983) 88, 97 (describing Whig-Federalist conception of legal science).
[58] 30 N. AM. REV. 137-38 (1830). Story too viewed legal science as a method of deriving the first principles of law "from which we must commence all our learning" – principles that have their roots in "that necessary and eternal justice which we call the law of nature." *Id*. at 141.[6 N. AM. REV. 45 (1818)]

treatises and precepts on mere *manner* and *conduct*, become comparatively unnecessary to such minds . . . . [T]he scientific mind is always supposed to derive, from the complexion of its pursuits, more correct, more enlarged, and more *honorable* views, than one of more circumscribed knowledge."[59]

Finally, Hoffman appears to embrace the republican conviction that law practice should be dominated by an exclusive elite – that sound practice of the science demands a class worthy of the power it confers and the labor it exacts. He writes that "[a] science so literal and extended, so dignified and important, should be cultivated by those alone, who are activated by the principles of the purest and most refined honor."[60] As G. Edward White has argued, Hoffman's Course of Study fits squarely within the discourse of "a new class of lawyers – elite commentators – who defined their role as educating the profession and the public in the 'science' of law."[61] The educational project, derived from a scientific conception of law, was but one aspect of a multipronged effort in the early stages of the nineteenth century to respond to several problems facing the profession: (1) pervasive anti-lawyer sentiment (which remained constant even as the demand for legal services grew),[62] (2) the paucity of distinctively American legal authority to guide judicial decision, (3) the dangers to the republican vision posed by an increasingly rapacious and commercially oriented populace, and (4) the legislative

---

[59] II COURSE 723 (emphasis original); *see also id*. at 744.
[60] I COURSE 26. *See also* Bloomfield (1979) 681-82 ("the adjustment of ideal norms to passing realities was a delicate business at best, to be entrusted only to skilled professionals – including, of course, that band of scientifically trained lawyers whom he and other legal educators were laboring to create.").
[61] White, MARSHALL COURT 79.
[62] The standard anti-lawyer tracts were Jesse Higgins, *Sampson Against the Philistines, or the Reformation of Lawsuits; and Justice Made Cheap, Speedy, and Brought Home to Every Man's Door: Agreeably to the Principles of the Ancient Trial By Jury, Before the Same Was Innovated by Judges and Lawyers* (Phil. 1805); Benjamin Austin, *Observations on the Pernicious Practice of the Law* (Boston, 1786), reprinted at 13 AM. J. LEG. HIST. 241 (1969); George Watterston, *The Lawyer, or Man as He Ought Not to Be* (Pitt. 1808); {ADD William Manning, THE KEY OF LIBERTY (_)}. *See also* Bloomfield, AMERICAN LAWYERS 32-58; Friedman, A HISTORY 303-304..

destruction of formal standards for admission to the practice of law. As White asserts, elite legal commentators "self-consciously set out not only to respond to the increased demand for legal sources, specifically in the systematization and publication of legal rules and doctrines, but also to establish themselves as professional guardians of republican principles, persons whose special knowledge of 'legal science' enabled them to recast law in conformity with the assumptions of republican government."[63]

Even if it is beyond peradventure that Hoffman's Course of Study reflects the values of republican ideology, it is far from clear that his *Resolutions on Professional Deportment* (his effort to translate those values into a code of ethics) are representative either of practice at the time or the consensus of republican legal elites on the specific legal duties entailed by their self-appointed role as the "governing class." Role critics have treated Hoffman as though he stood at the center of a republican ideal of morally activist lawyering, but on this very question he may properly belong at the margin – as the exponent of a rather extreme version of that ideal. I examine authors who offered alternative definitions of the lawyer's role in Section III, but it is worth noting here aspects of his book and biography thatproblematize the claim that his *Resolutions* express the core of a lost tradition of lawyering.

First, the Course of Study was originally published in 1817 *without* the *Resolutions*, three years after Hoffman accepted an appointment to teach law at the University of Maryland.[64] The *Resolutions* were not added until the second edition issued in 1836 when he resigned his university position.[65] Since Hoffman abandoned his law lectures in 1832 due to low attendance, none of his own students were trained using

[63] *Id*. at 79. For his discussion of Hoffman, see *id*. at 87-95.
[64] Bloomfield (1979) 678.
[65] Bloomfield (1979) 684.

the *Resolutions*.[66] Indeed, far from expressing then-prevailing professional norms, Maxwell Bloomfield contends that the *Resolutions* were a reaction *against* them– a post hoc "protest against the debasement of professional mores that he perceived in the Jacksonian era."[67] Bloomfield adds that Hoffman attempted to implement his *Resolutions* "in his own practice, but was criticized for impracticality and neglect of his clients' interests."[68] And after the publication of the second edition, Hoffman departed the field altogether – he "abandoned law for belles letters and spent his remaining years in fruitless efforts to write a best seller."[69]

Second, other legal instructors, even those who endorsed a scientific approach to law, generally omitted Hoffman's expansive moral and humanistic curriculum, focusing instead on more narrow legal principles. Bloomfield reports, for instance, that Joseph Story (to whom the Course of Study is dedicated), sheared off nearly everything from Hoffman's course except the readings in common law and the constitution soon after he

---

[66] Bloomfield (1979) 682-83. To be fair, most lawyers who were invited to found university law schools or teach law subjects at the time suffered from low attendance. Chancellor Kent's travails at Columbia, for instance, are well known. His first series of lectures went from 36 lawyers in 1794, to three (including his own clerk) the following year, to none in the third year. He resigned the position in frustration in 1798. *See* 2 Chroust (1965) 181-83; Friedman, American Law 322 ("the main path to practice . . . went through apprenticeship, for the overwhelming majority of lawyers"). But this places Hoffman, again, at the borders of early nineteenth century law training, rather than the core since the vast majority of lawyers were not trained in law schools. And Hoffman's lectures may have suffered, where others did not, from lack of imagination and a rather stale sense of fun. Bloomfield argues that his "gentility and cosmopolitan scholarship seemed anachronistic at best" to young lawyers "born into a world of democratic hoopla and feverish technological change." (1979) 687. For "rest" from the intense labors of law study, his book prescribes "bathing, partial ablutions, especially on the forehead, hands, and wrists; frequent brushing of the hair, gentle walking in the streets; . . . even to seek amusement in counting the tiles or bricks of neighboring houses . . . to muse over the gaily decorated windows of the shops, and . . . to . . . speculate on the probably etymology of the curious names so often presented on signs . . . ." I COURSE 41-42. Even students not born into a world of democratic hoopla and technological change may have found inspiration wanting in this approach.

[67] Bloomfield (1979) 684. This rather telling fact about the genesis of Hoffman's Resolutions has been ignored by role critics.

[68] Bloomfield (1979) 685.

[69] *Id*. *cf*. 2 Chroust (1965) 218 (noting, without citation, that Hoffman lectured at a new school in Philadelphia from 1844 to 1847). Literary ambition was hardly uncommon for lawyers of the period, *see* Robert A. Ferguson, LAW AND LETTERS IN AMERICAN CULTURE (1984), but the circumstances of Hoffman's retreat from law to literature are telling.

adapted the curriculum for his lectures at the nascent Harvard Law School.[70] And in the most prominent private law school of the period, run by Tapping Reeve in Litchfield, Connecticut, the training was purely technical.[71] Founded in 1784, the Litchfield School graduated more than 1000 law students before closing in 1833. Its students not only "hailed from every state of the Union" (a dramatic accomplishment for the time), they became the "governing class" of legal elites par excellence. Anton-Herman Chroust reports that "2 became Vice Presidents of the United States, 3 became Justices of the Supreme Court of the United States; 34 sat on the highest courts of their states, including 16 Chief Justices or Chancellors; 28 became United States Senators, 101 were elected to the House of Representatives; 14 became governors of their states; 6 served in the federal Cabinet; and 3 became college presidents."[72] Yet professional ethics had no visible place in the standard curriculum except perhaps insofar as the cases taught reflected norms embedded in contemporary practice and procedure.

As a personal protest against the perceived evils of Jacksonian democracy, however, Hoffman's *Resolutions* become more understandable. Bloomfield observes that

---

[70] Bloomfield (1979) 687; Gordon (1983) 87; *cf.* Charles Warren, A HISTORY OF THE AMERICAN BAR 540 (1911) (asserting without citation that the 1817 Course of Study was "for many years the standard manual for law students").

[71] *See, e.g.,* Marian C. McKenna, TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL 64 (1986) (listing the standard topics covered in lectures by Reeve and his teaching partner James Gould); *see also id*. at 179, 181 (laws and resolutions of the school); 2 Chroust 210-12 (describing Litchfield as "undoubtedly the most important law school in America . . . far into the nineteenth century"; reporting subjects covered in student notebooks and quoting an 1829 advertiser on the school's method of instruction in which there is no mention of ethics or humanistic studies); Josiah Quincy, *An Address Delivered at the Dedication of the Dane Law College in Harvard University*, October 23, 1832, in Perry Miller, THE LEGAL MIND IN AMERICA, FROM INDEPENDENCE TO THE CIVIL WAR 201, 206 (1962). This is not to say that Hoffman stood entirely alone, at least among *university* law faculty, in including professional ethics in the curriculum. Benjamin Butler's 1835 program for the new law school in the University of the City of New York included lectures on "Forensic Duties and Professional Ethics" in the third year – though Butler's ethical prescriptions are significantly less elaborate and less morally activist than Hoffman's. *See* Benjamin F. Butler, *A Plan for the Organization of a Law School in the University of the City of New York* (1835), reprinted in Hoeflich, The GLADSOME LIGHT 165, 174-76 (1988).

[72] 2 Chroust 214.

Hoffman was a devout, highly educated son of a prosperous Baltimore mercantile family, and a proud member of the Baltimore bar, which "was notorious for both eccentricity and affectation." Bloomfield continues:

> Having survived the Revolution with no appreciable loss of prestige or power, Maryland's attorneys showed little inclination to treat the average client as an equal. While the legal community in Baltimore grew from sixteen in 1779 to fourty-three in 1810, no corresponding democratization of personnel or mores took place. Most of the new practitioners were the sons of merchants or gentry, who strove to emulate the manners and lavish life style of such bar leaders as William Pinkney and Robert Goodloe Harper. . . . The acknowledged competence of Baltimore's practitioners in the early nineteenth century led one local enthusiast to assert that his city's bar was "the ablest of our country, and by far the haughtiest."[73]

Hoffman was thus situated in rarified professional air. And for just this reason, his sharp response to the "leveling process" that threw into doubt the "traditional society of the late eighteenth century [and] its cohesive elite leadership,"[74] gives the *Resolutions* an idiosyncratic, reactive, even wistful tone.[75]

Role critics have also ignored the extent to which "Hoffman's approach to legal ethics, like his jurisprudence, was steeped in religious conviction."[76] The Course of Study opens with a "Student's Prayer,"[77] and his annotations to the readings prescribed in the Bible emphasize that "[t]he purity and sublimity of the morals of the Bible have at no time been questioned; it is the foundation of the common law of every Christian nation. The Christian religion is a part of the law of the land, and, as such, should receive no

[73] Bloomfield (1979) 677.
[74] Bloomfield (1979) 684.
[75] Susan Carle goes further, characterizing the Resolutions as "argumentative, defensive, and more than a little bombastic." (1998) 12.
[76] Carle (1998) 11. Carle goes so far as to label it "religious jurisprudence." See also Schweber (1999) 446-48 (discussing role of "natural theology" in the legal theory of Hoffman and other university-based law teachers).
[77] I COURSE 49.

inconsiderable portion of the lawyer's attention."[78] Strong religious faith not only renders law and morality inseparable for Hoffman,[79] it seems to have given him a profound confidence in the capacity of properly trained lawyers to make correct moral judgments about the justice or injustice of the law and their clients' legal objectives . In the preface to the *Resolutions* he says he believes that "in most cases one of the disputants is *knowingly* in the wrong . . . ."[80] Thus while a lawyer may be tempted by the interests and passions that animate those who wish to bring unjust suits, Hoffman was confident that religion, morals, and the "elevated honor" which scientific law study provokes will normally forestall the lawyer's corruption.[81]

On each of these grounds – his reactive motivation for drafting the *Resolutions*, the singularity of his heavily moral and interdisciplinary approach to scientific law teaching, his membership in an insular, hyper-elite bar, and his religiously based objectivism on legal ethics – we have occasion to question whether Hoffman's thoroughgoing commitment to moral activism in lawyering in fact speaks for the "governing class" of lawyers in the early nineteenth century.

B. George Sharswood – MoralActivism or Moral Skepticism?

Sharswood was born in Philadelphia in 1810. After graduating from the Classics Department at the University of Pennsylvania, he apprenticed under Joseph R. Ingersoll, a prominent member of the Philadelphia bar. Once in law practice, he developed into a classic lawyer statesman, three times serving in the state legislature, quickly ascending to

[78] I COURSE 65.
[79] *See* Carle (1998) 11; Bloomfield (1979) 680-681.
[80] II COURSE 746.
[81] II COURSE 747.

the bench and accepting, at age 40, an appointment to teach law at his alma mater. He served as Chief Justice of the Pennsylvania Supreme Court from 1879 until just before his death in 1883.[82] His *Essay on Professional Ethics*, which went through five editions and was circulated along with excerpts from Hoffman's *Resolutions* to the ABA committee charged with drafting the 1908 Canons,[83] was adapted from a *Compend of Lectures on the Aims and Duties of the Profession of the Law* delivered before the Law Class of the University of Pennsylvania in 1854.[84]

The view of the role expressed in Sharswood's *Essay on Professional Ethics* is more complex than David Hoffman's in a number of respects, and this complexity has produced interpretive dissonance among role critics and other scholars. At least one commentator has argued that the essay endorses a client-centered theory of the role[85]; others counter that it fits squarely within the republican justice-centered tradition[86]; and a few, moved by the internal tensions of the essay, claim that it presents a middle position between the extreme moral activism of Hoffman and the radically client-centered maxim offered by Lord Henry Brougham in a speech before the House of Lords in 1820.[87] The interpretive dissonance alone is reason enough to question the coherence of the

---

[82] *See Memorial*, in Hon. George Sharswood, AN ESSAY ON PROFESSIONAL ETHICS (5th ed. 1884).
[83] *See* Carle (1998) 9.
[84] Sharswood, *Memorial*.
[85] Papke in ETHICS AND THE LEGAL PROFESSION 38.
[86] Pearce (1992); Simon, PRACTICE 63.
[87] Hoeflich (1999) 803-07; Carle (1998) 12-13; Patterson (1980); Bloomfield (1979) 687. In his famous effort to defend Queen Caroline "against charges of adultery brought on behalf of George IV," Brougham argued that "*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 expedients, and at all hazards to other persons, and, among them, to himself, is his first and only duty . . . .*" Hoeflich (1999) 795 (emphasis added). *See* Pearce (1992) 248 n.42 (citing David Mellinkoff, THE CONSCIENCE OF A LAWYER 188-89 (1973) and noting that "Brougham's comments implied a threat to reveal the King's previous secret marriage to a Roman Catholic, which would have thrown England into turmoil."). The context of the speech, while often noted, is seldom considered as a reason to question whether the maxim propounds a general theory of lawyering or is simply a rhetorical argument designed to effectively meet the exigencies presented by Brougham's rather unique client. *Cf.* Deborah Rhode, *An Adversarial Exchange on Adversarial Ethics: Text, Subtext, Context*, _ J. Legal Educ. _ ().

declention thesis and the dominance of civic republican moral activism among antebellum lawyers. But by and large, role critics have ignored this dissonance, lumping Sharswood together with Hoffman and "depict[ing] a smooth process in the transmission of legal ethics doctrines" through the nineteenth century.[88]

Interpretive dissonance exists for good reason. The *Essay* both reflects and resists the republican premises that animate Hoffman's *Resolutions*. On the one hand, Sharswood embraces both the scientific theory of law and the idea that lawyers bear special obligations to governance as professional elites.[89] On the other hand, Sharswood carefully distinguishes law from moral obligation,[90] and assiduously avoids any pretension to the kind of moral objectivism that enables Hoffman to assume lawyers and clients will, in most cases, know who stands in the right. On the latter point, Sharswood repeatedly admonishes readers that questions regarding fidelity to client "are the most difficult questions in the consideration of the duty of a lawyer,"[91] and that even a lawyer's considered judgment on the justice of his client's case may turn out to be

---

[88] Carle (1998) 9.

[89] *See* Sharswood 26 ("From the ranks of the Bar, more frequently than from any other profession, are men called to fill the highest public stations in the service of the country, at home and abroad. The American lawyer must extend his researches into all parts of the science, which has for its object human government and law; he must study it in its grand outlines as well as in the filling up of details."); *id*. at 30 (same), *id*. at 53-54 (on obligation of bar in its statesmanship capacity "to diffuse sounds principles among the people, that they may intelligently exercise the controlling power placed in their hands"). *See generally* Pearce (1992), (2001).

[90] *See, e.g*., Sharswood 47-48 (arguing for stare decisis on ground that judicial decision according to principles of justice alone would produce legal uncertainty and invite anarchy; "The law becomes a lottery, in which every many feels disposed to try his chance."); *id*. at 77-78 (distinguishing between a lawyer's legal obligation to clients, and his "wider" moral responsibility); *id*. at 82 ("No court or jury are invested with any arbitrary discretion to determine a cause according to their mere notions of justice. Such a discretion vested in any body of men would constitute the most appalling of despotisms. Law, and justice according to law – this is the only secure principle upon which the controversies of men can be decided."); *id*. at 83 (arguing that statute of limitations is a legal, if not always moral, defense).

[91] Sharswood 76; *id*. at 81 (specifying the limit on a lawyer's duty of zealous representation "is a problem by no means of easy solution"); *id*. at 89 ("It may be delicate and dangerous ground to tread upon to undertake to descend to particulars upon such a subject. Every case must, to a great degree, depend upon its own circumstances, known, peradventure, to the counsel alone . . . .").

incorrect.[92] He answers the "common accusation in the mouth of gainsayers against the profession . . . [that] there must be a right and a wrong side to every lawsuit," by insisting that "[e]very 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 on the evidence."[93] And he warns that "it will often be hazardous to condemn either client or counsel upon what appears only. A hard plea – a sharp point – may subserve what is at bottom an honest claim, or just defence; though the evidence may not be within the power of the parties, which would make it manifest."[94]

This epistemological skepticism not only makes Hoffman's confident moralism seem brazen by contrast, it directly affects Sharswood's view of the lawyer's role. While the *Essay* offers considered opinions on professional ethics, it stops well short of prescribing a system of "Resolutions" to be memorized by the practicing lawyer, [95] and the opinions given are at least equivocal, if not internally conflicted. The client, he argues, is entitled to the lawyer's "entire devotion," and to "warm zeal in the maintenance and defence of his rights."[96] The lawyer, moreover, "is not morally accountable 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," because parties have the right "to have every view presented to the minds of the judges, which can legitimately bear upon the question," and because the lawyer who refuses cases which appear unjust "usurps the functions of both

[92] *See id*. at 88 (quoting Sir Mathew Hale's observation that he changed his practice of selecting cases according to his view of their justice when he discovered that, on two occasions, cases that initially appeared "very bad" turned out to be "'really very good and just'").
[93] Sharswood 81-82.
[94] Sharswood 89.
[95] Hoffman's Fiftieth Resolution was to "read the forty-nine resolutions, twice every year, during my professional life." II COURSE 775.
[96] Sharswood 78-79.

judge and jury."[97] These two principles – dedication to client service and ethical neutrality – are the defining traits of adversarial advocacy.[98] Thus, if Sharswood had stopped here, his essay would stand as a powerful counter to the tradition of morally activist lawyering role critics say he exemplifies.[99]

But just as soon as these principles have been enumerated, Sharswood begs off, emphasizing that most lawyers have taken them too far:

> It by no means follows, however, as a principle of private action for the advocate, that all causes are to be taken by him indiscriminately, and conducted with a view to a single end, success. It is much to be feared, however, that the prevailing tone of professional ethics leads practically to this result. He has an undoubted right to refuse a retainer, and decline to be concerned in any cause, at his discretion.[100]

Sharswood then bifurcates the right to refuse by distinguishing between suing and defending: on the one hand, a lawyer (whether civil or criminal) should never prosecute a case he believes to be unjust (since the office of lawyering would then be "'degraded to that of a mercenary'"[101]), a lawyer for the defendant, on the other hand, may use all his abilities to hold the plaintiff to the facts and the law, even if he believes his client is culpable.[102] And in cases where the defense lawyer believes *justice* is on the side of his

---

[97] Sharswood 83-84. Interestingly, Sharswood deduces the lawyer's non-accountability not merely from the duty to client, but from the lawyer's status as an officer of the court. The lawyer, he emphasizes, "is not merely an agent of the party." *Id*. at 83.

[98] *See* Spaulding (2002); Simon (1978), David Luban, *The Adversary System Excuse*, in GOOD LAWYER (1984).

[99] Papke appears to stop here in reaching the conclusion that Sharswood advocates a client-centered theory of the role. *See* Papke in ETHICS AND THE LEGAL PROFESSION 38.

[100] Sharswood 84.

[101] Sharswood 97.

[102] *Compare* Sharswood 93 (aiding the state in a prosecution "ought never to be done against the counsel's opinion of its merits"); *id*. at 96 (in civil matters "Counsel have an undoubted right, and are in duty bound, to refuse to be concerned for a plaintiff in the legal pursuit of a demand, which offends his sense of what is just and right [because] . . . *the courts are open to the party in person to prosecute his own claim, and plead his own cause*"); *with* Sharswood 90-91 ("Every man, accused of an offence, has a constitutional right to a trial according to law; even if guilty, he ought not to be convicted and undergo punishment unless upon legal evidence; and with all the forms which have been devised for the security of life and liberty. . . . He is entitled, therefore, to the benefit of counsel to conduct his defence . . . to suggest all those reasonable doubts which my arise form the evidence as to his guilty, and to see that if he is convicted, it is according to law."); *id*. at 91 (arguing counsel must accept court appointment for a criminal defendant); *id*. at 95 (civil

client, Sharswood endorses unchecked zeal – the lawyer may not only use all his "ingenuity and eloquence" to ensure success, but may "fall back upon the instructions of his client, and refuse to yield any legal vantage-ground, which may have been gained through the ignorance or inadvertence of his opponent."[103]

Pearce has argued, and others have assumed, that on balance, morally activist republican principles prevail over client-centered values in this bifurcated scheme.[104] Be that as it may, three things are equally clear. First, Sharswood's endorsement of moral activism is far more circumspect than Hoffman's, suggesting that a range of views on the ethics of lawyering may have been thought consistent with republican values. Second, his endorsement of moral activism is (as we saw with Hoffman) more a reaction against than a reflection of, prevailing professional norms. (Recall his "fear" that "the prevailing tone of professional ethics leads practically" to the principle that lawyers accept cases "indiscriminately . . . with a view to a single end, success."[105]) Third, Sharswood's bifurcated scheme is internally inconsistent. At least in civil cases, holding plaintiffs' lawyers morally accountable for the causes they represent while exempting defense lawyers is difficult to square with Sharswood's skepticism about lawyers' ability to accurately prejudge the merits of cases, his concerns about allowing lawyers to usurp the role of judge and jury, and his emphasis on the importance of *equal* representation by competent experts to the proper functioning of the adversary process.[106] All of these

---

"defendant has a legal right to require that the plaintiff's demand against him should be proved and proceeded with according to law").

[103] Sharswood 96, 98; *see also id.* at 92.

[104] Pearce (1992) 261-67.

[105] Sharswood 84.

[106] On the final point, Sharswood says:

> If it were thrown upon the parties themselves, there would be a great inequality between them, according to their intelligence, education and experience, respectively. Indeed, it is one of the

points have been lost in role critic's haste to present Hoffman and Sharswood as archetypical exponents of a coherent republican theory of morally activist lawyering.

III. The Sentinel as Mercenary

> The proper place to try causes is before the properly constituted tribunals; and although every man of character, under our system, may to a certain extent select his causes and refuse retainers, yet the sober truth is, that the more mercenary our profession is, the more it will deserve respect, and conduce to the safety of the citizen and the welfare of society . . . .
>
> -- Peleg W. Chandler (1846)

> The true lawyer, imbued with lessons of wisdom, and accustomed to labor in all that ennobles the soul and refines the mind and chastens the feelings, is one of the ornaments of his race. The vindicator of the laws of God and man; a guardian of morality and conservator of right; the distributor of justice and the protector of the injured and the innocent; a public sentinel to sound the alarm on the approach of danger; he is one of the firmest safeguards of society. His profession is one of transcendent dignity.
>
> -- James Jackson (1846)

There are several rather striking facts about these quotations. While they appear diametrically opposed – one embracing the concept of the lawyer as mercenary, the other lionizing the lawyer, in Story's famous phrase, as a public sentinel[107] – both were written by authors who staunchly defend a client-centered, ethically neutral conception of the

---

> most striking advantages of having a learned profession, who engage as a business in representing parties in courts of justice, that men are thus brought nearer to a condition of equality, that causes are tried and decided upon their merits, and do not depend upon the personal characters and qualifications of the immediate parties.

Sharswood 95. Although the statement comes just after Sharswood claims that civil defendants have the right to a full defense, the argument plainly supports a right to competent representation for both plaintiffs and defendants. It is also difficult to see why, on the reasons Sharswood offers, the lawyer for a civil defendant who is clearly liable should be held to a lower moral standard than the lawyer for a civil plaintiff with an unjust claim. For both lawyers, justice is vindicated by refusing to press their clients' claims, yet Sharswood contends that the defense lawyer may forge ahead.

[107] *See* Joseph Story, *Address Before the Members of the Suffolk Bar*, September 4, 1821, in P. Miller, LEGAL MIND 63, 71 (1962); Joseph Story, *Discourse Pronounced on the Inaugruration of the Author as Dane Professor of Law in Harvard University*, Augsut 25, 1829, in P. Miller, LEGAL MIND 176, 181 (1962).

lawyer's role radically different from the morally activist ideal.[108] And like other antebellum defenders of the adversary ethic, both authorsfall squarely within the "governing class" of republican legal elites. Their role defenses also appear at the centerpoint of the asserted hegemony of republican moral activism – a decade after the publication of Hoffman's *Resolutions* and eight years before Sharswood's *Essay on Professional Ethics* – and in the same medium (magazine articles) other republican elites used to advance their governing class ideology. To effectively pierce the myth of republican moral activism we need to explore the contours of this robust debate on the definition and justification of the lawyer's role without assuming that republican ideology necessarily entails a morally activist theory of lawyering.

A. Law Publishing: The Propaganda Project

The general consensus among historians is that, after the Revolution and in the face of a rapidly expanding, nascent legal system, the legal profession was rather desperate for published legal resources. "There were no American reports to speak of in the colonial period," Lawrence Friedman writes, so lawyers were forced "to rely on English reports, or on secondhand knowledge of English cases, gleaned out of English treatises."[109] By the time the colonies gained independence and established their own courts, exclusive reliance on English sources became less fashionable, to say the least, and lawyers became "hungry" for American cases – indeed, for a permanent, American system of common law.[110] By the first decade of the nineteenth century, lawyers and

[108] *See* Chandler, *The Practice of the Bar*, 9 MO. L. RPTR. 241, 242 (1846); Jackson, *Law and Lawyers: Is the Profession of the Advocate Consistent with Perfect Integrity?*, 28 KNICKERBOCKER 49 (1846).
[109] Friedman, A HISTORY OF AMERICAN LAW 323 (1985).
[110] *Id*.

often judges in a handful of states had begun gathering and publishing legal opinions. Although they became more formal and exclusively doctrinal when "appointed officials replaced private entrepreneurs as law reporters," the early reports "were far more than slavish accounts of the judges' words . . . they were guidebooks for the practitioner. Some reporters added little essays on the law to the oral and written courtroom materials they collected."[111]

In addition to case reports, a market slowly emerged for a broader "jurisprudential and practical literature."[112] This included newspaper reports and commentary on trials, treatises and digests on specific areas of law, and, much more gradually, periodicals, or "law magazines" as they were called, which combined the genre of case reporting with sporadic synthetic legal analysis and commentary on hot topics.[113] Bloomfield's study of antebellum law magazines shows that while there were relatively few (no more than 20 at any point in time and just 12 prior to 1830) and while most "failed to survive more than a few years . . . magazine publishing in general experienced a boom during these years . . . [and] the rate of growth for such specialized publications remains impressive . . . ."[114]

An 1844 essay by Peleg Chandler, editor of the Monthly Law Reporter, reflects both the anxiety and the promise of the nascent medium.[115] It opens emphatically by celebrating the presence in the United States of "*seven* journals, devoted to jurisprudence; *seven* champions, we trust, of justice; *seven* burning candlesticks; not *seven* sleepers.

---

[111] *Id*. at 325; *see also* Warren, AMERICAN BAR 325-340, 540-48.
[112] Friedman, AMERICAN LAW 326.
[113] *Id*. at 326-29; Maxwell Bloomfield, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876 143 (1976).
[114] Bloomfield, AMERICAN LAWYERS 142; *see also* Friedman, AMERICAN LAW 329 (noting that "better reporting put most of them out of business").
[115] The journal started out as the "Law Reporter," but, for simplicity, I refer to it throughout as the "Monthly Law Reporter."

With the child of Wordsworth, we may say, 'We are *seven*.'"[116] But before reviewing these journals, the essay pauses, ominously, on the fate of ten failed efforts: "As we cast our eyes upon the remains of so many journals that have gone before us, we feel forcibly the brevity of existence that may be allotted to some of those now rejoicing in new-born life."[117]

Bloomfield contends, and other historians have agreed, thatthe mission of those who controlled law publication in general, and law magazines in particular, was not simply to meet a bourgeoning demand for authoritative legal sources among practioners, but also, and perhaps more importantly, to advance a distinctly republican ideology of law as the province of a virtuous elite. That is to say, the literature of law, such as it was, reflected not merely materialistic or functional impulses, but a basic propagandistic urge. The perceived provocations to write, on this account, included longstanding public hostility toward lawyers, criticism of their support for reception of common law doctrines from England, and, especially as Jacksonian leveling impulses surfaced in the 1820s and 1830s, the destruction of barriers to the practice of law by laymen.[118] As Bloomfield asserts:

> Like the case material, the remaining contents – reviews of new law books, hints for the improvement of office habits or courtroom strategy, summaries of recent state laws, and memoirs of practitioners living and dead – appealed to a narrow professional clientele. But behind a façade of objectivity and noncommittal exposition law writers busily pursued a further end: the creation of an effective counterimage to the popular stereotype of the lawyer as an enemy of the lower classes.[119]

---

[116] *American Law Journals*, *7* MO. L. RPTR. 65 (1844).
[117] *Id*. at 66.
[118] I say "perceived," because, as Bloomfield has emphasized, and as we will see, critics of the profession included distinguished members of the bar, not just a Jacksonian "sans-culotte radicalism." AMERICAN LAYWERS 138.
[119] Bloomfield, AMERICAN LAWYERS 144; *see also id*. at 142-43, White, MARSHALL COURT 105 (discussing coordination between judges, treatise writers, reporters and legal educators); 2 Chroust (1965) 30 ("Highly effective in the gradual conquest of public opinion and the common mind was the consistent

But if this is so, it is all the more surprising to find within pages dedicated to the republican professional agenda, outright ridicule and rejection of the morally activist ideal of lawyering.[120] Moreover, it would appear that republican legal elites were *always already* in the business of generating personally and publicly consoling myths about professional identity.[121]

B. Rereading the Role of the Republican Lawyer

To test the myth of civic republican moral activism, I have surveyed the four most successful law magazines whose period of publication roughly overlaps with the dates of publication of Hoffman's *Resolutions* and Sharswood's *Essay on Professional Ethics*.[122] These are: The American Jurist (28 volumes published in Boston from 1829-1843), The Monthly Law Reporter (27 volumes published in Boston from 1838-1866), The New York Legal Observer (12 volumes published in New York from 1843-1854), and The Western Law Journal (10 volumes published in Cincinnati from 1843-1853). For each journal I examined all articles discussing ethical issues in the practice of law – this

---

and clever barrage of self-serving propaganda which the lawyers levied in their own behalf.") (citing P. Miller (1962) 41).

[120] Although my survey of the periodicals corroborates Bloomfield's propaganda thesis to a certain extent, he does not discuss the articles regarding professional ethics in making his broader claim that the image of the profession promulgated in the magazines was of "a benevolently neutral technocrat." AMERICAN LAWYERS 142. Even if Bloomfield is correct that elite lawyers were anxious to disclaim *political* interest or ambition (what I take to be the core of his argument on the normative image presented in the magazines) I am much more hesitant to draw a synthetic conclusion of this kind with respect to the separate question of lawyers' roles *qua* lawyers, and much more sympathetic with his critique of whiggish historians who leaped too quickly to synthetic claims about the profession at the time. *See* Bloomfield, AMERICAN LAWYERS 137 (criticizing Warren, Pound and Chroust for constructing a false profession/populous dichotomy in examining the criticisms regarding antebellum law and lawyers; "The 'degradation' of the nineteenth century lawyer accordingly becomes a function of external pressures and interference rather than tensions *within the legal profession itself*.") (emphasis added).

[121] *See* Bloomfield, AMERICAN LAYWERS 144 ("every great movement sooner or later enters a mythmaking phase, in which earlier achievements are reappraised and idealized as guides for the future") (emphasis added).

[122] I have defined success by longevity – each of the reviewed journals was in print for at least a decade.

includes articles on the relationship between law and morality, moral activism versus the adversary ethic, the judicial process and the problem of legal indeterminacy ("uncertainty" was the term in vogue[123]), codification, reprints of lectures and public addresses on the legal profession and law reform, editorial commentary on lawyers' conduct in famous cases (both English and American), discussion of Lord Brougham's maxim, as well as reviews and reprints of works on legal ethics (again, both English and American).[124] I have also surveyed topical articles, addresses and materials from other legal and non-legal periodicals between 1790 and 1860.[125]

Although some generalizations can be made – for instance, that the Monthly Law Reporter begins strongly advocating the adversary ethic in articles by the editor and then moves gradually to a more equivocal position with changes in the editorship,[126] and that the Monthly Law Reporter and the Western Law Journal more openly support the adversary ethic than either the New York Legal Observer or The American Jurist (both of

---

[123] *See, e.g.*, Chief Justice Parker, *A Charge to the Grand Jury Upon the Uncertainty of the Law, and the Duties of those Concerned in the Administration of It* (1842).

[124] Because eulogies for prominent lawyers and judges have been treated by both Bloomfield and Hoeflich, I exclude them from consideration here.

[125] Here I relied on cross-references from the law magazines and term searches in the Nineteenth Century Masterfile, www.paratext.com, the American Periodical Series Online, www.aps.umi.com, and Making of America, http//cdl.libarary.cornell.edu/moa – all online, indexed databases focusing on early American periodicals.

[126] Compare, for instance, the essays in Volume 5, discussed *infra* _, by Peleg Chandler, with *The Webster Case*, 12 MO. L. RPTR. 1, 9 (1850) (editor Stephen H. Philips commenting on Boston murder trial; criticism of defense counsel for lackadaisical defense "is uncalled for and unjust . . . . This is most lamentable, for it would seem to throw upon the most high-minded advocate the revolting task of contriving in every instance the wildest and most improper line of defense"); *Professional Conduct: The Courvoisier Case*, 12 MO. L. RPTR. 433 (1850) (ed. Stephen H. Philips describing and responding to conduct of defense lawyer in famous English murder trial; defense lawyer allegedly attempted to implicate others and vouched for his client's innocence before the jury after his client had confessed the crime); *Mr. Charles Phillips Defence of Courvoisier*, 12 Mo. L. Rptr. 536 (1850) (same); 12 MO. L. RPTR. 553 (1850) (same); *Book Review of Sharswood's Compend of Lectures on the Aims and Duties of the Profession*, 17 MO. L. RPTR. 656 (1855) (editors George P. Sanger and George S. Hale giving favorable review of Sharswood; "we should be glad to see his work in the hands of every student at law, indeed, of every lawyer").

which seem to lean toward moral activism or indifference on the question)[127] – the fairest statement is that the editors generally avoided tendentious principles in their selection of and commentary on legal ethics material.[128] One finds work supporting moral activism and work defending the adversary ethic in each journal, suggesting that, on the whole, and certainly over time, the editors sought to publicize rather than strictly control debate on the question of the lawyer's role.[129] What one does not find, *in any journal*, is

---

[127] Compare the essays by Chandler (editor of the Monthly Law Reporter) and Timothy Walker (editor of the Western Law Journal), discussed *infra* _, with *Proper Qualifications of an Advocate*, 5 AM. JURIST 407, 408 (1831) (quoting argument for "great moral probity" in British Solicitors from London Legal Observer, January 1831); Simon Greenleaf, *A Discourse Pronounced at the Inauguration of the Author, as Royall Professor of Law, in Harvard University*, August 26, 1834, 13 AM. JURIST 107, 118 (1835) ("In the ardor of forensic conflict [the lawyer] is still to be governed by the standard of morals in private life, and to personate no man but himself."); James Kent, *An Address Delivered Before the Law Association of the City of New York*, October 21, 1836, 16 AM. JURIST 471, 474 (1837) (lawyer educated in science of law will when great interests are involved, and strong principles excited, be able to vindicate the cause of right, and truth, and justice, with powerful sympathies, and in strains of impassioned eloquence"); *Points on Criminal Law Evidence*, 10 N.Y. LEG. OBSERVER 368 (1852) (arguing that exclusion of compelled confessions sacrifices justice and common sense "on the shrine of mercy"); *The Legal Profession: Lawyers and Lawyers' Fees in the "Old Dominion*," 5 N.Y. LEG. OBSERVER 161 (1847) (whiggish history of colonial regulation of lawyers in Virginia).

[128] A more systematic investigation of the editors' biographies would have to be conducted to say more on this point. The trouble with such an undertaking is that all of the journals were, for at least some period, run by multiple editors and, with the exception of the Western Law Journal, articles and commentary by the editors were not identified by name. *See American Law Journals*, 7 MO. L. RPTR. 65, 73 (1844) (noting that anonymous publication was the standard practice "of periodical criticism in England and America" and criticizing the Western Law Journal for deviating from the tradition); *cf.* Walker, *Anonymous Writing – "I" v. "We*," 1 WEST. L.J. 511-12 (1844) (defending authorial attribution and use of first person singular rather than "'the time-honored plural 'We' . . . employed . . . by editors to cover their weakness'") (quoting Peleg Chandler, 7 Mo. L. Rptr. at 74). For the same reason – at least with respect to the essays examined from the Monthly Law Reporter – anonymous publication makes it impossible to unqualifiedly attribute authorship to its editor Peleg Chandler. But his regular use of the "editorial We" for the period in which he held sole editorial control of the magazine strongly supports the attribution of authorship where I have made it. *See also* 1 WEST. L.J. at 512 (noting that Mr. Chandler has used "we" in his own editorial commentary "in [the article criticizing the Western Law Journal], and every other article written by him").

[129] Client-centered material can be found in the pages of the American Jurist and the New York Legal Observer. *See* Daniel Mayes, *Whether Law is a Science, An Introductory Lecture*, Delivered to the Law Class of Transylvania University, November 8, 1832, 9 AM. JURIST 349, 359 (1833) (defense of special pleading); Basil Montagu, *The Barrister*, 26 AM. JURIST 366 (1842) (English barrister extensively quoted from essay offering client-centered conception of the role); *Advocates and Clients*, 1 N.Y. LEGAL OBSERVER 112 (1842) (quoting Lord Brougham's maxim). And material supporting moral activism can be found in the pages of the Monthly Law Reporter, *see supra* note _, and the Western Law Journal. *See Law and Lawyers*, 2 WEST. L.J. 135 (1844) (excerpting David Dudley Field's essay The Study and Practice of Law "*because it presents a very strong view of the moral obligations of the profession. My own opinions, have been heretofore expressed in this Journal*.") (emphasis added); *The Profession*, 5 WEST. L.J. 284 (1848) (quoting advocate of "union and purity" in the profession); *Study of the Law: John C. Calhoun's Letter*, 7 WEST. L.J. 534, 535 (1850) (reprinting letter from John C. Calhoun to student at Ballston Law

unequivocal support of morally activist lawyering either on the terms Hoffman sets out in his *Resolutions* or on the bifurcated scheme Sharswood sets out in his *Essay*.

1. "Mawkish Cant" and "Conscience Lawyers": Defending Client-Centered Service and Ethical Neutrality

Because they have been ignored by role critics, the views of nineteenth century elites who vigorously promoted an adversary ethic are worth exploring in some detail. Although there are significant differences in style and emphasis, a common rhetorical structure is apparent in their writings. Most begin by explaining that they write in order to address or correct the popular misconception that lawyers are dishonest, unscrupulous, bad men who willingly earn a living advocating for clients and causes they know to be unjust. Thus Peleg Chandler begins an 1842 essay entitled *The Case of the Boorns* (a criminal case in which the public, and the jury, mistakenly believed the accused was guilty of murder) with the following introduction:

> It is a common reproach against the profession, that advocates undertake the defence of criminals whom they know to be guilty. An unsuccessful defence is viewed as conclusive evidence that it should not have been undertaken; and a successful one, as unwarrantable prostitution of talents to a bad cause; as a wrong done to society under the sanction of law. . . . The successful advocate is sometimes regarded as a bad citizen, whose energies have been directed to breaking the bars of a tiger's cage, and causing the remorseless savage a little longer to pursue its depredations. In any event, the profession are often stigmatized as the "indiscriminate defenders of right and wrong by the indiscriminate utterance of truth or falsehood."[130]

Chandler is far less diplomatic in an essay published a year later called *Legal Morality*, in which he responded to criticisms of the bar in a religious newspaper:

School, January 20, 1850; "In the defense of one whom you believe to be guilty, proceed no further than is necessary to elicit the truth, by an even balance of testimony. It is a fearful thing to encourage crime, even though it be in the way of professional defense.").

[130] *The Case of the Boorns*, 5 MO. L. RPTR. 193 (1842).

> There has been a great deal of mawkish cant about the practice of the law; and some moralists have been indulgent enough to volunteer apologies for the necessary obliquity of a lawyer's conscience; while others, less lax in their views of moral duties, have consigned the whole profession and its practice to unqualified condemnation. The impression, which an uninformed mind would derive from either of these classes of writers, would be, that chicanery and deception were [sic] assentially incident to the practice of law; and the only question that could arise in regard to it, would be how a man who made any pretention to honesty, could reconcile it to his conscience to be a lawyer at all. . . . Indeed, a notion something like this has long prevailed . . . [and] it is . . . supposed to rest upon certain admitted facts . . . among them, the most prominent, perhaps, is, that not only is a lawyer willing to engage in a bad cause, but let a criminal be ever so guilty, he is almost always able to find professional aid in his defence.[131]

As Chandler's proems suggest, role defenders also tended to frame their responses to popular misconceptions by isolating and working from what they took to be the strongest charge against the profession – that lawyers knowingly defend guilty criminals, or, alternatively, defend the accused without being satisfied or even caring about their guilt or innocence.[132] This is not to say, however, that the lawyer's duty in civil cases was disregarded or rigidly distinguished.[133] Instead, role defenders used the criminal paradigm both to establish the strength of their convictions in a context that implied in theory, if not in fact, the most dire consequences for society, and, as with contemporary arguments for the adversary ethic, in order to construct a compelling paradigm of zealous advocacy.[134]

On the merits of the adversary ethic, role defenders typically insisted that (1) serving the client serves rule of law values, (2) contrary to Hoffman, most cases are

---

[131] *Legal Morality*, 5 MO. L. RPTR. 529 (1843). *See also The Practice of the Bar*, 9 MO. L. RPTR. 241 (1846); Jackson, *Law and Laywers: Is the Profession of the Advocate Consistent with Perfect Integrity?*, 28 THE KNICKERBOCKER 377 (1846); *The Morals and Utility of Lawyers*, 7 West. L.J. 1, 10 (1849).

[132] *See, e.g.*, 9 MO. L. RPTR. 248 (arguing that a clearly guilty defendant still has the right to have a lawyer put the prosecution to its proof); 5 MO. L. RPTR. 194 (same); 28 THE KNICKERBOCKER 382 (same).

[133] *See, e.g.*, Walker, 7 WEST. L.J. 11-12; Jackson, 28 THE KNICKERBOCKER 379 (discussing contracts, commercial law, and trusts and estates along with criminal law); 5 MO. L. RPTR. 530-31 (defending use of statute of limitations).

[134] For one of the few strong, contemporary role defenses, see Morgan Freedman, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975).

actually doubtful cases on questions of morality, (3) the lawyer has a duty to serve regardless of what he thinks about the morality or justice of the client's ends, (4) a morally activist conception of the role would permit the lawyer to usurp the function of judge and jury, and (5) whatever they support in the role, chicanery and deliberate falsehood are categorically indefensible. Chandler's essay, *Legal Morality*, and James Jackson's essay, *Law and Lawyers: Is the Profession of the Advocate Consistent with Perfect Integrity?*, are emblematic.

a. Peleg Chandler

Born in 1816 at New Gloucester, Maine to a blue blooded family, Peleg Whitman Chandler graduated from Bowdoin College and after a short stint apprenticing in his father's law office in Bangor, entered what was then known as the Dane Law School at Harvard.[135] He began work in legal publishing early, reporting cases for the Boston Daily Advertiser while still at Harvard, and in the year after being admitted to the Suffolk County Bar, established the Monthly Law Reporter.[136] Strong republican propagandist themes can be seen in his letter to Joseph Story detailing the reasons for launching the magazine:

> It seems to me that the spirit of innovation is, in many respects, tearing away, in our profession, many of the most ancient and approved landmarks. There is a vast deal of theory – an immense longing for El Dorados in the law. A great deal is said in particular cases, even in arguments in court, about what the law ought to be or might well be, but precious little of what it is. Now it would seem that a good way to check this thing, as well as the political revolution founded in the same spirit, is to hold up before the profession and the public the decisions fresh from the court – to place before them the law, as it comes from the dispensers of it—from those who are too far removed from the public to be easily affected by the changing fashions of the day . . . Noisy radicals are not men who have read

[135] He read law under Theophilus Parsons, a relative.
[136] *See* DICTIONARY OF AMERICAN BIOGRAPHY.

> intimately the reports and become acquainted with the intricate machinery, of which, if a part be disarranged, the whole may suffer . . . In conducting the L.R., I have been actuated by these feelings, and have striven to make it a matter of fact affair.[137]

Yet on the question of professional ethics, Chandler was a staunch opponent of moral activism in the role. Against the "mawkish cant" of those moralists who denounced lawyers for taking unjust cases, Chandler stressed the rule of law values served by adversary proceedings in his essay *Legal Morality*

> Now let us suppose all of this to be true, what does it amount to in supporting the charge? Is it not simply this: A lawsuit is a controversy between two parties, where each seeks to avail himself of the aid of some one, more experienced than himself, to establish the fact that he is in the right, or not so much in the wrong as the other party alleges; and here is a class of men who by study and devotion to business, have qualified themselves to represent these litigant parties before tribunals established for the very purpose of determining such controversies.[138]

Chandler then queries rhetorically: "May they, then, without violating their consciences, lend their aid to parties thus situated? Or must the lawyer . . . first settle in his own mind, beyond the possibility of mistake, precisely where the truth and equity of the cause lies?"[139]

Even if the lawyer *should* refuse in one out of a thousand cases where the cause is clearly against the interests of justice, "what shall he do in the nine hundred ninety-nine cases of a doubtful character where . . . 'a great deal may be said on both sides?'"[140] And "[w]ho in this is deceived or injured" if the lawyer holds himself "bound as an honest man, fairly and fully to present to the court or jury, whatever there is of truth or justice in

---

[137] Quoted in Bloomfield, AMERICAN LAWYERS 143; *see also Preface*, 1 MO. L. RPTR. iii-iv (1838); *The Law Reporter*, 1 MO. L. RPTR. 55 (1838).
[138] *Legal Morality*, 5 Mo. L. Rptr. 529, 530 (1843); *see also The Bench and Bar*, 5 MO. L. RPTR. 1, 7 (1842) (arguing against judicial pre-judgment that "[i]n most cases, it is the erroneous view which is the most obvious, -- the correct one is to be dug out and brought to light. It is truth which resides in a well, and it is error which generally covers that well.").
[139] *Id*. at 530.
[140] *Id*.

his client's cause, so as to produce its full effect, even though in finally balancing the merits, the scale is found to preponderate against him?"[141]

Turning from question to answer, Chandler says he believes "not only that a lawyer may honorably and honestly engage in a cause of doubtful justice," but that, far from filtering law and fact based on his opinion of the merits or justice of his client's case, "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, leaving to the counsel upon the other side to do the same thing for his client."[142] He goes on to link this view to thei mpartial administration of justice: "In this way the whole cause is brought fairly before the tribunal which is to decide it. It is in fact, the only way in which justice can ordinarily be reached, and while trials are thus managed, not only will justice in most cases be attained, but what is scarcely less important, so far as others than the parties are concerned, it will be done as to satisfy the public mind, that this justice has been fairly reached."[143] We can see all the familiar contours of what David Luban (referring to the modern prevalence of amoral advocacy) has called "the adversary system excuse" – the claim that the lawyer's client-centered role is foreordained by the requirements of the adversary process.[144]

Chandler goes even further though, arguing not just that adversary presentation of proof leads to a full consideration of the merits, but that it serves the interests of law and justice for the lawyer to plead technical defenses like the statute of limitations:

> [I]t is said lawyers are guilty of taking advantage, in behalf of their clients, of technical rules of law, and one of the graver charges adduced in one of the articles already alluded to, was that the statute of limitations has been at times made use

---

[141] *Id*.
[142] *Id*.
[143] *Id*. Playing the point out, Chandler argues that the public would come to doubt the validity of hasty convictions based on popular opinion. *Id*. at 530-31.
[144] Luban in GOOD LAWYER (1984) 113.

> of to defeat an honest debt. All this may sound very well, and might be very good logic as well as good ethics, if the lawyer made use of these legal bars in his own case. But if legislators make laws which are intended for general application, 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? . . . Rules of law, designed to advance the greatest good of a whole community, may sometimes work individual injustice, and if the right of any citizen to avail himself of what the law has provided is to depend upon the moral sense of his legal adviser, law would lose its very definition as *a prescribed rule of action*, and vary, not according to the length of the chancellor's foot, but the *stretch* of a lawyer's conscience.[145]

ThusChandler not only rejects Hoffman's resolutions regarding technical pleas, but his entire account of the lawyer as judge. Moral activism by lawyers would lead to lawlessness and suppression of individual rights – a despotism of attorneys. The lawyer's expertise, Chandler insists, should be dedicated to achieving the client's ends, not to prejudging the client's case and usurping thereby the function of judge and jury.

Chandler concludes the essay by distinguishing sharp practice and chicanery on the one hand, from the zeal produced by lawyers virtuously engaged in defending unpopular clients and attacking government corruption. "Let no one suppose we would apologize for, or defend quibbles or chicane in the practice of law. The premises upon which we rest our remark is, that neither trick nor falsehood are any more necessarily connected with the practice of law than that of medicine or theology."[146] Echoing the republican commitment to law as a science requiring long study, Chandler implies that lower standards for admission to practice are at least partly to blame for chicanery and deception.[147]

But apart from trickery and "intentionally misrepresent[ing] evidence to a jury, or legal principles to a court," Chandler argued that lawyers are entitled, and often obliged

---

[145] *Id*. at 531-32 (emphasis original).
[146] *Id*. at 532.
[147] He writes that "since the legislature in their wisdom have thrown open the bar to all, and taken away from its members all restraints or control over one another, this evil may have been increasing." *Id*.

to "take great license of speech . . . to attain anything like justice."[148] Eloquence, the arts of the orator, are often necessary, he said, "to contend with popular prejudices, and unfriendly, not to say false, witnesses, as well as powerful and interested combinations. . . . It is at such times that the moral courage of a good lawyer is brought to bear upon those who would prostrate his client."[149]

Chandler's view of "the necessity of an independent bar to the cause of human rights" thus directly counters Hoffman's view of professional independence.[150] Instead of independence from *client* (in order to serve public justice), Chandler advocates independence from *state and popular opinion* (because public justice is impossible without strong client-centered advocacy). Both conceptions meet the civic republican definition of virtue as self-restraint and sacrifice for the public good, and both conceptions reflect republican conceptions of law as a science of principles administered by an elite corps of public sentinels.[151]

Chandler also worked outside journalism to live up to the lawyer-statesman ideal: he was a prominent civil trial lawyer ("the best jury lawyer in Massachusetts with the possible exception of Choate"); he twice served in the State House of Representatives and held positions on the Boston Common Council; he also accepted an appointment as United States bankruptcy commissioner; and he published with some regularity outside the Monthly Law Reporter. So he can hardly be branded a "rank and file" lawyer and

---

[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] Chandler blasts the "senseless homily about the doubtful propriety of a religious or a good man, pursuing the profession of law," insisting that the honor and trustworthiness of the profession is proved by the fact that individual members of the community so often repose their trust in lawyers. *Id*. at 532-33. "Whatever idle tongues or more idle pens may say of the morality of the legal profession as a pursuit, the relation which lawyers hold to the community belies such general and undefined charges." *Id*. at 533. For a more reserved contemporary statement with strong parallels to Chandler, see Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WISC. L. REV. 1529.

dismissed for want of civic republican credentials.[152] Nor was *Legal Morality* his only defense of the adversary ethic.[153]

b. James Jackson

Son of the governor of Georgia, James Jackson was born in 1819, attended the University of Georgia in Athens and read law under Howell Cobb. A "cultivated classical scholar" and "a pious Methodist," he was admitted to practice in 1839 and rather quickly entered a life of public service.[154] He was a Representative in the Georgia General Assembly from 1845-1849, took the bench for the superior courts of the western circuit of the state, and then served in Congress until the Civil War broke out when he became a judge-advocate on Stonewall Jackson's staff. Following the war he reentered practice, running a law office with a series of partners until his appointment to the Georgia Supreme Court in 1875. He served as Chief Justice of the Court from 1880 until his death two years later.[155]

Writing to rebut the charge that "[a] successful lawyer is a sort of licensed knave, refined perhaps in his mode of cheating, but really little better than a prime minister of Satan," Jackson begins his essay, *Law and Lawyers*, by observing that the expense and delay of litigation, along with popular envy against "[e]xcellence of any kind" can account for much of the "obloquy cast upon the profession."[156] But expense, he insists, is a relative concept ("men are prone by nature to consider the possession of their property

---

[152] *See supra* note 39.
[153] *See The Bench and the Bar*, 5 MO. L. RPTR. 1 (1842); *The Case of the Boorns*, 5 MO. L. RPTR. 193 (1842); *The Practice of the Bar*, 9 MO. L. RPTR. 241 (1849); *Trial of Courvoisier – License of Counsel*, 3 MO. L. RPTR. 194 (1840).
[154] P. Miller, LEGAL MIND 275.
[155] DICTIONARY OF AMERCAN BIOGRAPHY 546.
[156] 28 THE KNICKERBOCKER 377 (1846).

an indisputable right, and to regard whatever is spent in defending it as lost"), and delay, although a "serious evil," is the fault of the legislature, "or whoever constitute the courts of a state, for not establishing a reasonable number of judicial tribunals; or it is more frequently attributable to the trickery of the other party litigant . . . ."[157] In any event, Jackson concludes, "[t]he advocate is the last person to be held responsible for this great stain upon our legal system."[158] And envy of professional elites he denounces as a "pernicious" sentiment, since the false accusations it produces among the "ignorant rabble" risks severing the "golden chain" of public confidence and esteem which binds men to virtue.[159]

But while dismissing "the cynicism of the modern rabble" Jackson concedes that "the advocate is perhaps exposed to greater temptations to wicked practices than any other person in society."[160] Practicing "a science so intricate and mysterious" gives lawyers power to pervert law "and in the name of Justice itself to thwart justice," or to take advantage of their relation of confidence with clients "to defraud [them] without detection or even suspicion . . . ."[161] Still, Jackson adds, all "the other liberal professions" are subject to similar temptation because they enjoy similar privileges.[162] "But that there is any thing in the science or the practice of law which necessarily involves a stifling of conscience, the sacrifice of one iota of principle, a support of injustice or inevitable dishonesty, we do most firmly and solemnly deny."[163]

---

[157] *Id*.
[158] *Id*.
[159] *Id*. at 378.
[160] *Id*.
[161] *Id*.
[162] *Id*.
[163] *Id*. at 379.

Jackson then breaks his defense of the integrity of the profession into four segments corresponding to what he takes to be the "chief objections [and] calumnies thrown out against the advocate . . . ."[164] The first charge "triumphantly asserted by some wiseacres of the present day" is that advocates are guilty of dishonesty at least half the time by "enlist[ing] in a cause without knowing or even caring which side is in the wrong" when it is impossible that both sides are right.[165] Jackson's reply, like Chandler's, is that in most cases, the truth of the matter is either unknowable or requires a full presentation of proof to decide:

> [I]t is only necessary to bear in mind that all matters of opinion are not capable of perfect mathematical demonstration; that they are not so obvious as to make it necessary that either party should prosecute his claim at the expense of integrity; *that the affairs of mankind are not so nicely adjusted as that one party in a law-suit should be entirely right and the other entirely wrong; and that truth cannot be elicited and justice awarded unless both sides of a case are fairly represented*. Consider the intricacies of contracts and commercial relations; the difficulty in many cases of ascertaining the true meaning of the will of testators; and above all, the nice distinctions to be made in determining the degree of criminality.[166]

Even if a lawyer wanted to, factual and legal indeterminacy render it "palpably absurd for the advocate to prejudge the questions to which these and a thousand other subjects, equally complicated, give rise."[167] And, perhaps more importantly for Jackson, the desire to prejudge is misplaced: "it is not for the advocate to say whether a cause is just or unjust; for him to decide upon the justice or injustice of a case would be to usurp the province of the judge. Many cases which at first seemed to be bad have on examination proved to be good."[168] Instead, "the advocate is bound to represent his side of the case,

---

[164] *Id*.
[165] *Id*.
[166] *Id*. (emphasis added).
[167] *Id. See also id*. ("Probably in the majority of cases which turn out unfavorably to the advocate, he really believes himself to be in the right.").
[168] *Id*.

right or wrong, in the best possible light, and to enforce the strongest arguments he can devise in favor of his client, leaving the validity of those arguments and the true merits of the case to the decision of the judge, whose business alone it is to decide."[169] Any other course, Jackson warns, would "introduce mob law, and make every man his own judge and his own avenger."[170] Thus, as with Chandler, Jackson links epistemological uncertainty to the adversary system and the adversary system to the maintenance of rule according to law. The lawyer's duty of zealous client service and ethical neutrality follows as a consequence of these premises.

The second charge Jackson addresses is that the lawyer defends "depraved criminals" – people "whom he knows to be *morally* guilty."[171] Jackson acknowledges the social interests behind the "demand that justice should be done to [the criminal] as well as to the offended law and the outraged community."[172] But against this, he argues, two familiar principles of justice also must be weighed – "that every man shall be presumed innocent until proven guilty," and "that punishment shall be apportioned to the crime."[173] Thus, "[n]o matter how certain the community may be of the criminal's guilt, it would be a palpable subversion of law to allow this fact to detract one itoa from the privilege of his defence. Without this faithful scrupulousness of the law it would lose its authority and we its protection."[174] The same right to defend exists with respect to the degree of culpability, Jackson adds, even where there is uncontroverted evidence of guilt, and the criminally accused invariably require "the learning and ingenuity of counsel" to ensure

[169] *Id*.
[170] *Id*.
[171] *Id*.
[172] *Id*. at 380.
[173] *Id.*
[174] *Id*.

adherence to law rather than prejudice. Indeed, client service in this setting, for Jackson, is as just a professional goal as vindicating the claims of the innocent and oppressed:

> Here then, on the inimitable principles of justice, do we take our stand, and maintain that every case, however bad, every criminal, however depraved, has a claim upon the resources of the advocate and that the advocate may honestly defend a person whom he knows to be guilty of some crime; and we hold that in attempting to avert from his client a penalty disproportioned to his offence, he is discharging a duty as truly just and noble as if he were holding the shield of his eloquence over the most pure and innocent.[175]

At least in criminal matters, the right to counsel and the adversary ethic, he concludes, are what distinguish "the humanity of modern law" from "the barbarism of former ages."[176]

Quite apart from litigating the degree of culpability, Jackson continues, lawyers are charged with endeavoring to prove innocent clients they know to be guilty, especially by raising technical defenses. Here Jackson distinguishes law from morality while preserving law's relationship to justice and to what Hoffman called "the substantial interests of the community." He argues that "technical rules" have been adopted in order to protect the innocent, that "every science has its forms," and that "it is only through the technicalities of the law that its spirit can be imparted and the understanding reached."[177] So when a lawyer successfully moves to dismiss an indictment due to a technical flaw, "it is not the advocate who clears the criminal. He only performs his duty to his client, leaving the result of his arguments to the judge and jury. Why not throw the blame, if blame there be, upon them? Every avenue of escape for the prisoner should be kept open."[178] By vindicating the rights of the accused, Jackson asserts in a formulation well-worn in contemporary discourse, the liberty of all is protected. Thus, short of "bribery or

---

[175] *Id*. at 380-81.
[176] *Id*. at 381.
[177] *Id*.
[178] *Id*.

trickery . . . or any other sort of meanness, the advocate . . . may honestly and conscientiously . . . labor with all his might to show that the evidence adduced in a given case does not justify conviction."[179]

The final charge Jackson responds to is that the lawyer's strict adherence to the attorney-client privilege often "cheats the law out of its proper victim."[180] Here, Jackson takes a completely client-centered turn, *equating* the lawyer with the client in order to equate any obligation to divulge client secrets with compelled self-incrimination.[181]

The essay closes with strong republican bromides on the dignity and moral rectitude of law and lawyering (and with the invocation of Story's "public sentinel" metaphor quoted at the beginning of this section). That Jackson and Chandler come from such different backgrounds (one is a southerner, a product of the apprentice system and spent more time in public service than law practice, the other is New England gentry, a disciple of the new vision of university law schools, and a renowned trial lawyer) but arrive at such similar conclusions about the ethics of lawyering, suggests the norm of client-centered, ethically neutral advocacy was not an isolated or parochial phenomenon.

Unlike the work of Hoffman and Sharswood, Jackson and Chandler's articles were not addressed to law students, but rather to the profession as a whole. Whether this influenced the strength of their views is difficult to say. However, Timothy Walker, the editor of the Western Law Journal, gives us a glimpse of a republican propagandist who (like Sharswood) reproduced addresses to law students for consumption by a general law audience.

---

[179] *Id*. Like Chandler, Jackson complains that "the law itself is defied and mocked by its own ministers," but he insists that these "usurers and gamblers and sharks and thieves" cannot be used to stigmatize the "whole class as rogues . . . ." *Id*.
[180] *Id*.
[181] *Id*.

c. Timothy Walker: A Middle Position?

Once established in Boston, Chandler never strayed far. Timothy Walker, by contrast, was a native of Massachusetts who, despite deep roots (his family came over on the Mayflower) left for the west after completing a year of study under Joseph Story at the Harvard Law School. (Despite Walker's support of codification, a break from conservative republican doctrine, Perry Miller characterizes him as "the first who carried the message directly from the lips of the master."[182]) He arrived in Cincinnati at the age of 27 in 1830 and apprenticed with a local firm for a year before being admitted to practice.

With a former Ohio Supreme Court Judge, Walker founded in 1833 what later became the Law School of Cincinnati – a private school affiliated with Cincinnati College. And in 1842, a year before he launched the Western Law Journal, he took the bench as judge of the court of common pleas in Hamilton County. Walker is best remembered, though, for his Introduction to American Law (1837) – a compilation of lectures he gave in the law school thatwent through thirteen editions, the last published in 1905.[183]

The ambitions for the Western Law Journal were "to gather from, and diffuse among the Lawyers of the West, whatever is most worthy of note in their profession. To this end, they are, one and all, invited and urged to furnish Reports of interesting Cases, Notices of new Law Books, and Biographical Sketches of deceased members of the

[182] P. Miller, LEGAL MIND 239.
[183] DICTIONARY OF AMERICAN BIOGRAPHY 363; P. Miller, LEGAL MIND 238-39.

profession."[184] It appears, however, that Walker was the main provider for most of the life of the journal. He "performed nearly all the editorial labor" until another editor, M.E. Curwen, came on to assist in the final three years of the journal's ten year run.[185] When the journal finally closed, it was not merely the inadequacy of subscriptions (the journal rarely brought in more than the costs of publishing), but the desultory response of the western bench and bar to his invitation to "furnish matter" for the journal's pages.[186]

The Western Law Journal contains at least three works reprinted from Walker's efforts in law teaching.[187] His essay, *Ways and Means of Professional Success*, taken from a valedictory address to the graduates of the Law Class of the Cincinnati College on March 2, 1939, is exemplary.[188] Thematically, Walker mounts a defense of client-centered, ethically neutral advocacy that is both more subtle and less strident than those of Jackson and Chandler. The address also reflects a fascinating concatenation of republican values (law as a scientific discipline requiring virtuous, hard working experts) and progressive positions such as the dire need for law reform and a critique of lawyers' self-interested opposition to it. Walker's normative conception of the role thus imagines the lawyer as a public sentinel, but on terms that place him between Sharswood, on the one hand, and Jackson and Chandler on the other.

Walker suggests three "principle requisites for professional success" to his students: a "competent knowledge of the law, strict attention to business, and inflexible

---

[184] *Prospectus of the Western Law Journal*, 1 WEST. L.J 1 (1843).
[185] *Editor's Letter*, 10 WEST. L.J. 430 (June 15, 1853).
[186] *See id*.; *The Western Law Journal: Shall it Be Continued?*, 10 WEST. L.J. 522 (1853).
[187] These include *Advice to Law Students: being the substance of a valedictory address to the graduates of the Law Class, in the Cincinnati College*, delivered March 3, 1838, 1 WEST. L.J. 481 (1844); and excerpts from the INTRODUCTION TO AMERICAN LAW interlineated in rebuttal form to *The Morals and Utilities of Lawyers*, a lecture by one John T. Brooke, D.D., Rector of the Church of Christ, Cincinnati, before the Philomathesian Society of Kenyon College, 7 WEST. L.J. 1 (1849). *See also* P. Miller, LEGAL MIND 240.
[188] 1 WEST. L.J. 542 (1844).

integrity."[189] Professional success, he admonishes, is not defined in financial terms,[190] but rather in the reputational rewards incident to "high eminence at the bar."[191] Money is significant only insofar as it helps ensure a lawyer's security and "independence."[192] Moving to the first principle of success, Walker argues that competence is only to be "acquired by vast labor. Our profession," he continues, "allows no borrowed capital. We must ourselves create the stock we trade upon; not by hand-work, but by head-work; long continued, unremitted head-work. . . . [Y]ou could not have selected a profession requiring more laborious research."[193]

Even so, Walker insists, knowledge of the law is insufficient by itself to guarantee success. The lawyer must also be devoted to his clients. "The most learned lawyer in the world would not get business, if he did not attend to it. The question with the client is, not who knows the most law, but who will manage the cause best; and, all other things being equal, he will manage a cause the best, who devotes the most attention to it."[194] A good lawyer "should be able to anticipate and meet every question of fact and law which can possibly arise in the progress of a trial. Otherwise he will find himself drifting in the dark without rudder or compass."[195] Here Walker nods to the republican project of separating lawyers from political ambition, adding that effective, client-centered service demands that lawyers "must be nothing but lawyers. . . . [L]aw must be your exclusive

[189] *Id*. at 548.
[190] *Id*. at 542 ("we should hardly call him a successful lawyer, who merely drudged for his daily bread").
[191] *Id*. at 543.
[192] *Id*.
[193] *Id*. at 544.
[194] *Id*. at 545.
[195] *Id*.

pursuit."[196] She is "a jealous mistress," and "professional and political success rarely go together."[197]

Knowledge of the law and dedication to one's clients must be supplemented with unflagging integrity. "I know of no profession," Walker argues, "in which success depends so much upon public confidence; and nothing but the strictest integrity can secure this confidence."[198] Here Walker makes his strongest endorsement of moral activism, asserting that at least in the context of client counseling (an aspect of the role ignored by Chandler and Jackson) the lawyer's "opinions should not only be learned, but honestly given. . . . Such a course will gain ten clients where it loses one, and thus virtue will literally be its own reward."[199]

Walker then moves to the question of litigating for an unjust cause. He dismisses public criticism on this point as "a libel upon us,"[200] but his position is mixed, both anticipating the epistemological caution of Sharswood and retreating a bit from the normative conclusions of Chandler and Jackson:

> When a client has a bad cause, shall we prosecute it for him? This is a question which each of you must make up his own mind upon, for it will often arise. After much reflection, *I have arrived at the conclusion, that a lawyer is not accountable for the moral character of the cause he prosecutes, but only for the manner in which he conducts it*. If he does no more than present the case to the Court and the jury in the most favorable light, without falsehood, deception or misrepresentation, it seems to me that he only discharges his duty to himself, his client, and the community, and co-operates in promoting the great ends of justice.[201]

---

[196] *Id*.
[197] *Id*. at 545-46; *see also id*. at 546 ("I would rather stand well even in a county Court, than be at the very head of stump politicians. And had I the most burning thirst for fame, and the power to choose what kind it should be, I would be a Mansfield rather than a Pitt, a Marshall rather than a Jefferson.").
[198] *Id*. at 546.
[199] *Id*. *See also id.* at 547 ("Make it an invariable rule, therefore, never to advise a man contrary to your own convictions.").
[200] *Id*. at 546.
[201] *Id*. at 547 (emphasis added).

Moral activism regarding a client's ends, on the other hand, "would make lawyers their clients' conscience-keepers, and require them to prejudge a cause by declining to undertake it. The result would be that a questionable case would find no advocates; and thus a cause is decided before it goes into Court. This reasoning may be fallacious, but it has satisfied my own mind."[202]

With Walker then, we see a more rigid distinction between the lawyer's moral accountability for the ends served and the means used.[203] All three role defenders repudiate chicane and what Walker calls "the rascally maxim, that every thing is fair in litigation,"[204] but, Walker appears more categorical. As he elsewhere emphasizes: "[Clients] have purchased your services, but not your consciences. You are not responsible for the goodness of their cause; but you are responsible for the means you use to gain it."[205]

Walker also rejects the notion (embraced by other role defenders) that flaws in the *law* can be used by lawyers to deflect public scorn against them. On Walker's account, lawyers *make law* and are therefore responsible for remedying its defects.[206] Despite the

---

[202] Even where the lawyer has advised the client that he stands on the wrong side of the case, Walker remains client-centered. As he argues in another essay, where the lawyer believes the law to be against his client, he "need not hesitate to act for him" if the client insists on pursuing the matter since "*we are not infallible, and peradventure, the law may turn out to be the other way; or he may have justice on his side, though the law may seem against him; and in either case, he ought not to be cut off from the chances of litigation*." *The Morals and Utility of Lawyers*, 7 WEST. L.J. 1, 11 (1849) (emphasis added). Where the law is with the client, but the lawyer believes "abstract justice" is not, "no principle of moral obligation prohibits me from prosecuting his cause . . . I am not an infallible judge of right and wrong . . . I undertake only to assert his legal rights; and if, in doing so, I make use of no chicanery or deception, I come out of the cause with clean hands. *The question of abstract justice is with him not with me; and I am as much justified in conducting the cause, as the judge is in deciding it for him*." *Id*. at 12 (emphasis added).
[203] The distinction has held. *See* ABA Model Rule of Professional Conduct 1.2.
[204] *Ways and Means of Professional Success*, 1 WEST. L.J. 542, 547 (1844).
[205] *Advice to Law Students*, 1 WEST. L.J. 481, 483 (1844).
[206] 1 WEST. L.J. at 548 ("The law, considered as a science, is far from being perfect. . . . But I would go further, and say, that at this moment, the law is far in the rear of all the other sciences. If you ask who are to blame for this, I answer, the lawyers themselves. They have ever been, and ever must be the chief lawmakers; and for this plain reason, that they alone can know the wants to be supplied.").

"improving spirit" felt "in every other science," he says, the lawyer has heretofore resisted law reform because

> [s]elf-interest . . . prompts him to resist innovation. He feels as if he had a vested right in the very abuses of the law. He has no idea of encouraging that reform, which would place the mere stripling on a level with himself. And when you ask him to change the law, since he alone knows how to do it, he smiles at your simplicity. Will he help to legislate bread out of his mouth? This is asking a little too much. He is willing to help in reforming anything else, but prefers that the law should remain as it is.[207]

Walker thus brilliantly turns the metaphor of legal science – used by conservatives like Story to defend the common law[208] – into an argument for law reform generally, and codification in particular. He simultaneously adds to his basically client-centered conception of the role, a moral obligation to engage in law reform – a move echoed in David Dudley Field's early writings[209] and imported into what Robert Gordon has called the "schizoid" concept of lawyering when the bar turned away from civic republican ideals.[210]

2. The Literature of Moral Exhortation

Walker, Jackson and Chandler all offer robust defenses of client-centered, ethically neutral lawyering from *within* the conceptual framework of civic republicanism.[211] Others can be added to the list. For instance, Samuel D. Parker, a Commonwealth's Attorney for Suffolk County in the1830s , is reported to have offered in

---

[207] *Id*. at 548.
[208] *See* P. Miller, LEGAL MIND 184-85.
[209] *See* Field SPEECHES, WRITINGS Vol. 1.
[210] Gordon (1988) 22; (1984) 65; (1983) 99.
[211] *Cf.* Charles P James, *Lawyers and Their Traits, An Address Delivered Before the Law School of the Cincinnati College*, September 12, 1851, 9 WEST. L.J. 49 (offering the only thoroughgoing Jacksonian critique of the profession outside the discourse of republicanism I found; arguing, interestingly that open access to law practice will reform lawyers by bringing the standards of common morality into the profession).

trial a role defense nearly as strong as Lord Brougham's.[212] But the work of Chandler, Jackson and Walker is sufficient to undercut the core of the declention thesis – that serious, sustained defenses of the adversary ethic do not emerge until lawyers professionalize and become wedded to the rise of corporate capitalism in the late nineteenth century.

Nevertheless, it is important to note that the magazine literature does not unequivocally support client-centered service and ethical neutrality. There is a literature which at least roughly tracks Hoffman's and Sharswood's civic republican exhortation to moral activism. A detailed review of this literature is unnecessary to support the thesis of this paper,[213] but a few synthetic comments are in order.

Those who supported a morally activist ideal were, on balance, (a) more emphatic thatdeception and sharp practice bringing the profession into disrepute were caused by ignorance and knavery among lawyers who either entered the profession under newly reduced standards for admission or trained in the presumptively defective apprentice system,[214] (b) more likely to oppose law reform, especially codification,[215] and (c) less

---

[212] Parker is quoted as arguing:

> It is the duty of a counsel not to be a witness against his client, either by work or act. Even if his client should tell him he is guilty, he is bound not to take it to be so; for his client, through ignorance of the law, or the nature of the evidence, requisite to warrant a conviction, may suppose himself guilty, under the law, when in fact he is not, although he may have committed some great moral wrong. Even if the counsel be morally convinced of his client's guilt, he is not to act on that presumption, for he, in his turn, may also be mistaken in the weight of the testimony, and some principle of law involved in the case. Every man is to be tried by the law and the evidence, and the court and the jury are the only judges, known to the law, upon those two points, and not the counsel. His duty is simply to strive to lead the jury to a verdict of 'not guilty;' and if he misleads them to such a verdict, the responsibility is theirs, not his."

Anonymous, *The Legal Profession*, in Michael H. Hoeflich, THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES 216 (1988).

[213] I leave that project to role critics who would rehabilitate the declention thesis.

[214] *See, e.g.*, Story, in P. Miller, LEGAL MIND 183; Quincy, in P. Miller, LEGAL MIND 215; Richardson in P. Miller, LEGAL MIND 231-32; Isaac Parker, *Inaugural Address*, 3 N. AM. REV. 11, 15 (1816); Anonymous,

likely to express epistemological doubts about lawyers' ability to determine the justice of their clients' ends.[216] At the same time, on the specific question of a lawyer's right/duty to represent an unjust cause, no one offered a theory of moral activism as aggressive and detailed as Hoffman's.[217] Indeed, once it is acknowledged that some civic republican elites also framed client-centered, ethically neutral advocacy as a mode of lawyering *consistent* with "dignity," "honesty," "integrity," "good conscience," "justice" and the vision of the lawyer as a "public sentinel," it becomes considerably more difficult to say whether those who offered bromides about the laywer's duty to do justice would have disagreed, for instance, with Walker's balanced defense of the adversary ethic. This is especially so with respect to law school orators. Although Walker and Sharswood demonstrate that close reasoning on specific ethics questions was possible in such a setting, there appears to have been an equally strong trend of bold but vague exhortation.

To take but one example, in an address before the Law Academy of Philadelphia at the opening of classes in 1830, John M. Scott, a vice-provost of the school, gives a paradigmatic lecture on the republican lawyer-statesman ideal.[218] All thecentral elements are present: law as a science demanding long, diligent toil; lawyers as a governing elite, dominating not only law practice, but the bench and political offices; and a demand for perfect integrity in lawyering to forestall public obloquy and meet the lofty

---

Study of the Law (1837) in Hoeflich, GLADSOME LIGHT 203; L.J. Bigelow, *The Romance and Reality of the Law*, 58 THE KNICKERBOCKER 97, 105-106 (1861).

[215] *See generally* P.Miller, LEGAL MIND.

[216] *See* Simon Greenleaf, *A Discourse Pronounced upon the Inauguration of the Author as Royall Professor of Law, in Harvard University*, August 26, 1834, 13 AM. JURIST 119 (1835); *Review of T. Walker's Introduction to American Law*, 24 THE CHRISTIAN EXAMINER 221 (1838); Bigelow, 58 THE KNICKERBOCKER at 107.

[217] At least in the tone of exhortation, Simon Greenleaf comes the closest. *See* GLADSOME LIGHT (1988) 134.

[218] The address is reprinted in 13 HAZARD'S LAW REGISTER OF PENN. 337 (1833). Other examples could be given. *See, e.g.,* Story's orations in P. Miller, LEGAL MIND.

obligations of benevolent governance over "the ultimate destinies of [the] people."[219] Moral exhortation pervades the piece,[220] and yet Scott offers Lord Brougham's defense of Queen Caroline as a "towering pinnacle" of professional achievement.[221] He appears to have believed the defense was just, but he makes no reference to Lord Brougham's maxim, which every other commentator I have found, including staunch defenders of the adversary ethic, go out of their way to distinguish if not denounce.[222] Moreover, when Scott actually specifies the lawyer's ethical obligations, we find a broad endorsement of "abstinence from all falsehood" and professional courtesy toward courts and opposing counsel, followed by a collection of principles couched in a battlefield metaphor:

> Your profession is a manly and honorable profession. Fair argument, sound logic, and dauntless truth, intrepidity which fears no frown, independence which courts no favor, are its manly and honorable weapons: and he is a recreant to the order, and unworthy of its emblazonry, who enters its listed fields with less noble instruments of warfare.[223]

---

[219] 13 HAZARD'S REGISTER OF PENN. 337 (1833).

[220] *See, e.g., id*. at 338 ("Pursued by an upright and honorable mind, [the profession] frowns upon crime – it spurns at baseness – it abhors fraud – it advocates pure morality – it upholds truth – it illustrates virtue. In the grasp of the unworthy intellect or a depraved heart, it becomes the instrument of oppression – the pander of vice – the patron and partaker of crime"); *id*. at 340 ("The law emphatically demands integrity of conduct and purity of morals from its worshippers. How gross the inconsistency, should they whose whole study is to know how to prescribe the rule of right to others, be found themselves to be transgressors of that rule. . . . Endeavor to be as spotless as your erring nature will permit . . . .").

[221] *Id*. at 338.

[222] *Id*. *See also* 2 WEST. L.J. 136-37 (quoting David Dudley Field's rejection of Lord Brougham's maxim; "a more revolting doctrine never fell from any man's lips"); 5 MO. L. RPTR. 194-95 (Chandler, while defending adversary ethic "do[es] not assent to Lord Brougham's doctrine, that an advocate is bound to defend his client 'by all expedient means' – 'to protect him at all hazard and all cost to others' – to disregard 'the alarm, the suffering, the torment, the destruction which he may bring upon all others.' We do not defend the practice of attacking the characters of innocent witnesses to destroy the force of their testimony."); 12 MO. L. RPTR. 551 (quoting English editorial that "a more detestable doctrine than this, or one that, if generally acted on, would more surely break down the whole framework of society, it is impossible to imagine"); Anon., *The Legal Profession* (1838) in GLADSOME LIGHT 216 (characterizing Brougham's maxim as implausible). *But see* 1 N.Y. LEGAL OBSERVER 112 (reprinting the maxim without comment). It also worth noting that Lord Brougham succeeds in the trial by a diversion from the merits – by threatening to reveal a secret that would destroy the King. That is, in fact, the immediate object of his maxim – to convey the threat. Again, Scott's praise for Brougham's conduct can be read to endorse such a trial tactic.

[223] *Id*.

These principles surely preclude chicane, deception and taking advantage of an adversary's tactical mistake, but they bar taking a case of doubtful justice only by inference. Would holding the prosecution to the standard of proof in a criminal case amount to perpetrating a falsehood on the court if the client has confessed? Scott does not say.[224]

IV. Lifting the Veil of Elite Discourse

A. Elite Practice

The robust debate among civic republican legal elites about what it meant to be a public sentinel opens but, does not ultimately answer, the question whether moral activism or client-centered service dominated the profession. The link between civic republican ideology and morally activist lawyering (heretofore assumed an exclusive link) does not hold. But in order to move the analysis beyond the propagandistic defenses and ideal conceptions of lawyering propounded in the nineteenth century discourse of legal elites, we need to inquire more systematically into the nature and conditions of law practice. And we need to measure the results of these inquiries against the larger body of literature on nineteenth century law and legal change. However, just as an idealistic discourse cannot be read as representative of conduct on the ground in a broad profession, examination of law and law practice cannot be read, in any simple way,

[224] We have a rather obscure clue from his advice that young Pennsylvania lawyers should model their practice on the state's older generation of heroic lawyer-statesmen. He includes Thomas Addis Emmet, a lawyer who was apparently quite well-known for relying on *excessive* zeal in cases of doubtful merit. As Emmet's biographer observes: "His zeal sometimes clouds his judgment, and obscures the perceptions of his mind. In the worst of causes – in cases where the merits were palpably against him, I have known him struggle with the same ardor and assurance as though he was perfectly persuaded of the justice of his suit. This has diminished his influence in our courts. They have imbibed a habit of listening to his legal doctrines with suspicion." Quoted in *Thomas Addis Emmet,* 4 AM. JURIST 116, 125 (1830). G Edward White is more generous, noting that Emmet's "eloquence occasionally led to his undoing." White, MARSHALL COURT 213.

to reflect the normative conceptions of lawyers thus engaged.[225] Thus my purpose in this section is to twofold: first, to cautiously gesture in the direction of practice and legal change to suggest that those who defended the adversary ethic were not out of step with observable conduct in law practice; second, and perhaps more importantly, to demonstrate that further work is necessary before broad normative conclusions of the kind made in role criticism can be drawn.

G. Edward White's biographical accounts of "prominent lawyers before the Marshall Court" offers a window into some of the adversarial habits and styles of the lawyer statesmen of the period. For instance, Littleton Tazewell, a prominent admiralty lawyer from Norfolk, Virginia, was known for "an intensity and a competitiveness, and a seemingly greater interest in the mechanics of an argument than in the intrinsic rightness of the proposition he was arguing."[226] He apparently "hated to lose,"[227] so much so that, as a contemporary eulogist observed, he scrupulously studied and used his force of personality to manipulate jurors: Tazewell "either knew himself or learned from others the calling of every juryman; and . . . if he saw a dangerous man among them he . . . made the man believe that his standing in his own business depended upon his bringing a verdict in [Tazewell's client's] favor."[228] And when Justice Story wrote a draft opinion in an important admiralty case characterizing one of Tazewell's technical defenses as "subtle and novel," Tazewell vehemently objected to the slight – writing Marshall and forcing a revision. As White recounts:

---

[225] *See* Robert W. Gordon, *The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870-1910*, in Gerald W. Gawalt, THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 55-57 (1984) (discussing interpretive problems linking lawyers' conduct to their normative discourse); Gordon (1988) 49 (noting "fuzziness of the concepts and the difficulties of getting 'hard' or sufficient evidence . . . relating to independent counseling").
[226] White, MARSHALL COURT 215.
[227] *Id*. at 226.
[228] *Id*. at 219.

> Tazewell associated the phrase "subtle and novel" with efforts, as he put it [to a friend], to "put the people upon their guard against me" by the insinuation that "I am very capable of using a subtle argument upon any subject." An old charge of sophistry and artifice had recurred, and the charge had struck deep. "All this I heed not" Tazewell said [to his friend]. One suspects otherwise. One suspects that Tazewell feared that his opponents might have uncovered something fundamental about his character, and he was determined, in his proud, bluff fashion, to set things straight.[229]

Tazewell is thus a complex figure. While Story's slight has hints of a political stratagem relating to a rift between Tazewell and the Adams administration over matters of foreign policy underlying the case before the Court,[230] White agrees that the slight had merit, at least in the eyes of Tazewell's peers. But one can read the peer criticism either as lamenting a failure of integrity on Tazewell's part, as a failure to maintain the credibility necessary to effectively serve his clients, or as a flaw some of his peers played upon for litigation advantage. Only the first reading of the criticisms reflects a morally activist ideology.

And the critic who most clearly paints Tazewell's zeal as a moral flaw, William Wirt,[231] is equally open to the charge. Wirt was a huge figure in the early Supreme Court bar, "arguing 170 cases between 1815 and 1835," and participating in "all the great Marshall Court constitutional cases . . . as well as other significant private cases."[232] He served as Attorney General from 1817 to 1829, and was "as famous as any full time

---

[229] *Id*. at 225.

[230] Tazewell was representing the Spanish government regarding a ship it had commissioned "which had been captured by an American Warship [in 1822] and brought to Charleston for possible condemnation. The Spanish government sued in federal district court to prevent condemnation and to recover damages." *Id*. Tazewell's "principle policy argument" challenged the administration's position on Latin American affairs, and, White argues, Story was sympathetic to the administration. *Id*. at 224. The case is The Palmyra, 12 Wheat. 1 (1827).

[231] *Id*. at 214-15 ("His fault seemed to consist in the abuse of his strength; in that laxity of colloquial morals . . . which led him to triumph, with equal pleasure, in every victory, right or wrong.") (quoting Wirt).

[232] *Id*. at 264.

practitioner in the nation."[233] Like other young lawyers, however, he first made his reputation by taking criminal cases throughout Virginia. In 1806, a year before he was called to help George Hay in the famous trial of Aaron Burr, Wirt was asked to take on the defense of a man charged with murdering Chancellor Wythe, the patriarch of the Virginia legal profession.[234] The defendant was Wythe's nephew, widely assumed to have poisoned the Chancellor in order to accelerate his inheritance. The case is therefore prototypical of those in which Hoffman's *Resolutions* prescribe "no special exertions from any member of our pure and honorable profession."[235] Wirt not only accepted the defense but won an acquittal by successfully excluding critical evidence.[236]

What makes Wirt's conduct of the case so interesting is the mix of motives underlying his decision to take it and the fact that the incident later found its way into the law magazines. In a letter seeking advice from his wife, Wirt's concerns about the evidence of guilt, the opinion of polite society, and the possibility of "moral or professional impropriety," are blended with keen awareness that the case would help establish his reputation in Richmond, where he had just moved after years spent practicing in more rural parts of the state.[237] Thus although Wirt appears to have been

---

[233] *Id*. at 262.

[234] Charles Warren reports that Wythe was "[b]orn in 1726, admitted to the Bar in 1756, Professor of Law in 1870 in the College of William and Mary [the nation's first law professorship], sole chancellor of the Court of Equity in 1788, the legal teacher of Jefferson . . . Spencer Roane . . . John Breckenridge, John Wickham, H. St. George Tucker [who inherited Whythe's chair at William and Mary and authored the famous American edition of Blackstone's Commentaries], L.W. Tazewell, William Mumford and Goerge Nicholas." AMERICAN BAR, 47, 344.

[235] II COURSE 756.

[236] *See* John P. Kennedy, 1 MEMOIRS OF THE LIFE OF WILLIAM WIRT, ATTORNEY GENERAL OF THE UNITED STATES 140-44 (1850).

[237] The letter reads in part:

> What shall I do? If there is no moral or professional impropriety in it, I know that it might be done in a manner which would avert the displeasure of every one from me, and give me a splendid debut in the metropolis. Judge Nelson says I ought not to hesitate a moment to do it; that no one can justly censure me for it; and, for his own part, he things it highly proper that the young man

more concerned about taking a case of doubtful justice than Tazewell, the letter suggests those concerns may well have been overcome by personal ambition and belief in the adversary ethic, rather than the presence of arguably exculpatory evidence. The letter is reprinted with the commentary of Wirt's biographer in the April, 1850, issue of the Monthly Law Reporter.[238] The editor closes by noting that Wirt obtained the acquittal by invoking a rule of evidence to exclude incupating witness testimony: "We leave our readers to criticize his conduct . . . [but we] remark that we have never been able to ascertain that Mr. Wirt's standing as a man of honor and integrity was tarnished in the least by his conduct in this instance."[239]

The practice of prominent lawyers outside the hyper-elite class of Supreme Court advocates,[240] also reveals commitment to adversarial advocacy. Rufus Choate, an orator second only to Webster and an incomparable trial lawyer,[241] presents a fascinating concatenation of staunch political conservatism, civic republican legal ideology, and

---

> should be defended. Being himself a relation of Judge Wythe's, and having the most delicate sense of propriety, I am disposed to confide very much in his opinion.

MEMOIRS 143. Wirt's biographer describes it as "a case of conscience" because, at least for the moment, Wirt was financially stable -- "no longer impelled by hard necessity" to take every case that came his way. *Id*. at 140. He also notes that the Burr trial, which sealed Wirt's national reputation even though he lost, was repeatedly derailed by sharpness, "asperity" and personal acrimony between the lawyers – prompting Justice Marshall to reprimand both sides. On the misconduct, see *id*. at 154, 160. For the description of the trial see *id*. at 149-90.

[238] *Kennedy's Life of William Wirt*, 12 MO. L. RPTR. 613, 622-23 (1850) (ed. Stephen H. Phillips).

[239] *Id*. at 623.

[240] Supreme Court advocates besides Tazewell and Wirt are surely worth exploring. *See* White, MARSHALL COURT 230-41 (discussing Luther Martin, one of the lawyers for Aaron Burr, his "tendency to personalize his advocacy," and his "fierce loyalty to his clients, however unpopular their status"); *id*. at 267- 89 (discussing Daniel Webster, "the most famous, the most controversial, and perhaps the most charismatic of all the leading Marshall Court advocates"; noting that Webster often failed the ideal of independence "attempt[ing] to trade his political influence for financial prerequisites . . . [and] gravely profess[ing] the absence of a financial or personal interest in issues where an interest clearly existed"; concluding that "[*i]t is perhaps a telling commentary on the legal and political professions that Webster's craftiness, relentless ambition, prevarication, and braggadocio rewarded rather than hampered him as a politician.*") (emphasis added). *See also* Robert W. Gordon, *The Devil and Daniel Webster*, 94 YALE L.J. 445, 454-60 (1984).

[241] Perry Miller describes him as "the most successful pleader of his day." LEGAL MIND 258.

zealous, ethically neutral, client-centered advocacy.[242] In his capacity as an orator for Whig politics and a critic of law reform and Jacksonian incursions on the legal profession, Choate equated the bar with conservatism and conservatism with patriotism.[243] In an address at Harvard Law School in 1845, for instance, he denounced codification and Jacksonian reformism:

> We need reform enough, Heaven knows; but it is the reformation of our individual selves, the bettering of our personal natures . . . this is what we need – personal, moral, mental reform,-- not civil – not political! No, No! Government, substantially as it is; jurisprudence, substantially as it is; the general arrangements of liberty, substantially as they are; the Constitution and the Union, exactly as they are, -- this is to be wise, according to the wisdom of America.[244]

Law, he continued, is not the "actual and present will" of the majority.[245] "It is not the offspring of will at all. It is the absolute justice of the State, enlightened by the perfect reason of the State. That is law."[246] Choate was prefacing an argument for adherence to common law adjudication, which he depicted as a "mighty and continuous stream of experience and reason, accumulated, ancestral, widening, and deepening, and washing itself clearer as it runs on . . . ."[247] The "grand and prominent public function of the American Bar," then, is none other than "conservation. . . . We find our city of marble, and we will leave it marble."[248] Choate concludes the address with a civic republican

---

[242] *See, e.g.*, Matthews, CHOATE 71 (describing Whig political philosophy)
[243] P. Miller, LEGAL MIND 260-61.
[244] Choate, *The Position and Functions of the American Bar, as an Element of Conservatism in the State: An Address Delivered Before the Law School in Cambridge*, July 3, !845, reprinted in P.Miller, LEGAL MIND 258, 263-64 (1962).
[245] *Id*. at 264.
[246] *Id*.
[247] *Id*. at 266.
[248] *Id*. at 271-72. *See also* Jean V. Matthews, RUFUS CHOATE: THE LAW AND CIVIC VIRTUE 151 (1980) (noting that Choate had "an exalted conception of the legal profession as almost an order of chivalry in the service of the state").

exhortation to disinterested virtue: "On behalf of clients, often; on behalf of the law, always."[249]

And yet in his lively practice, Choate was both reviled and revered for zealous advocacy. A biographer observes that, "in whatever kind of case, his devotion to his client was absolute; for the length of the trial he seemed almost to absorb himself in his client."[250] And in jury trials he was relentless:

> [S]o complete was his command of the jury, it was said that while he practiced in Salem, no client of his was ever convicted in a criminal case. This was not an entirely enviable reputation to have. "People began to say that he was the scourge of society, that behind his aegis crime could flourish uncontrolled." It was the beginning of that tincture of mistrust mixed with admiration that would later earn him the slightly dubious sobriquet, "the wizard of the law."[251]

He also showed no hesitation to attack the character of opposing witnesses. "The aim was to dispose of the evidence by destroying the credibility of the individual."[252] Thus in an insurance case, he deftly undermined the unfaltering, and by all lights, truthful testimony of a witness by means of defamation:

> [H]e could not budge the testimony of one witness even after a day-long cross-examination, but he did bring out the man's general "bad character" and reputation and dwelt at length on this in his closing remarks to the jury. "Do you suppose, gentlemen, that in this vast violation of all the sentiments and virtues that bind men together in civil society, *veracity* alone would survive in the chaos of such a character?"[253]

Although courteous to opposing counsel, he regularly attempted to portray the opposing party as a villain, and (however much of a stretch it required) to portray his client in a "tragic and poetic" light.[254] "Above all, he relied on the fact that the burden of

---

[249] P. Miller, LEGAL MIND 272.
[250] Matthews, CHOATE 153.
[251] *Id*. at 23.
[252] *Id*. at 156.
[253] *Id*.
[254] *Id*.

proof must lay with the prosecution." So he was a master of "defense by alternative hypothesis."[255] In a famous murder case, for example, in which Choate's client was accused of slitting the throat of his mistress "in a brothel where they had been living together,"[256] Choate hypothesized that "[s]uicide is the natural death of the prostitute" and, alternatively, that if his client had committed the crime, he must have been sleepwalking.[257] The evidence against his client was largely circumstantial, but, just for insurance in his closing, he invited jury nullification by reading from an article against capital punishment and reminding the jury that the governor could not grant clemency in cases of this kind. The jury acquitted.[258]

Can we call this lawyering on behalf of clients, often; on behalf of the law, always? The converse seems more plausible. In his law practice, Choate exemplifies a client-centered, ethically neutral norm at least as strong as that advanced by Chandler and Jackson.[259] What did Choate mean, then, by placing the duty to law over the duty to client? Did he mean, in the language of modern ethics doctrine, zealous client service *within the bounds of the law*? This seems singularly unlikely given the tone of his address at Harvard, yet his practice seems to stretch even the modern doctrine.

As Choate's practice shows, once the veil of elite discourse on the role is lifted, a very complex picture of individual motivation and practical approaches toward the role emerges. Choate's public reputation indicates thathis own litigation conduct was among

---

[255] *Id*. at 157.
[256] *Id*.
[257] *Id.* at 158.
[258] *Id*.
[259] On the rare occasion when Choate broke from ethical neutrality, it was apparently in service of political principles. *See id.* 214-15 (declining to represent a fugitive slave on grounds of positional conflict in 1854); *cf. id.* 160 (describing Choate as "uneasy" and diminished in zeal during brief stint as prosecutor).

the causes of popular distrust and animosity toward lawyers.[260] And yet he was a far cry from the ignorant, untrained upstarts republican legal elites like him tended to blame for bringing the profession into disgrace. So his practice seems all the more inconsistent with his conservative pronouncements on the obligations of the profession. Did Choate see a conflict? If so, did he embrace it or try to suppress it? We cannot know for certain – though he appears, at least, not to have flagged in practice when criticisms were made.[261] Matthews, on the other hand, suggests he had "a personality for which dissolution was always a possibility."[262]

But whatever Choate's views on the matter, the apparent tension between his status as an exponent of civic republican ideology and his well-documented practice of the adversary ethic, suggests that we need to look much more closely and think much more carefully about what follows in legal ethics from a commitment to civic republican values. Preliminarily, it appears that, at least in practice,[263] lawyer-statesmen in the civic republican mainstream fell into habits and styles consistent with the adversary ethic. Lay criticism and peer criticism may have had a deterrent effect, but that effect would obviously have been diminished to the extent that elite lawyers felt their conduct in practice actually served civic republican values.[264] Lay criticism could then be dismissed as a misconception of the demands of the lawyering role and peer criticism could be

---

[260] *See, e.g., id*. 158-59 (describing trial in which witness for the prosecution claimed he was "persuaded into the crime by Choate's client, who had assured him that if anything went wrong 'there was a man in Boston named Choate and he'd get us off if they caught us with the money in our boots'").

[261] Standard biographical sources are scarce in Choate's case. He was not, Matthews notes, a letter writer, nor did he attempt any schematic writings – "his ideas are scattered, as they were communicated, in various speeches and orations." *Id*. at 3. And he may have won a war of attrition after all, or at least his supporters were not shaken in their faith. When he passed away in 1859, "Boston hung its flags at half mast and sounded minute guns in mourning." *Id*.

[262] *Id*. at 5.

[263] I have addressed the normative discourse in Section III.

[264] An good example is John Adams' well-known defense of British soldiers involved in the Boston Massacre. *See* L. Kinvin Wroth & Hiller B Zobel, 3 LEGAL PAPERS OF JOHN ADAMS 1 (1965); John Phillip Reid, *A Lawyer Acquitted: John Adams and the Boston Masacre Trials*, 18 AM. J. LEG. HIST. 189 (1974).

dismissed either as internal dissonance about the range of role conceptions consistent with civic republican values, or, as we saw with Tazewell, strategic efforts to diminish an able competitor's credibility.

B. "Rank and File" Practitioners

Stepping back from elite practice altogether, there is evidence to suggest that "rank and file" lawyers adhered to a client-centered ethic in practice even as they debated the proper normative conception of the role. Frances McCurdy's study of the art of oratory in Missouri frontier law practice emphasizes the public spectacle of trials and the lawyer's reliance on showmanship, tactical prowess, pandering to the jury, ruthless or ridiculing cross-examination, and "flay[ing] each other with sarcasm and invective."[265] Vigorous protection of the right to a jury trial under Missouri law meant that even fairly trivial disputes were often litigated to trial. Thus,

> [s]kill in appealing to jurors . . . became highly important to the success of attorneys. Learning the desires and prejudices of each man on the jury, successful pleaders, such as Henry Vorhis of Buchanan County, placed themselves close to the jury boxes and spoke to each man by name as if they relied solely on his decision for justice. John B. Clark ignored the principles of law, but learned the history of every man on the jury, his associations, likes and dislikes, and his peculiarities of temperament, and based his case on that knowledge. The outstanding strength of the pioneer lawyer lay in his ability to stir his listeners to anger, laughter, or tears.[266]

Although there were a few, McCurdy adds, who thrived at the bar without "strategy and pathetic appeals . . . because they knew legal principles and precedents and reasoned

[265] *Courtroom Oratory of the Pioneer Period*, 56 MO. HIST. REV. 7 (1961). On western law practice generally, see Friedman, AMERICAN LAW 163-67.
[266] *Id*. 4-5.

clearly and logically," all "sought to find the method that would win favorable verdicts."[267]

Similarly, Fannie Memory Farmer's study of antebellum circuit-riding lawyers in North Carolina reveals that lawyers often came to blows in the courtroom ("at the conclusion of a bout the judge would fine the offenders and resume court"[268]), that witnesses and parties were often "bullyragged" by opposing counsel, and that because trials were such public spectacles ("great crowds attended court despite the uncomfortable physical surroundings"[269]) lawyers "who put on a good show often attracted more clients than those who practiced in a quiet, dignified manner."[270] Although ethics rules were informal and "lax," Farmer argues that "most lawyers probably felt a certain amount of responsibility toward maintaining reasonably high standards."[271] She doubts, however, that many lawyers reached even the relatively client-centered standard Augustus S. Merrimon worked out in his journal while riding the circuit:

> I do not consider it the duty of a Lawyer to bewilder a Jury of the Court and lead their minds astray. This is not what a lawyer ought to do, and I consider it highly dishonorable for him to do it. It is every lawyer's duty to seek after the true and just rights of his clients, and to present his case in the most forcible light to the court and jury and he has not done his duty until he has done this; but it is not part of the duty of the lawyer to assist a scoundrel at law or in regard to the facts and whenever this is done, the man who does it is to some extent and [sic] accomplice. . . . A lawyer, in the true sense of the term, never studies Chikenery

[267] *Id*. at 8-9, 11.
[268] *Legal Practice and Ethics in North Carolina: 1820-1860*, 30 N.C. HIST. REV. 335 (1953).
[269] *Id*. at 336; *see also id*. at 334 (noting that members of the public "found a favorite means of relaxation in attending trials. The court was the center of activity; most men went – both to see their friends and for the diversion of watching court proceedings. The spectators not only watched the trials, but often indulged in drinking while at court").
[270] *Id*. at 342.
[271] *Id*. at 348.

> [sic] and low cunning. No, a man who is a lawyer, never fears to meet the question and battle face to face.[272]

Roughly comparable habits and views (with the exception of courtroom brawls) can be found in the pages of Daniel Rogers' *New York City Hall Recorder*, one of the few early nineteenth century case reporters to publish accounts of trials.[273] Generally, Rogers reported proceedings from the New York Court of Sessions – trials, mostly criminal, before the Mayor as presiding judge, and the city Aldermen. The court's jurisdiction included both felonies and misdemeanors, and, in 1816, the first year of the reporter, the vast majority of reported cases were jury trials for grand larceny, forgery and passing counterfeit bills, robbery, and obtaining goods by false pretenses. Two murder trials, two bigamy trials and a handful of civil cases were also reported.

Rogers apparently could not resist the temptation, on occasion, to embellish the renditions with biblical references and introductions or conclusions to the actual trial that reprove, admonish or expound upon the moral aspects of the case. Testimony, arguments of counsel and the court's rulings and instructions to the jury are also paraphrased or skipped altogether as often as they are quoted directly. So the reporter is both incomplete and, in places, clearly tendentious, but it nonetheless appears to convey a useful portrait of criminal trial practice in New York City.

Only impressionistic conclusions can be drawn because we do not know what the lawyers knew or believed about their cases, but the reported trials disclose a style of practice that is, by and large, client-centered. Defendants who appear, on the face of the

---

[272] *Id*. at 349; *see also id*. at 349-50 (quoting a more moralistic standard article arguing that "the good advocate was one who would not plead a cause if 'his tongue must be confuted by his conscience'").
[273] *See* Friedman, AMERICAN LAW 326 ("With few exceptions, official reporters contained only appellate opinions. Occasionally, newspapers covered important or lurid trials; a few trial transcripts appeared as pamphlets."); *see also* Bloomfield, AMERICAN LAWYERS 73 (noting that Rogers' *Recorder* "reported many municipal court decisions not ordinarily available in printed form"; also noting that William Sampson, a principal in the codification movement, practiced there for a time).

facts presented, guilty, were nevertheless represented with vigor and sometimes acquitted[274]; and lawyers not only pressed for technical legal defenses,[275] they used tactical devices such as attacking the character of witnesses and playing to the sympathies and prejudices of the jury.[276] At the same time, in four cases in 1816, the defense lawyer threw up his brief during trial when confronted with strong proof by the prosecutor.[277]

---

[274] *See, e.g.*, Rhodes' Case 1 N.Y. City Hall Rec. 1 (1816) (acquittal from forgery charge where defendant sought change for a badly altered ten dollar bill and fled when it appeared tavern owner had gone for a watchman); Traux's Case, 1 N.Y. City Hall Rec. 44 (1816) (acquittal from grand larceny charge where defendant who admitted stealing silver spoons and a dressing case was "a young man of property and respectable in his connections in the city of Albany . . . [whose] senses had been impaired, and his moral faculties totally ruined by the excessive use of ardent liquor"); Hill's Case, 1 N.Y. City Hall Rec. 57 (1816) (acquittal from charge of receiving stolen goods where defendant, a pawnbroker disclaimed knowledge goods were stolen); Blake's Case, 1 N.Y. City Hall Rec. 99 (1816) (acquittal from murder charge where husband, accused of stabbing wife in the chest, found with blood on his shirt, fingernails and arms, and a bloody knife in his pocket).

[275] *See, e.g.*, Rhodes' Case, 1 N.Y. City Hall Rec. 1 (1816) (defense counsel arguing for strict construction of forgery statute and attacking indictment for failing to track formal aspects of statute); Ridgway's Case, 1 N.Y. City Hall Rec. 3 (1816) (same; larceny); McNiff's Case, 1 N.Y. City Hall Rec. 8 (1816) (motion to dismiss indictment on ground that prosecution witnesses were convicted felons and accomplices to the crime, therefore incompetent to testify; denied); Jackson's Case, 1 N.Y. City Hall Rec. 28 (1816) (objection to introduction of defendant's confession to victim upheld in grand larceny case where confession was obtained in expectation of favor; victim promised not to turn in the defendant); Lazarus's Case, 1 N.Y. City Hall Rec. 89 (1816) (nolle prosequi entered after defense counsel offered seven technical defenses); Vosburgh's Case, 1 N.Y. City Hall Rec. 130 (1816) (rejecting as too formal, defendant's motion for acquittal on ground that the name on a bad check varied by two letters out of six from the name stated in the indictment); Williams' Case, 1 N.Y. City Hall Rec. 149 (1816) (defendant acquitted after successful motion to exclude confession of grand larceny "extorted by fear" in the stationhouse); Sellick's Case, 1 N.Y. City Hall Rec. 185, 188 (1816) (defense counsel in murder trial successfully excluding testimony of black man, who swore he had been freed, on ground he was not in possession of manumission papers and could not be freed by owner's wife under doctrine of coverture). On the prominence and success of technical defenses in criminal cases of the early nineteenth century, see Friedman, AMERICAN LAW 149-52 (defining and discussing "hypertrophy" and "record worship" of appellate judges; arguing that hypertrophy "served the needs of the dominant American male – the self-reliant man . . . supremely confident in his own judgment, but . . . jealous of the power of the state").

[276] *See, e.g.*, McNiff's Case, 1 N.Y. City Hall Rec. 8, 9-10 (1816) (sustained character attack on key prosecution witnesses; "M'Donald was only in bridewell [prison] for beating his wife, but this day he has made higher proofs. Betts has two callings; one half the time he *thieves*, and the other half he *witnesses*) (emphasis original); Rilley's Case, 1 N.Y. City Hall Rec. 23 (1816) (defense counsel pleaded with jury in grand larceny case to have sympathy for defendant "a woman with three small children, a stranger in the city, with few friends"); Rothbone's Case, 1 N.Y. City Hall Rec. 26 (1816) (prosecutor's closing argument, in trial against woman for "keeping a disorderly house" – referred to jurors "as fathers, as brothers" and asked "Will you suffer infamy itself, in its most hideous deformity, to stalk our streets? Will you permit women of this description to seduce and lead astray your daughters, your sisters, your female servants, with impunity?"); Spence v. Duffy, 1 N.Y. City Hall Rec. 39 (1816) (civil action for damages for assault and battery where defendant store owner forcibly detained woman who refused to buy linen once defendant had cut it; defense counsel, William Sampson, closed by observing "that it had of late become so fashionable for women to assume the character of suitors in this court, that he was fearful its attention would soon be exclusively confined to the litigations of the sex. He knew in what a melting mood a woman's cause was

These examples – gathered from different strata of the bar, and from different states – collectively support the inference that the various normative defenses of lawyering offered by Chandler, Jackson, and Walker resonated with the styles and habits of practicing lawyers. This is not to say either that client-centered, ethically neutral lawyering dominated practice or that practitioners were free from public and peer criticism insofar they followed that norm rather than moral activism. I argue only that the evidence suggests the norm had firm roots in both law practice and the ideology of civic republican elites. Authors like Chandler, Jackson and Walker were not simply creating a consoling but essentially fictional ideal in response to public criticism of the bar. Rather, their defenses of client-centered lawyering take the form of a partial demurrer, admitting that lawyer's take unjust cases and arguing (in different ways) that this is actually

---

apt to find the jury; that an appeal would be made to their gallantry; and that they would be conjured, in compassion to the tenderness of the sex, to pronounce a heavy verdict against his client; that they knew the way in which shoppers like the plaintiff taxed and fretted the time and patience of industrious dealers like his client."); Hill's Case, 1 N.Y. City Hall Rec. 52 (1816) (of prosecution witness in trial for receiving stolen goods defense counsel said "Look, gentlemen of the Jury, at the foul character of the principal witness . . . the meanest reptile in the creation is an Angel of light compared with this abandoned profligate. And yet he appears against a respectable citizen, and you are shortly to be called upon to pronounce the defendant guilty from such testimony!"); Goldsby & Covert's Case, 1 N.Y. City Hall Rec. 81 (1816) (prosecution, in trial for forgery, attempted to establish defendants' guilt by association, arguing defendants were arrested and lived with convicts; court ruled inadmissible); Francis' Case, 1 N.Y. City Hall Rec. 121 (1816) (counsel for perjury defendant "poured forth a torrent of invective against the police, unsupported by testimony" in his closing argument until ordered by judge to "confine himself to the evidence"); McDougal v. Sharp, 1 N.Y. City Hall Rec. 73 (1816) (extended, vacuous defense against a civil suit for slander, prompting court to excoriate defense for bad faith); Brigham's Case, 1 N.Y. City Hall Rec. 30 (1816) (court denied motion to postpone trial on defendant's request for time to secure testimony of exculpatory witness; prosecution argued motion was for purposes of delay only).

[277] Rogers adds color to at least one of the withdrawals. In a robbery trial, he reports: "After the disclosure of [adverse] testimony, Dr. Graham, with that honest indignation which naturally arises in the mind of every man at such atrocious villainy, immediately abandoned their defense." Stewart & VanOrden's Case, 1 _ 80 (1816). *See also* Mitchell's Case, 1 N.Y. City Hall Rec. 5 (1816) (defense lawyer withdrew after store clerk's testimony in trial for grand larceny); Decosta's Case, 1 N.Y. City Hall Rec. 83 (1816) (in misdemeanor trial for obtaining property under false pretenses, defense counsel withdrew after conceding "that he had been led to believe that the state of the facts was different from what they now appeared to be" and that he had prepared a defense that would not meet the prosecution's proof); Henry, Palmer & Smith's Case, 1 N.Y. City Hall Rec. 128 (1816) (in trial for highway robbery Rogers notes that "after the introduction of testimony concerning the apprehension of the prisoners in their flight, the prosecution rested the cause, and Price, as counsel for the prisoners, abandoned their defense"); *cf.* Walworth's Case, 1 N.Y. City Hall Rec. 171 (1816) (prosecution dropped bigamy case after own witnesses could not verify defendant's cohabitation with second husband).

consistent with rule of law values and the civic republican conception of the lawyer as a public sentinel.

Conclusion

The goal of this article has been to pierce the myth that civic republicanism in the nineteenth century was exclusively consistent with a morally activist conception of the lawyer's role. This myth has mislead role critics to the conclusion that strong, public defenses of the adversary ethic do not emerge until the bar's late-nineteenth century professionalization project and its concomitant exposure to the influence of corporate capitalism. In light of the rich antebellum discourse on the relationship between client-centered, ethically neutral representation and civic republican ideology, and manifestations of this concept of representation in law practice, the declention thesis must be reconsidered. Perhaps, upon reconsideration, we shall find that the profession was in "decline" well before 1870. Law and lawyers, after all, were already beginning to settle around the interests of a burgeoning commercial and mercantile class in the antebellum period and, as I have shown, the adversary ethic was well established.[278]

But, even if a colorable claim could be made on this front, I am less inclined to extend the declention thesis than I am to explore what it would mean to acknowledge that the profession has *always already* been divided about the definition and justifiability of

[278] *See* Morton J. Horwitz, 1 THE TRANSFORMATION OF AMERICAN LAW: 1780-1860 140-59 (1977) (discussing success of early nineteenth century "alliance between the mercantile classes and the legal profession"), Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967), Harry N. Scheiber, *Federalism and the Economic Order, 1789-1910*, _ LAW & SOC'Y 57 (1975) ("It is now well accepted that the 'style' of judicial law-making, at least before 1860, was predominantly *instrumental*, reflecting pragmatic concern to advance productivity and material growth.") (emphasis added). [[[since all come in 1830s/1840s do role defenders reflect liberal individualist impulses in rhetoric of civic republicanism – see G. Edward White 3, 57, 67 ("crisis in the language of republicanism")???]]]

the lawyering role. Whiggish histories of the antebellum legal profession first obscured this internal division by treating the apprentice system, reduced admissions standards, the unpopularity of lawyers, and lack of professional organization or formal self-discipline as evidence of a degraded period which (thankfully, they insisted) gave way to the professionalization project at the turn of the century.[279] On this account, the elite bar of the early and mid nineteenth century was divided against the public and uneducated pettifoggers, but not against itself. Role criticism goes further, erasing the division altogether by hypostatizing the morally activist concept of lawyering advocated by Hoffman and Sharswood. We need a fresh start.[280]

One reason to embrace both the division and the rich debates it has provoked is that more danger may lie in their suppression or superficial resolution. Both clent-centered and morally activist conceptions of the role are pernicious in their extreme forms since both can lead to injustice and, ultimately, to lawlessness – a tyranny of omnipotent clients or a tyranny of omnipotent lawyers. If nothing else then, openly acknowledging, carefully studying, and even coming to enjoy the contest between the two ideals, may operate to preserve an essential "habit of reluctance" in their proponents.[281]

---

[279] *See* Bloomfield, AMERICAN LAWYERS 136 (discussing whiggish bias of Charles Warren, Anton-Herman Chroust and Roscoe Pound).

[280] [[[Possible starting point is Shallhope – false notion of single, monolithic republicanism – actually varied widely by geography, class and interest]]]

[281] Postema, in ETHICS AND THE LEGAL PROF'N 169.