Lost and Found: David Hoffman and the History of American Legal Ethics

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I. INTRODUCTION

David Hoffman (1784–1854) founded the Law Institute at the University of Maryland,[1] authored in 1817 *A Course of Legal Study*, the first methodical introduction to the study of

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1. *See History & Mission*, UNIV. OF MD. SCH. OF LAW, http://www.law.umaryland.edu/about/mission.html (last visited Sept. 18, 2014).

American law,[2] successfully practiced law in Baltimore,[3] and in 1836 wrote the first maxims of legal ethics, *Fifty Resolutions in Regard to Professional Deportment* ("*Resolutions*").[4] Yet when a two-volume history of the Maryland bench and bar was published in 1901, Hoffman was ignored.[5] After disappearing for over a century, American lawyers and legal scholars rediscovered Hoffman. Since the late 1970s, Hoffman has been regularly and favorably cited as a guide to overcoming ethical woes in the American legal profession.[6]

How and why was David Hoffman "lost" to American law for over a century, and why was he was then "found"? Hoffman was lost because his view of ethics was premised on virtue, specifically the concept of honor, an ideal that was fading even as he wrote. A gentleman was accorded honor by the public based on its perception that his actions were right. Actions falling below the standard of public morality were therefore dishonorable. Thus, "[w]hat is morally wrong, cannot be professionally right, however it may be sanctioned by time or

2. *See generally* DAVID HOFFMAN, A COURSE OF LEGAL STUDY; RESPECTFULLY ADDRESSED TO THE STUDENTS OF LAW IN THE UNITED STATES (Baltimore, Coale & Maxwell 1817) [hereinafter HOFFMAN, LEGAL STUDY: 1817].

3. *See* Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 677-78 (1979).

4. *See generally* 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 752-775 (Baltimore, Joseph Neal, 2d ed. 1836) [hereinafter HOFFMAN, LEGAL STUDY: 1836]. For more on David Hoffman and his contribution to the field of legal ethics, see Thomas L. Shaffer, *David Hoffman's Law School Lectures, 1822–1833*, 32 J. LEGAL EDUC. 127 (1982); Francis S. Philbrick, *Hoffman, David*, *in* 9 DICTIONARY OF AMERICAN BIOGRAPHY 111, 111-12 (Dumas Malone ed. 1932); *David Hoffman: A Biographical Sketch*, *in* DAVID HOFFMAN: LIFE, LETTERS AND LECTURES AT THE UNIVERSITY OF MARYLAND, 1821-1837, at 13, 13-41 (Bill Sleeman ed. 2011) [hereinafter HOFFMAN: LIFE, LETTERS, AND LECTURES]; Howard Schwerber, *Hoffman, David*, *in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 267, 267-68 (Roger K. Newman ed. 2009).

5. *See generally* CONWAY W. SAMS & ELIHU S. RILEY, THE BENCH AND BAR OF MARYLAND: A HISTORY 1634 TO 1901 (1901) (discussing the history of the legal profession in Maryland, but failing to mention David Hoffman). Hoffman also went unmentioned in the copious BIOGRAPHICAL CYCLOPEDIA OF REPRESENTATIVE MEN OF MARYLAND AND DISTRICT OF COLUMBIA (Baltimore, National Biographical Publishing Co. 1879) and GREAT AMERICAN LAWYERS: A HISTORY OF THE LEGAL PROFESSION IN AMERICA (William Draper Lewis ed. 1907). When the American Bar Association adopted its Canons of Professional Ethics in 1908, the organization noted Hoffman's contribution but announced that its work was derived from the later work of Pennsylvania Judge George Sharswood. *See Transactions of the Thirty-First Annual Meeting of the American Bar Association*, 33 A.B.A. REP. 3, 56 (1908).

6. *See, e.g.*, Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343, 350-51 (2008).

custom."[7] Hoffman's aristocratic belief system was being displaced in an emerging age of individualism, one in which public honor was supplanted by private conscience.[8]

Writing in the 1830s, Alexis de Tocqueville noted, "in ages of equality, every man finds his beliefs within himself, and . . . all his feelings are turned in on himself."[9] Ralph Waldo Emerson wrote in his journal that the 1820s was "the age of the first person singular."[10] In this era of individualism, private interests were primary. Whether a lawyer behaved ethically became a test of private conscience, not public honor.[11] This transition was accompanied by a second shift, one in which lawyers accepted that legal ethics differed from public morality.[12] The foremost duty of a lawyer was to serve his client's private interests, and the lawyer was not morally accountable to the public for the client's goals.[13] These shifts to liberalism left Hoffman behind. Hoffman was so forgotten that when his *Resolutions* were reprinted in 1953, legal historian Arthur Sutherland commented that it was "a document which

7. HOFFMAN, LEGAL STUDY: 1836, *supra* note 4, at 765 (Resolution XXXIII).

8. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 477 (J. P. Mayer & Max Lerner eds., George Lawrence trans., 1966) (noting the rise of "individualism," coined by Tocqueville and discussing relation between individualism and democratic society); LAWRENCE FREDERICK KOHL, THE POLITICS OF INDIVIDUALISM: PARTIES AND THE AMERICAN CHARACTER IN THE JACKSONIAN ERA 6-13 (1989) (discussing the rise of the modern American, the "inner-directed individual," and "the transition from a society based on tradition to a society based on an ethic of individualism").

9. 2 TOCQUEVILLE, *supra* note 8, at 477. He also opined, "[e]ach man is forever thrown back on himself alone, and there is danger that he may be shut up in the solitude of his own heart." *Id.* at 478.

10. DANIEL WALKER HOWE, MAKING THE AMERICAN SELF: JONATHAN EDWARDS TO ABRAHAM LINCOLN 107 (2009) (quoting 1827 journal entry).

11. *See* T. Walker, *Ways and Means of Professional Success*, 1 W. L.J. 542, 547 (1844) (urging lawyers to act so that each may "stand justified at the bar of [his] own conscience, whatever others may think of [his] conduct"); *The Practice of the Bar*, 9 MONTHLY L. REP. 27, 27 (1846) (asking "to be delivered from self-styled *conscientious lawyers*, who will engage for no parties that are not morally right").

12. *See* JOHN T. BROOKE, THE LEGAL PROFESSION: ITS MORAL NATURE, AND PRACTICAL CONNECTION WITH CIVIL SOCIETY 15 (Cincinnati, H.W. Darby & Company 1849) ("The question then is, can a conscientious man, in view of this law of love, bind himself by an oath, to execute, as a judge, a *system* of laws, which, although on the whole, wise and good, will *occasionally*, *incidentally* and *unavoidably*, conflict with the moral rights of individuals?").

13. *See* GEORGE SHARSWOOD, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW 23-26 (Philadelphia, T. & J.W. Johnson 1854).

should be more widely known."[14] Hoffman's legal ethics were largely unknown because they ran contrary to the dominant ethic of lawyer behavior.

Hoffman was found in response to a moral crisis within the American legal profession. By the late 1970s, many lawyers feared that the liberal ideal of the lawyer as a zealous agent for a client ignored the lawyer's duties to society.[15] This crisis was exacerbated by two events: (1) Watergate, in which lawyers blindly followed the demands of their client—the President—to society's detriment;[16] and (2) the decision by the American Bar Association to replace its 1969 Code of Professional Responsibility, because the Code embraced the "fiction" that ethical issues were "matters of ethics rather than law."[17]

One criticism of the ABA's 1983 Model Rules of Professional Conduct was its emphasis that a lawyer's ethical duty was almost wholly to one's client.[18] Some critics concluded the new Model Rules created an ethic of "winning at all costs" and encouraged "Rambo-style litigation tactics,"

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14. Arthur E. Sutherland, *Conduct of Judges and Lawyers & Legal Ethics*, 54 COLUM. L. REV. 147, 151 (1954) (book review). In fact, many historians dismissed Hoffman. In one of the first books on the history of American law, James Willard Hurst discussed legal ethics in depth, but he never mentioned Hoffman. *See generally* JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS (1950). Hurst does, however, mention Sharswood's contribution to legal ethics. *See id.* at 329. Although Hoffman received prominent coverage in Perry Miller's *The Life of the Mind in America: From the Revolution to the Civil War*, Hoffman essentially remained lost because Miller ignored his work on legal ethics. *See* PERRY MILLER, THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 158-59, 182 (1966).

15. *See generally* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) (explicating the liberal defense of the lawyer as an agent of the client).

16. *See, e.g.*, Kathleen Clark, *The Legacy of Watergate for Legal Ethics Instruction*, 51 HASTINGS L.J. 673, 674 (2000) ("[E]thics instruction might have helped some of the other lawyers, such as Egil Krogh . . . . [He] was so overawed by the prestige and power of the Presidency that his conscience was lulled to rest . . . ."); JETHRO K. LIEBERMAN, CRISIS AT THE BAR: LAWYERS' UNETHICAL ETHICS AND WHAT TO DO ABOUT IT 35 (1978) ("More than twenty-five lawyers were formally named as defendants or co-conspirators in Watergate and related criminal proceedings."); *see also* David R. Brink, *Who Will Regulate the Bar?*, 61 A.B.A. J. 936, 937 (1975) ("[I]f Watergate has not tarnished the image of lawyers, at least it has acutely intensified public consciousness of questions of legal ethics and professional accountability.").

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

18. *Cf.* Michael Ariens, *"Playing Chicken": An Instant History of the Battle Over Exceptions to Client Confidences*, 33 J. LEGAL PROF. 239, 262-65 (2009) (detailing the history of protecting client confidences over the interests of others).

decried by many in the late 1980s.[19] An important reaction to this crisis in professionalism and morality was the promotion of an ethic of lawyerly virtue.[20] Because Hoffman concluded a lawyer's duty to a client was limited by his duties to society, he has served since the late 1970s as an example of an historical ethic contrary to the standard conception of liberal neutrality in representing clients.[21]

Part II of this article discusses Hoffman's *Resolutions* in light of the antebellum history of Baltimore, as well as Hoffman's professional career and personal fortunes. Part III traces the disappearance of Hoffman in legal ethics debates from the mid-nineteenth century through the first seven decades of the twentieth century. Lastly, Part IV provides a historical context for the revival of Hoffman's *Resolutions*, particularly the transformation of the American legal profession beginning in the 1970s.

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19. FIRST BLOOD was released in 1982 and starred Sylvester Stallone as John Rambo, a Vietnam War veteran evading capture by any means necessary. FIRST BLOOD (Anabasis N.V., Elcajo Productions 1982). The sequel, RAMBO: FIRST BLOOD PART II, was released in 1985 and made three times the domestic revenue as the original. *Rambo: First Blood Part II*, IMDB, http://www.imdb.com/title/tt0089880/?ref_=tt_rec_tt (last visited Sept. 18, 2014). The success of these films led to lawyers calling "winning at all costs" behavior "Rambo-style litigation." *See* John J. Curtin, Jr., *A Message From the President: Civil Matters*, 77 A.B.A. J., Jan. 1991, at 8, 8 (discussing the Seventh Circuit report on Rambo-style litigation tactics and noting he had addressed the issue seven years earlier as chair of the ABA Litigation Section); Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637 (1990) (decrying "unfair tactics and intimidation" and promoting an effort to discourage the "Rambo" attitude); *see also* Robert N. Sayler, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J., Mar. 1988, at 78, 79. The "hired gun" served as a metaphor for zealous advocacy. *See* THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 16-18 (1994); *see also* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 166 (1988) ("[T]he role of [the] legal hired gun is morally untenable.").

20. *See* Susan Wolf, *Ethics, Legal Ethics, and the Ethics of Law*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 38, 40 (David Luban ed. 1983); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 31 (1978).

21. *See* LUBAN, *supra* note 19, at xx (concluding the standard conception allowed a lawyer to exhibit "extreme partisan zeal on behalf of the client" absent "moral responsibility for the client's goals or the means used to attain them"). *See generally* David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637 (1986) (suggesting lawyers should be held morally responsible for the goals of their clients); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980) (advocating for a new standard of ethics in the legal profession with lawyers taking responsibility for their professional conduct).

II. BALTIMORE AND THE HISTORY OF HOFFMAN'S RESOLUTIONS

David Hoffman was born in 1784, the youngest son in a family of twelve children.[22] By then his father Peter, a German immigrant, had moved the family from Frederick, Maryland to Baltimore and opened a dry goods business.[23] His timing was excellent—the newly formed United States needed goods to supply its army.[24] Baltimore was not occupied by the British, and its merchants made substantial profits during the Revolutionary War.[25] Peter Hoffman later opened Peter Hoffman & Sons, a trading business with offices in Baltimore and London.[26] Its rise was rapid, and the Hoffman family became one of the leading merchant families of Baltimore.[27] The Hoffmans were one of "a cluster of families [that] emerged . . . as the unchallenged leaders of Baltimore's aristocracy."[28] David Hoffman was raised as a member of the social and economic elite, which had replaced the traditional Maryland planter aristocracy.

When Hoffman became a member of the Maryland bar in the early nineteenth century, he joined a relatively small, but rapidly growing, legal community in Baltimore.[29] Baltimore lawyers came from the city's aristocracy, but the expansion in the number of lawyers did not signify that any "corresponding democratization of personnel or mores took place."[30] Lawyers and merchants constituted a "conservative republicanism,"[31] believing that elites were to govern for the benefit of society.

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22. BALTIMORE: PAST AND PRESENT WITH BIOGRAPHICAL SKETCHES OF ITS REPRESENTATIVE MEN 295 (Baltimore, Richardson & Bennett 1871).

23. *Id.* at 295-96.

24. *See* Frank A. Cassell, *The Structure of Baltimore's Politics in the Age of Jefferson, 1795–1812, in* LAW, SOCIETY, AND POLITICS IN EARLY MARYLAND 277, 278 (Aubrey C. Land et al. eds., 1977).

25. *Id.*

26. *See* BALTIMORE: PAST AND PRESENT WITH BIOGRAPHICAL SKETCHES OF ITS REPRESENTATIVE MEN, *supra* note 22, at 295-96.

27. GARY LAWSON BROWNE, BALTIMORE IN THE NATION, 1789–1861, at 12 (1980).

28. *Id.*; *see also* WHITMAN H. RIDGWAY, COMMUNITY LEADERSHIP IN MARYLAND, 1790–1840: A COMPARATIVE ANALYSIS OF POWER IN SOCIETY 222 (1979) (noting Peter Hoffman's inclusion in the decisional elite and his influence in Baltimore).

29. The number of lawyers in Baltimore increased from sixteen to forty-three between 1799 and 1810. Bloomfield, *supra* note 3, at 677.

30. *Id.*

31. *See* CHARLES G. STEFFEN, THE MECHANICS OF BALTIMORE: WORKERS AND POLITICS IN THE AGE OF REVOLUTION, 1763–1812, at xiii (1984).

Baltimore lawyers were almost always considered gentlemen due to Maryland's stringent statutory requirements to become a lawyer.[32] The 1817–1818 *Baltimore Directory* listed David Hoffman among a group of just forty attorneys.[33] Five years later, he was one of fifty-four.[34] This was a small, elite group for the third-largest city in the nation with a population of more than 62,000 people by 1820.[35]

Hoffman's *Resolutions* were published in the second edition of *A Course of Legal Study* in 1836.[36] They are, in part, a response to the end of conservative republicanism in Maryland. Hoffman's published diatribes against Andrew Jackson reflect his rearguard action to reclaim the place of the gentleman aristocrat.[37] Initial attacks on aristocratic rule in Maryland helped precipitate the transformative 1812 Baltimore Riot.[38] By the early 1830s, Hoffman concluded that his position at the University of Maryland was untenable.[39] Soon thereafter, he suffered great personal loss when his only son died.[40] In

32. *See* Dennis R. Nolan, *The Effect of the Revolution on the Bar: The Maryland Experience*, 62 VA. L. REV. 969, 993 (1976) ("One other factor which may have helped keep the bar's reputation intact was Maryland's continued insistence on three years of law study under the supervision of a practicing attorney and an examination for fitness prior to admission to the bar."); 1 SAMS & RILEY, *supra* note 5, at 245-46 (noting 1831 statutory changes to eligibility for admission to the bar). A few exceptions apparently existed. *See* WILBUR HARVEY HUNTER, A BALTIMORE LAW FIRM: A BRIEF HISTORY OF HINKLEY AND SINGLEY AND ITS PREDECESSORS, 1817–1967, at 9 (1967) (noting arrival of Edward Hinkley in Baltimore "about 1815" and his admission to the bar on March 25, 1817, just two years later).

33. THE BALTIMORE DIRECTORY FOR 1817–18 *passim* (Baltimore, James Kennedy 1817). The author thanks Brian Detweiler for compiling the list of attorneys from the *Baltimore Directory*.

34. C. KEENAN'S BALTIMORE DIRECTORY FOR 1822 & 1823 *passim* (Baltimore, R. J. Matchett 1822). This directory also listed seven judges in the Baltimore legal community. *Id.*

35. *History: 1820 Fast Facts*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/fast_facts/1820_fast_facts.html (last visited Sept. 18, 2014).

36. *See* HOFFMAN, LEGAL STUDY: 1836, *supra* note 4, at 752-75.

37. *See infra* Part II.E.

38. *See* Paul A. Gilje, *The Baltimore Riots of 1812 and the Breakdown of the Anglo-American Mob Tradition*, 13 J. SOC. HIST. 547, 547-48 (1980) [hereinafter Gilje, *Baltimore Riots*]; *see also* PAUL A. GILJE, RIOTING IN AMERICA 60-63 (1996); Paul A. Gilje, *"Le Menu Peuple" in America: Identifying the Mob in the Baltimore Riots of 1812*, MD. HIST. MAG., Spring 1986, at 50, 50-51; STEFFEN, *supra* note 31, at 243-50; Frank A. Cassell, *The Great Baltimore Riot of 1812*, MD. HIST. MAG., Fall 1975, at 241, 241.

39. *David Hoffman: A Biographical Sketch*, *supra* note 4, at 18, 36 ("Hoffman had announced his intention to close the Law Institute and leave the University.").

40. *Id.* 36-37.

1835, Baltimore went through its wrenching Bank Riot, which confirmed Hoffman's dark view of the baleful consequences of Jacksonian democracy.[41] Hoffman's interest in his legal practice also appeared to dwindle after 1830.[42] Together, these personal and professional circumstances influenced Hoffman's *Resolutions*.

A. Baltimore 1790–1812

Baltimore was a small, provincial town when the United States declared independence.[43] In part because it was unoccupied during the Revolutionary War, the city's merchants "made immense profits fulfilling government contracts" for military provisions.[44] The first census in 1790 listed 13,503 persons in Baltimore, which almost doubled to 26,514 by 1800 and increased to 46,555 by 1810.[45] Baltimore embraced a variety of peoples, creating a society "new, raw, and constantly in flux."[46] Divisions in society were apparent early and were exacerbated by the rise of a two-party system—the ascendant Jeffersonian Republicans and the aristocratic Federalists—in Baltimore by the end of the eighteenth century.[47]

In 1796, the Maryland legislature granted corporate status to Baltimore, which gave the city its first powers of self-governance.[48] Though this grant would eventually benefit skilled craftsmen and tradesmen working in the city, the shift in Baltimore's legal status was not accompanied by a social shift.[49]

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41. *See generally* ROBERT E. SHALHOPE, THE BALTIMORE BANK RIOT: POLITICAL UPHEAVAL IN ANTEBELLUM MARYLAND (2009) (providing a comprehensive overview of the political ideologies connected with the Baltimore Bank Riot). On riots in American cities during this time, see MICHAEL FELDBERG, THE TURBULENT ERA: RIOT & DISORDER IN JACKSONIAN AMERICA (1980), which focuses on the Philadelphia Native American Riots of 1844. *See also* LEONARD L. RICHARDS, "GENTLEMEN OF PROPERTY AND STANDING": ANTI-ABOLITION MOBS IN JACKSONIAN AMERICA (1970) (discussing the anti-abolition of slavery movement by Northerners in the 1830s).

42. *See David Hoffman: A Biographical Sketch*, *supra* note 4, at 37.

43. *See* Cassell, *supra* note 24, at 278.

44. *Id.*

45. MD. STATE PLANNING COMM'N, POPULATION OF MARYLAND: BALTIMORE CITY AND COUNTIES, 1790–1949, at 29 (1949).

46. Cassell, *supra* note 24, at 278.

47. *See id.* ("It is not surprising, therefore, that as the . . . influential families that composed the plantation interest drifted into the Federalist party in the 1790s, there was a natural predisposition in Baltimore to embrace Republicanism.").

48. BROWNE, *supra* note 27, at 34.

49. *See id.* at 34-35.

Instead, "society was the status elite," an exclusive group, largely consisting of merchants and lawyers, that controlled the politics of the city in its early days.[50] The composition of the political elite changed over the first decade of Baltimore's corporate existence as the social status of the representatives in the city council changed. Jeffersonian Republicans eventually dominated the municipal administration, and those Republicans were more often tradesmen and mechanics than lawyers.[51] Republican representatives "used democratic rhetoric to gain support for their own goals," which mercantile and professional elites found anathema.[52] But even as political representation changed, merchants, lawyers, and other professionals remained the occupational groups with the largest wealth in Baltimore during the first two decades of the nineteenth century.[53] They also continued to possess significant social authority.[54]

In mid-1807, a British frigate attacked the warship *Chesapeake*, impressed four sailors, and hobbled the ship.[55] At about the same time, a grand jury indicted Aaron Burr in Virginia for treason, and news of both events reached Baltimore on the same day.[56] In Republican Baltimore, the attack on the *Chesapeake* confirmed the majority's allegiance to President Jefferson and Republicans.[57] In the fall, Luther Martin returned to Baltimore after successfully defending Burr in his treason trial.[58] Part of Martin's defense of Burr included a steady

50. *Id.* at 35.

51. *Id.* at 43.

52. *Id.* For an overview of Baltimore's political development from 1795 to 1812, see Cassell, *supra* note 24.

53. *See* STEFFEN, *supra* note 31, at 16 (listing the mean wealth of Baltimore occupations in 1804 and 1815).

54. *See* RIDGWAY, *supra* note 28, at 95 ("Members of first families continued to be political leaders and to hold political offices, as did leading merchants, but in the 1820s others who appealed to the increasingly diverse urban constituency rose to positions of power and influence.").

55. Cassell, *supra* note 24, at 289.

56. *Id.* at 290. Two years earlier, Luther Martin represented Supreme Court Justice Samuel Chase, a Federalist, in his Senate impeachment trial. *See generally* WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992). On Martin, see Edward S. Delaplaine, *Martin, Luther*, *in* 12 DICTIONARY OF AMERICAN BIOGRAPHY 343, 343-45 (Dumas Malone ed. 1933); Gregory A. Stiverson, *Martin, Luther*, *in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW, *supra* note 4, at 364, 364-65, and BILL KAUFFMAN, FORGOTTEN FOUNDER, DRUNKEN PROPHET: THE LIFE OF LUTHER MARTIN (2008).

57. *See* Cassell, *supra* note 24, at 290.

58. *See* Delaplaine, *supra* note 56, at 343-45.

invective against Thomas Jefferson, who Martin accused of acting like the hated King George III.[59] Upon his return, Martin immediately renewed his attack on Jefferson.[60] He proceeded to defend the conduct of Chief Justice and Federalist John Marshall in a notice in the Federalist press.[61] Martin declared:

> We have proved . . . that in America there are lawyers who cannot be intimidated by fear of presidential vengeance, nor by the phrenzy of a deceived, misguided people, from securing even to those destined to be the victims of power, those rights for the enjoyment of which the constitution is and ought to be their sacred honor and inviolate pledge.[62]

Martin's statements were accurately perceived by Baltimore Republicans as directly attacking Jefferson, and a riot ensued.[63]

Disputes between Federalists and Jeffersonian Republicans in Baltimore intensified, and by 1808, journeymen mechanics became more militant.[64] Federalists were aghast at the tarring and feathering of an Anglophile shop foreman named Robert Beatty by several members of a shoemakers' society, and members of the Union Society of Journeymen Cordwainers (the "Union") were indicted for conspiracy the next year.[65] Republicans criticized the violence but generally sympathized with the shoemakers.[66] An essay penned by "A Journeyman Cordwainer" compared the action against Beatty to the tarring and feathering of Tories during the Revolution.[67] On occasion, he argued, "the people could not permit justice to be stymied in the courts; they had to take matters into their own hands."[68] The anonymous author concluded, "I am serious . . . I think the discretionary law of tarring, [et cetera] is a happy general supplement to particular law, providing for heinous offences

59. R. KENT NEWMYER, THE TREASON TRIAL OF AARON BURR: LAW, POLITICS, AND THE CHARACTER WARS OF THE NEW NATION 149 (2012).

60. *See* STEFFEN, *supra* note 31, at 232.

61. *Id.*

62. *Id.*

63. *See id.* at 236.

64. *Id.* at 209.

65. STEFFEN, *supra* note 31, at 209, 220.

66. *See id.* at 220.

67. *Id.*

68. *Id.*

which would otherwise escape punishment."[69] Although the assailants were found guilty of assault in January 1809, the governor pardoned them after three days in jail.[70] Beatty was later tried for perjury and acquitted.[71]

In June 1809, the Union went on strike and refused to work for two shoemakers, James Sloan and Angello Atkinson, who employed journeymen who did not belong to the Union.[72] Sloan was a well-known Federalist, clearly at odds with Republicans who continued to support the strikers.[73] One of the non-Union journeymen, John Davidson, claimed the Union was involved in a criminal conspiracy to prevent nonmembers from obtaining employment.[74] The Baltimore County Criminal Court issued thirty-seven indictments against Union members.[75] The Union hired Luther Martin to represent them, and though only one journeyman was tried, the conviction of Union President George Powly apparently led to the Union's demise.[76]

B. The Baltimore Riots of 1812

In 1808, Alexander Contee Hanson Jr. founded the *Federal Republican*, "an extreme Federalist journal on almost every count."[77] Hanson was a member of Baltimore and Maryland's aristocratic elite, and the *Federal Republican* delighted in skewering Jeffersonian Republicans and their supporters, which it often designated as "THE RABBLE," and routinely attacked radical democracy.[78] The *Federal Republican* was also committed to promoting British interests.[79] Hoffman and

69. *Id.* For more information on the various labor conspiracy cases in the early federal period, see CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 128-79 (1993).

70. STEFFEN, *supra* note 31, at 220-21.

71. *Id.* at 221.

72. *Id.* at 222.

73. *Id.*

74. *Id.*

75. STEFFEN, *supra* note 31, at 222.

76. *Id.* at 223.

77. JEFFREY L. PASLEY, "THE TYRANNY OF PRINTERS": NEWSPAPER POLITICS IN THE EARLY AMERICAN REPUBLIC 241 (2001).

78. *See id.*

79. *Id.* ("[I]ts distate for democracy and enthusiasm for the British cause in the Napoleonic Wars rivaled anything found in Hartford or Boston.").

Hanson were strong political allies and likely friends.[80] They apparently attended St. John's College in Annapolis at the same time, both were Federalists, both were lawyers, and both were from aristocratic families.[81] The duo also believed in governance by the elite, not the masses.[82]

On June 1, 1812, President James Madison asked Congress to consider declaring war against Great Britain, and the Senate agreed on June 17.[83] Baltimore Republicans strongly supported war, but Hanson raged against it, stating "[w]e are avowedly hostile to the administration of James Madison, and we never will breathe under the dominion, direct or derivative, of Bonaparte, let it be acknowledged when it may."[84] On June 22, a mob destroyed the *Federal Republican*'s printing office, and Hanson escaped to the District of Columbia, where he resumed printing.[85] At this point, the riot was channeled within its traditional limits, and the mob focused on the destruction of property rather than people.[86]

Instead of disbanding, the mob gathered most nights for almost a month in search of various targets to strike.[87] On July 26, Hanson and other Federalists returned to Baltimore and the next day distributed an edition of the *Federal Republican*.[88] The paper appeared to be printed on Charles Street in Baltimore, but it was actually published in Georgetown.[89] Hanson and his supporters then barricaded themselves in the Charles Street building and waited to see if the mob would respond—it did.[90]

By daybreak on July 28, Thaddeus Gale and John Williams had been shot to death by defenders of the *Federal*

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80. *See* ROBERT J. BRUGGER, MARYLAND: A MIDDLE TEMPERAMENT 1634–1980, at 178 (1988).

81. *See* PASLEY, *supra* note 77, at 241 (discussing Hanson); Bloomfield, *supra* note 3, at 674 (discussing Hoffman).

82. *See* PASLEY, *supra* note 77, at 241 (discussing Hanson); Bloomfield, *supra* note 3, at 676 (discussing Hoffman).

83. DAVID B. MATTERN, JAMES MADISON: PATRIOT, POLITICIAN, AND PRESIDENT 73 (2005).

84. PASLEY, *supra* note 77, at 246.

85. Cassell, *supra* note 38, at 244-45.

86. *See* Gilje, *Baltimore Riots*, *supra* note 38, at 549 ("[O]pportunity for doing further violence was declined when the mob had [Federalist newspaperman Jacob] Wagner's house and family at its mercy . . . .").

87. *Id.* at 551.

88. *Id.* at 552.

89. *Id.*

90. Cassell, *supra* note 38, at 247.

Republican,[91] and Hanson and his supporters had agreed to surrender.[92] Some of Hanson's supporters successfully fled the Charles Street building, but others were captured by the mob and beaten.[93] Some members of the mob demanded death for "every monarchist and aristocrat it could lay its hands on."[94] Twenty-seven-year-old David Hoffman was one of those escapees whom the mob caught and nearly hanged.[95] Hanson and his companions were taken to jail.[96] That night, the mob entered the jail and beat to death James Lingan, a general in the Revolutionary War, as he pleaded on his knees for mercy.[97] Members of the mob also severely beat Light Horse Harry Lee—another famous Revolutionary War general and father of Robert E. Lee—Hanson, and other Federalists.[98]

After the riots were finally quelled in early August, the recriminations began. Federalists used Lingan's death to win a majority in the Maryland House of Delegates; thus, the lessons of the riots for Federalists were that all extralegal violence must be rejected, and that only force was sufficient to halt mob violence.[99] The first lesson was about the primacy of law over custom. When the mob began demolishing the *Federal Republican*'s printing house in June, Republican Mayor Edward Johnson urged the mob to stop.[100] In reply, one man said, "Mr. Johnson, I know you very well, no body wants to hurt you; but the laws of the land must sleep, and the laws of nature and reason prevail."[101] This statement reflected a view abhorrent to Federalists. The mob, rejecting both the elite and a common

91. For a detailed account of the fighting, see *id.* at 247-59.

92. *Id.* at 252.

93. *Id.*

94. BRUGGER, *supra* note 80, at 178 (internal quotation marks omitted).

95. JOHN NEAL, WANDERING RECOLLECTIONS OF A SOMEWHAT BUSY LIFE 206 (Boston, Roberts Bros. 1869) ("Professor Hoffman would have been strung up, without judge or jury, on a tree-branch, yet overhanging Jones's Falls, but for the providential interference of a stranger, who satisfied the murderers that they had got hold of the wrong man.").

96. *See* BRUGGER, *supra* note 80, at 178 ("[A]uthorities had persuaded the Federalist band to surrender and marched the men to jail . . . .").

97. Cassell, *supra* note 38, at 256.

98. Gilje, *Baltimore Riots*, *supra* note 38, at 555. The riot was noted by Alexis de Tocqueville as an "example of the excesses to which despotism of the majority may lead." 1 TOCQUEVILLE, *supra* note 8, at 233 n.4.

99. *See* Cassell, *supra* note 38, at 259.

100. Gilje, *Baltimore Riots*, *supra* note 38, at 549.

101. *Id.*

idea of law, asserted an authority to govern and to govern beyond the common law.[102] A report, *A Portrait of the Evils of Democracy, Submitted to the Consideration of the People of Maryland*, drafted by the Committee of Grievances and Courts of Justice of the Maryland House of Delegates, was issued condemning the riot and captured the view of the aristocratic Federalist elite.[103]

C. Hoffman and Professional Deportment: 1810–1837

When *A Course of Legal Study* was published in 1817, Hoffman had been married for over a year, and his wife, Mary McKean, from a prominent Philadelphia family, had given birth to their first child, a son.[104] In a letter from the mid-1820s, Hoffman claimed that he earned $9,000 annually from 1818 through 1823, which, if true, made him one of Baltimore's wealthiest lawyers.[105] Though he had not yet lectured there, Hoffman was appointed Professor of Law at the new Law Institute at University of Maryland in 1814.[106] *A Course of Legal Study* was immediately and lavishly praised for its learnedness, most importantly in an unsigned review by Supreme Court Justice Joseph Story.[107] After a "perusal of Mr. Hoffman's work . . . we have not the slightest hesitation to declare, that it contains by far the most perfect system for the study of the law, which has ever been offered to the public[].'"[108]

Hoffman's only reference to professional deportment in the first edition of *A Course of Legal Study* came in the book's "Auxiliary Subjects."[109] This section began with a short introduction from Hoffman, who used optimistic terms to

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102. DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830, at 229 (2005) (noting Federalists hoped the Constitution would "create neither a government of men nor one of law but rather one of men governed by a common understanding of law").

103. *See generally* A PORTRAIT OF THE EVILS OF DEMOCRACY, SUBMITTED TO THE CONSIDERATION OF THE PEOPLE OF MARYLAND (Baltimore, 1816).

104. *David Hoffman Time Line*, *in* HOFFMAN: LIFE, LETTERS AND LECTURES, *supra* note 4, at 53, 53.

105. Bloomfield, *supra* note 3, at 678.

106. *Id.*

107. *See A Course of Legal Study Respectfully Addressed to the Students of Law in the United States*, 6 N. AM. REV. & MISC. J. 45, 76 (1818) (book review).

108. *Id.*

109. *See* HOFFMAN, LEGAL STUDY: 1817, *supra* note 2, at 324.

describe the legal profession.[110] A lawyer undertook proper conduct when he acquired "liberal ideas," as such knowledge was equated with "*honourable* views."[111]

Four years later, Hoffman published his *Syllabus of a Course of Lectures on Law*.[112] The final lecture was intended to be devoted to the topic of professional deportment.[113] Although reprints indicate that several lectures included some detail, this lecture included just its title. In late 1822, Hoffman began lecturing at the University of Maryland.[114] His introductory lecture was published a year later,[115] and two additional lectures and an address to law students were published between 1824 and 1826.[116] From 1822 to 1832, he represented clients in six separate cases in the Supreme Court of the United States, and also appeared before the Maryland Court of Appeals on several occasions.[117] This decade represented Hoffman's peak as a lawyer and legal educator.

Beginning in 1833, Hoffman suffered a number of personal and professional setbacks. His only son died that year.[118] Although he remained listed as an attorney in the *Baltimore Directory*,[119] his last recorded appearance before any appellate

110. *See id.* at 324-28.

111. *Id.* at 327.

112. *See* David Hoffman, *Syllabus of a Course of Lectures on Law*, *reprinted in* HOFFMAN: LIFE, LETTERS AND LECTURES, *supra* note 4, at 61, 61-156.

113. *Id.* at 156.

114. Shaffer, *supra* note 4, at 128.

115. David Hoffman, *A Lecture, Introductory to a Course of Lectures, now Delivering in the University of Maryland, reprinted in* HOFFMAN: LIFE, LETTERS AND LECTURES, *supra* note 4, at 157, 157-232.

116. David Hoffman, *A Lecture being the Second of a Series of Lectures, Introductory to a Course of Lectures Now Delivering in the University of Maryland*, *reprinted in* HOFFMAN: LIFE, LETTERS AND LECTURES, *supra* note 4, at 249, 249-98; David Hoffman, *A Lecture being the Third of a Series of Lectures, Introductory to a Course of Lectures Now Delivering in the University of Maryland*, *reprinted in* HOFFMAN: LIFE, LETTERS AND LECTURES, *supra* note 4, at 299, 299-360; David Hoffman, *An Address to Students of Law in the United States*, *reprinted in* HOFFMAN: LIFE, LETTERS AND LECTURES, *supra* note 4, at 233, 233-248.

117. *See David Hoffman Time Line*, *supra* note 104, at 53-54.

118. *See id.* at 54.

119. *See* MATCHETT'S BALTIMORE DIRECTOR 92 (Baltimore, R.J. Matchett 1833); MATCHETT'S BALTIMORE DIRECTOR 123 (Baltimore, R.J. Matchett 1835); MATCHETT'S BALTIMORE DIRECTOR 169 (Baltimore, R.J. Matchett 1837); MATCHETT'S BALTIMORE DIRECTOR 207 (Baltimore, R.J. Matchett 1842).

court was in 1832.[120] He gave his final lecture at the University of Maryland in 1833 and then became engaged in a long and serious legal and financial dispute with the University.[121]

At the same time that Hoffman was dealing with personal struggles, the legal profession as a whole was suffering because the status of, and honor bestowed upon, lawyers was regularly questioned. One remarkable example of the venom directed at lawyers during this time was *A Letter to the Honorable Rufus Choate*, written in June 1831 and published as a pamphlet in 1832.[122] Choate, a brilliant Massachusetts lawyer and Whig,[123] was attacked by Democrat and labor leader Frederick Robinson for using the cabal of the "brotherhood of the bar" to prevent Robinson from representing another in court.[124] Robinson made a long and artful argument in favor of opening the profession to all, for limiting its membership was "anti-republican," emblematic of associations whose object is "to settle society down into cast[e]s, and render the barriers between them impassable; to form society into aristocratic, subordinate gradations, and 'orders,' and to fix insuperable boundaries between them. But the basis of our community is equality, and not subordination."[125] The bar was a part of a powerful aristocracy that "saps the liberties of the people," and whose members "exalt themselves and . . . degrade and debase the rest of our species," to "distinguish themselves, from what they call 'the common herd, the mob, the vulgar, the rabble.'"[126]

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120. *See David Hoffman Time Line*, *supra* note 104, at 53-55 (noting Hoffman "[a]ppear[ed] before the U.S. Supreme Court in *Robert Oliver v. James Alexander and Seventy-seven others, Seamen of the Warren*" in 1832).

121. *See David Hoffman: A Biographical Sketch*, *supra* note 4, at 20.

122. *See* Letter from Frederick Robinson to the Honorable Rufus Choate (June 25, 1831), *reprinted in* FREDERICK ROBINSON, A LETTER TO THE HON. RUFUS CHOATE, CONTAINING A BRIEF EXPOSURE OF LAW CRAFT, AND SOME OF THE ENCROACHMENTS OF THE BAR UPON THE RIGHTS AND LIBERTIES OF THE PEOPLE (n.p., 1832) [hereinafter Letter from Frederick Robinson].

123. *See* Claude M. Fuess, *Choate, Rufus*, *in* 4 DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 4, at 86, 86-90; Jean V. Matthews, *Choate, Rufus*, *in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW, *supra* note 4, at 105, 105-06; Joseph Hodges Choate, *Rufus Choate*, *in* 3 GREAT AMERICAN LAWYERS, *supra* note 5, at 531, 531; DANIEL WALKER HOWE, THE POLITICAL CULTURE OF THE AMERICAN WHIGS 225 (1979).

124. Letter from Frederick Robinson, *supra* note 122, at 3.

125. *Id.* at 15; *see also* DANIEL FELLER, THE JACKSONIAN PROMISE: AMERICA, 1815–1840, at 130-31 (1995) (discussing the disconnect between laborers and the aristocracy).

126. Letter from Frederick Robinson, *supra* note 122, at 16.

Robinson took a similar tone in an 1834 oration to trade-union members, in which he attacked the monopoly of the bar, and claimed "[t]he judiciary in this state, and in every State where judges hold their office during life, is the headquarters of the aristocracy."[127] Robinson's excoriation of Choate and the legal profession was a paradigmatic example of Jacksonian democracy—of the rejection of rule of an aristocratic elite in favor of a body based on "equality, and not subordination." It served also as an example of everything David Hoffman opposed.

Law addresses across the nation also changed. Pennsylvania lawyer Job Tyson spoke to the Law Academy of the Philadelphia Bar in 1839, opening: "It is natural to feel a deep solicitude for the repute of a profession, which we have chosen as the business of our lives."[128] He began this way because it was true that "[m]any bad men, wearing the panoply of the profession, have been enabled to perpetrate their deeds under its sanction."[129] It was crucial that lawyers, "at the darkest period of our political history, when tyranny wore the guise of a necessary tax for the public good," cultivate an "elevated honour."[130] In 1831, Massachusetts lawyer Emory Washburn spoke to the Worcester Lyceum.[131] He rejected the Jacksonian claim that "rights and privileges are unequally distributed and enjoyed."[132] Massachusetts lawyer Peter Oxenbridge Thacher defended the legal system on the ground that it "constitutes the ligament of society," binding all classes, from merchant and mechanic to lawyer and farmer, and worked

127. Frederick Robinson, *A Program for Labor*, *reprinted in* SOCIAL THEORIES OF JACKSONIAN DEMOCRACY: REPRESENTATIVE WRITINGS OF THE PERIOD 1825–1850, at 320, 328 (Joseph L. Blau ed. 1947) (containing portions of Robinson's oration); *see also* TOMLINS, *supra* note 69, at 191-92 (noting speech and response by Boston lawyer Peter Oxenbridge Thacher).

128. JOB R. TYSON, DISCOURSE ON THE INTEGRITY OF THE LEGAL CHARACTER 5 (Philadelphia, Order of the Law Academy 1839).

129. *Id.* at 6; *see also* JOHN M. SCOTT, AN ADDRESS DELIVERED TO THE LAW ACADEMY OF PHILADELPHIA, AT THE OPENING OF THE SESSION, IN SEPTEMBER 1830, at 7 (Philadelphia, Mifflin & Parry 1830) ("Our profession has suffered deeply from the unworthiness of individuals who have worn its garb without adopting its principles.").

130. TYSON, *supra* note 128, at 9, 29.

131. *See* EMORY WASHBURN, A LECTURE, READ BEFORE THE WORCESTER LYCEUM, MARCH 30TH, 1831, at 3 (Worcester, Dorr & Howland 1831).

132. *Id.* For more on Washburn, see Robert M. Spector, *Emory Washburn: Conservator of the New England Legal Heritage*, 22 AM. J. LEGAL HIST. 118 (1978).

as "that great leveller of human arrogance, and equalizer of social right and duty."[133] Leveling did not interest Hoffman.

Democratization of the legal profession worked together with political democratization. In 1831, the Maryland legislature reduced the required time of legal study to two years.[134] The aristocratic argument against relaxing bar-admission standards was made by Washburn, who concluded states had a choice between "an enlightened, educated, independent body of men, or a host of self-constituted, noisy and narrow-minded pettifoggers."[135] Hoffman sought to preserve the lawyer's elevated status in society, but this proved difficult. Writing in 1846, Hoffman declared his "deep conviction that the high tone of the Bar has suffered some impairment."[136] This had been his conviction since at least 1837, when Hoffman's *Miscellaneous Thoughts on Men, Manners, and Things* ("*Miscellaneous Thoughts*") was published:

> The [fear of lawyers], so prevalent among the lower orders in this and other countries, seems to me to be often more in words than in substance; for though lawyers are the constant subjects of the popular jeers, of the railing of the multitude, and of the ridicule even of the drama; and though the people have habitually leagued them with the devil, and love to tell many disparaging tales of them, yet lawyers still remain the most entrusted, the most honoured, and withal, the most efficient and useful body of men, in proportion to their number, of any in the community; and, if there be still remaining among us any elements that can

133. PETER OXENBRIDGE THACHER, AN ADDRESS, PRONOUNCED ON THE FIRST TUESDAY OF MARCH, 1831, at 17 (Boston, Hilliard, Gray, Little, & Wilkins 1831). In late 1834, Thacher, then a judge, responded to Robinson's Fourth of July speech by instructing the grand jury that "[e]mployers may not combine against their workmen to depress, by unfair means, their wages; nor may workmen combine against employers, unjustly, to raise them." TOMLINS, *supra* note 69, at 193. Thacher concluded, "This is even handed justice, and is as good for the laborer as for the employer." *Id.* (*quoting* Thacher).

134. Ch. 268, § 2, LAWS OF MARYLAND--1831, at 1032; *see also* 2 ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 259 (1965) (quoting two-year provision); Nolan, *supra* note 32, at 993 (same); 1 SAMS & RILEY, *supra* note 5, at 245-46 (same).

135. Emory Washburn, *On the Legal Profession in New England*, 19 AM. JURIST & L. MAG. 49, 52 (1838).

136. DAVID HOFFMAN, HINTS ON THE PROFESSIONAL DEPORTMENT OF LAWYERS, WITH SOME COUNSEL TO LAW STUDENTS 3 (Philadelphia, Thomas Cowperthwait & Co. 1846).

> be called aristocratic, they will be found no where so certainly, as among gentlemen of the legal profession.[137]

D. The Baltimore Bank Riot of 1835

Two other outside events may have influenced the more pessimistic tone of the second edition of Hoffman's *A Course of Legal Study*. First, the re-election of Andrew Jackson in 1832 was anathema to Hoffman.[138] Jackson revived the party system and emphasized ideological differences among the people,[139] which Hoffman and other Whigs believed sharply divided society.[140] By the 1836 presidential election, the idea of "[p]arty itself became a partisan issue."[141] Second, Baltimore, known as "mobtown" since the 1812 Riot,[142] exploded in violence in August 1835. The Baltimore Bank Riot was just one of many riots in the United States that year.[143] *Niles' Weekly Register*, a national newspaper printed in Baltimore, listed fifty-three riots in the United States in 1835 alone.[144] Baltimore's riot, caused in large part due to the collapse of the Bank of Maryland, reflected continuing deep class and social differences in Baltimore.

After Andrew Jackson vetoed the re-charter of the Second Bank of the United States in 1832,[145] he began to destroy the "Monster" by depositing all federal funds in selected state

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137. ANTHONY GRUMBLER, MISCELLANEOUS THOUGHTS ON MEN, MANNERS, AND THINGS 323-24 (Baltimore, Coale & Co. 1837). Hoffman often used the pseudonym "Anthony Grumbler" in written works. *See David Hoffman Time Line*, *supra* note 104, at 54.

138. *See* Ariens, *supra* note 6, at 356.

139. Wesley MacNeil Oliver, *The Rise and Fall of Material Witness Detention in Nineteenth Century New York*, 1 N. Y. U. J. L. & LIBERTY 727, 735 (2005) ("In the late 1820s, the first American party system had collapsed, leaving various factions of Jeffersonian Republicans who would be divided again into two parties with the polarizing ascendancy of Andrew Jackson.").

140. *See* Ariens, *supra* note 6, at 356.

141. DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 485 (2007). Another annoyance may have been the decision of the Democratic Party to meet in Baltimore in 1835 for its national convention. *See id*. Hoffman's concern may have been ameliorated by the election of James Thomas, an anti-Jacksonian, as Governor of Maryland. *See* BRUGGER, *supra* note 80, at 806; GRUMBLER, *supra* note 137, at 194 (attacking the "miserable logic, and worse morals, of very many partisans").

142. Gilje, *Baltimore Riots*, *supra* note 38, at 556.

143. ASHRAF H. A. RUSHDY, AMERICAN LYNCHING 32 (2012).

144. RICHARDS, *supra* note 41, at 12; *see also* RUSHDY, *supra* note 143, at 32 ("The year 1835 saw at least 147 riots, 109 of which occurred in the summer.").

145. ROBERT V. REMINI, ANDREW JACKSON AND THE BANK WAR 80-81 (1967).

banks, which his adversaries called "pet" banks, and withdrawing funds from the Second Bank as needed to pay federal expenses.[146] Both actions were intended to bleed the Second Bank dry, and Jackson succeeded.[147] The pet banks were usually "friendly" to Democratic views, and one such bank was the Baltimore-based Union Bank, operated by Thomas Ellicott.[148]

In 1831, Evan Poultney purchased a controlling interest in the Bank of Maryland.[149] He appointed two young Baltimore lawyers, John Glenn and Reverdy Johnson, to the bank's board of directors.[150] To attract capital to the Bank of Maryland, the directors offered to pay a munificent five percent on all deposits, which encouraged ordinary Baltimoreans to deposit their savings with the bank.[151] These men and three others then conspired to enrich themselves through the Bank of Maryland.[152] In spring 1833, the group correctly predicted that Treasury Secretary Roger B. Taney, a Maryland lawyer, would name Union Bank as one of the government's "pet" banks.[153] They then resolved to use funds from the Bank of Maryland to purchase as much stock in the Union Bank as possible.[154] A year later, the Bank of Maryland closed, but not before Johnson engaged in several fraudulent acts designed to hide his involvement in its dissolution.[155] The closing of the Bank of Maryland was followed by the spread of pamphlets by the principals accusing each other of duplicity and fraud.[156] By early August 1835, the people of Baltimore, many of whom had lost their savings and were now at the mercy of an equity chancellor in charge of the matter, were anxious and angry. They looked to take out their anger on someone.[157]

Samuel Harker operated the *Baltimore Republican* newspaper, the only one of five Baltimore papers to support

146. *Id.* at 125.
147. *See id.*
148. *Id.* at 125-26.
149. SHALHOPE, *supra* note 41, at 32.
150. *Id.*
151. *Id.*
152. *Id.* at 33.
153. *See id*. at 34.
154. SHALHOPE, *supra* note 41, at 34.
155. *See id.* at 35-37.
156. *Id.* at 39-43.
157. *See id.* at 44.

Andrew Jackson's Democratic Republicans.[158] Harker was a determined Jacksonian, and "pitted the bank and the 'aristocracy' against Andrew Jackson and 'the people.'"[159] Jacksonians uniformly opposed aristocracy in favor of "the people."[160] Nevertheless, banks, through their control of money, were a likely source of aristocratic rule.[161]

Like the anonymous "Journeyman Cordwainer" and others before him, Harker also approved of the people's authority to take the law into their own hands when the law failed to meet the people's needs.[162] Thus, if the law was impotent, it would "sometimes be proper for the populace to punish certain offences which can be reached by no other means."[163] The ultimate power of the people was found in "Judge Lynch," or "lynching"—the authority of the people to take the law into their own hands when necessary.[164] "Lynching" was first widely used in the aftermath of the Vicksburg, Mississippi hangings of five gamblers on July 6, 1835.[165] At the time of the Bank of Maryland's failure, anti-Jacksonians viewed many of Andrew Jackson's actions as lawless,[166] leading some to view "Jackson as a kind of Judge Lynch, the inventor, in his way, of lynching."[167]

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158. *See id.* at 21.

159. SHALHOPE, *supra* note 41, at 23; *see also id.* at 24 ("[A]n organized aristocracy is leagued in concert against the *rights of the poor, and the liberties of the country*."). On the origins of the sovereignty of "the people," see the brilliant book by EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988).

160. *See* SHALHOPE, *supra* note 41, at 23.

161. *See id.* at 29 (quoting Harker's statement that aristocrats planned "to rule the country by means of their money" and, should they succeed, "to destroy the freedom of thought, the liberty of speech, and the rights of action, which the constitution of our country has guaranteed to the poor man as well as the man of wealth").

162. *See id.*

163. *Id.* at 31.

164. *Id.* ("[T]he figure of Judge Lynch came to symbolize the latent power of the people—a power that must not be denied."); *see also* CHRISTOPHER WALDREP, THE MANY FACES OF JUDGE LYNCH: EXTRALEGAL VIOLENCE AND PUNISHMENT IN AMERICA 27-38 (2002) (describing the rise of "lynchings" in the 1830s); RUSHDY, *supra* note 143, at 28-38 (same).

165. WALDREP, *supra* note 164, at 37; RUSHDY, *supra* note 143, at 32; *see also The Vicksburg Tragedy*, 48 NILES' WEEKLY REGISTER (Baltimore) 381-82 (1835) (reprinting an article on the Vicksburg lynchings).

166. HOWE, *supra* note 141, at 411 ("[Jackson] did not manifest a general respect for the authority of the law when it got in the way of the policies he chose to pursue.").

167. WALDREP, *supra* note 164, at 36.

On Wednesday, August 5, 1835, several hundred persons milled about with the apparent common view that John Glenn and Reverdy Johnson "had mismanaged the trust and abused the confidence reposed in them."[168] Though several boys threw stones at Johnson's house, others stopped them in the hope that the equity chancellor would assist those who had lost their savings when the Bank of Maryland closed.[169] The next night, Johnson's house incurred more damage, and Mayor Jesse Hunt attempted to halt destruction of property by urging the crowd to follow the rule of law.[170] On Saturday night, rioting began and, despite the attack on Johnson's house being a failure, rioters successfully destroyed John Glenn's home and carried off his wine collection.[171] On Sunday, the rioters finally entered Johnson's home, and finding that some furniture had been removed, obliterated his library, including his "rare works of the law," and burned the house.[172] The chaos finally petered out on Tuesday, August 11, 1835.[173]

During the course of the Baltimore Bank Riot, at least five died and twenty others were seriously injured.[174] The criminal trials of those charged with participating in the riot were fairly tried; some were convicted, others acquitted.[175] Reverdy Johnson continued his efforts to conceal his involvement in the fraud by filing civil suits against Evan Poultney and others and engaging a protégé, assistant attorney general Richard Gill, to obtain indictments against several persons on whom Johnson wished to place blame for the collapse of the Bank of Maryland.[176] Johnson was occasionally successful in these legal

168. SHALHOPE, *supra* note 41, at 46; *see also Narrative of Event—In Baltimore*, 48 NILES' WEEKLY REGISTER (Baltimore) 412-16 (1835) (providing primary report on the rioting).

169. SHALHOPE, *supra* note 41, at 46.

170. *Id*. at 47-48.

171. *See id.* at 53-57.

172. *Id.* at 60-61.

173. *Id.* at 69.

174. SHALHOPE, *supra* note 41, at 1.

175. *See id.* at 79-85.

176. *See id*. at 88-89. Johnson's biographer exonerates him from any responsibility, a conclusion directly at odds with Shalhope. *See* BERNARD C. STEINER, LIFE OF REVERDY JOHNSON 12 (1914) ("Johnson was conclusively cleared from any wrong-doing in connection with the bank.").

proceedings, but the trials were unconvincing as a public matter.[177]

E. Hoffman's Second Edition of *A Course of Legal Study* and the Unrepentant Aristocrat

One of the criticisms of Hoffman's 1817 *A Course of Legal Study* was its length.[178] The second edition was more than double the size of the first, comprising 876 pages in two volumes.[179] One of the additions made by Hoffman was to his discussion of professional deportment.[180] Instead of listing eleven disparate readings to acquaint the reader with professional deportment, Hoffman provided a syllabus of twenty-one, including four from the Bible, followed by an essay and fifty *Resolutions in Regard to Professional Deportment*.[181]

By the time the second edition went to press, all of the criminal trials concerning the Baltimore Bank Riot were complete, as well as many of the trials in which Johnson worked assiduously to demonstrate he was a wronged man.[182] Hoffman left no record of his thoughts of either the riot or the collapse of the Bank of Maryland. As a general matter, the riot likely confirmed his view of the dangers of Jacksonian democracy, and Johnson's actions would have struck Hoffman as dishonorable and venal.

The purpose of Hoffman's exposition on professional deportment is found in his introductory essay. Even though the science of the law "furnishes the heart with the purest principles of action . . . the *practice* of our profession is peculiarly calculated to suppress their influence."[183] The depravity of man often tempted lawyers to seek fame, money, or power. This

177. *Compare* Bernard Christian Steiner, *Reverdy Johnson*, *in* 4 GREAT AMERICAN LAWYERS, *supra* note 5, at 407, 409 ("[Johnson] clearly won the right to be counted among the greatest of the many great men who have shed luster upon the Maryland bar."), *with* SHALHOPE, *supra* note 41, at 88 ("[T]he trials . . . cast additional opprobrium upon [Johnson] . . . .").

178. *Review: A Course of Legal Study*, 3 THE PORTICO 192, 199 (1817).

179. *See generally* HOFFMAN, LEGAL STUDY: 1836, *supra* note 4.

180. The second edition covered professional deportment over fifty-five pages, whereas Hoffman only devoted five pages to the topic in the first edition. *Compare* HOFFMAN, LEGAL STUDY: 1817, *supra* note 2, at 324-29, *with* 2 HOFFMAN, LEGAL STUDY: 1836, *supra* note 4 at 720-75.

181. *See* 2 HOFFMAN, LEGAL STUDY: 1836, *supra* note 4, at 720-75.

182. *See* SHALHOPE, *supra* note 41, at 85, 98-100.

183. 2 HOFFMAN, LEGAL STUDY: 1836, *supra* note 4, at 745.

temptation was joined by the fact that "disputes and controversies" in which lawyers were necessarily involved "are frequently founded on bad, if not the worst of passions."[184] Thus, young lawyers needed to be on guard to avoid professional calamity through seduction by passion. The lawyer avoided this fate through "careful study of the moral sciences" and, just as importantly, by understanding that law could instill "the principles of an elevated honour."[185] Honor demonstrated one's virtue, which was the antidote to the temptation of the passions. Further, a young lawyer's departure from "the most honourable and refined moral deportment . . . excites more than ordinary distrust," for the lawyer's trustworthiness is essential to his success.[186] Hoffman used the words "honour," "honourable," or "honourably" thirteen times in his seven-and-one-half page essay on professional deportment in the second edition of *A Course of Legal Study*.[187]

Although honor consisted both of "genteel" and "primal" pathways,[188] it was comprised of three aspects: (1) a belief in one's worthiness; (2) publishing one's claim of self-worth to the public; and (3) "assessment of the claim by the public, a judgment based upon the behavior of the claimant."[189] Hoffman's emphasis on honor reflected his understanding of the world, a world disappearing in Baltimore and most of Jacksonian America.[190] A gentleman acted not to receive the praise of others, or as a matter of pride, but in order to demonstrate his understanding of his elevated role in society. He also acted honorably to demonstrate his virtuous reputation. Writing at this time, Tocqueville noted, "[h]onor, in times of the zenith of its power directs men's wills more than their beliefs."[191] Gordon S. Wood, discussing the late-eighteenth century American gentleman, wrote, "[h]onor was exclusive,

184. *Id.*

185. *Id.* at 747.

186. *Id.*

187. *See id.* at 744-51.

188. BERTRAM WYATT-BROWN, SOUTHERN HONOR: ETHICS & BEHAVIOR IN THE OLD SOUTH, at xvi-xvii (25th anniversary ed. 2007).

189. *Id*. at 14.

190. *See* GEORGE WILSON PIERSON, TOCQUEVILLE AND BEAUMONT IN AMERICA 494-96 (1938) (discussing a late 1831 conversation between Tocqueville and Baltimore lawyer John Latrobe, that noted the aristocratic "spirit" of Baltimore and its displacement by democratic views).

191. 2 TOCQUEVILLE, *supra* note 8, at 592.

heroic, and aristocratic, and it presumed a hierarchical world different from the one that was emerging in America."[192]

In 1837, Hoffman tried his hand at literature, publishing *Miscellaneous Thoughts*, using the not-well-hidden pseudonym Anthony Grumbler.[193] Hoffman rejected the Jacksonian "Numerical Principle of Government", or equality, as "jacobinical," a "suicidal" act.[194] He contrasted the "two great and distinct classes of people; the one selfish, crude, and mainly unprincipled, the other patriotic, enlightened, and mainly virtuous."[195] The former group was "the *earthy*, or *democratic* party."[196] The latter was "the *intellectual* or *aristocratic* party."[197] For Hoffman, "aristocrat" was a term of honor, and "aristocracy" was favorably contrasted with the "ultraism of our democracy."[198] Hoffman was raised in a place in which different classes of people naturally undertook different roles in society. While some opposed these hierarchies, they were common to Baltimore and Maryland in the eighteenth and early-nineteenth centuries. Indeed, class conflict was one of the reasons for the 1812 Riot. Class-based grievances and resentment also helped trigger the riots throughout the young nation during the summer of 1835.

Hoffman's emphasis on honor allowed him to keenly perceive conflicts of interest between lawyer and his client. For example, Hoffman explained clearly why a lawyer should not be

192. GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 159 (2009); *see also* Bertram Wyatt-Brown, *Honor*, *in* A COMPANION TO AMERICAN THOUGHT 310-11 (Richard Wightman Fox & James T. Kloppenberg eds., 1995) (discussing importance of the concept of honor in American history).

193. *David Hoffman Time Line*, *supra* note 104, at 54.

194. GRUMBLER, *supra* note 137, at 233-34.

195. *Id.* at 233.

196. *Id.*

197. *Id.* at 233-34. *But see* William Leggett, *The Division of Parties*, *reprinted in* SOCIAL THEORIES OF JACKSONIAN DEMOCRACY: REPRESENTATIVE WRITINGS OF THE PERIOD 1825–1850, *supra* note 126, at 66, 67 ("The one party is for a popular government; the other for an aristocracy. The one party is composed, in a great measure, of the farmers, mechanics, laborers, and other producers of the middling and lower classes, according to the common gradation by the scale of wealth, and the other of the consumers, the rich, the proud, the privileged, of those who, if our Government were converted into an aristocracy, would become our dukes, lords, marquises, and baronets.").

198. GRUMBLER, *supra* note 137, at 36. Tocqueville concluded that "hidden at the bottom of a lawyer's soul one finds some of the tastes and habits of an aristocracy." 1 TOCQUEVILLE, *supra* note 8, at 243.

permitted to purchase an interest in a client's cause.[199] Hoffman initially distinguished between contingent fee arrangements, to which he did not object, and the purchasing of causes, which interfered with the "absolute purity" of the lawyer-client relationship.[200] A contingent fee contract was an "independent contract" in which the lawyer exerted no "influence" on the client, and when the client was poor, to ban such arrangements was to make the client unable to prosecute his claim or to defend against the claim of another.[201] On the other hand, the purchase of the client's cause ordinarily occurred after the lawyer and client had established a relationship, and "after the strength of [the client's] case has become known to [the lawyer]."[202]

With regard to other aspects of the fee, a lawyer was to charge only a fee for "what [his] judgment and conscience inform [him] is [his] due, and nothing more."[203] Additionally, an honorable lawyer refused to succumb to the baser aspects of the marketplace. A lawyer should avoid "*half fees*," the practice of taking a discounted amount based on the dishonorable action of "*underbidding* . . . professional brethren."[204] Hoffman also cautioned lawyers against commingling their money with client funds, stressed the duty to return client funds promptly, urged lawyers to refuse to act as a witness when also serving as counsel or to switch sides, and reminded lawyers that they must preserve and return all papers to the client.[205] Additionally, Hoffman believed the lawyer should act respectfully and courteously at all times toward the judge, officers of the court and opposing counsel, no matter the other's "character and deportment."[206]

The idea of honor played a prominent role in several other resolutions. When a client's reputation was at stake, no compromise was possible, and the matter necessarily had to go to a verdict. Hoffman made clear that this should occur even when the opposing party possessed an "elevated standing," for

199. *See* 2 HOFFMAN, LEGAL STUDY: 1836, *supra* note 4, at 760-62 (Resolution XXIV).

200. *See id.* at 760-61.

201. *Id.* at 761.

202. *Id.* at 762.

203. *Id.* at 762 (Resolution XXVII).

204. 2 HOFFMAN, LEGAL STUDY: 1836, *supra* note 4, at 763 (Resolution XXVIII).

205. *See id.* at 753, 762-65, 766 (Resolutions VIII, XXV, XXVI, XXX, and XXXV).

206. *See id.* at 752-53 (Resolutions III, IV, V and VI).

the "great and wealthy" were required to make amends publicly and openly to the "ignoble and poor."[207] Public exoneration of one's reputation was necessary because public honor comprised much of a person's reputation. Hoffman's understanding of honor also affected his definition of the lawyer's duty to his clients. He believed a lawyer should be "zealous and industrious" in his representation, but the meaning of "zealous and industrious" representation was framed in terms of the lawyer's honor.[208] Hoffman sensibly urged lawyers to refuse to make "frivolous and vexatious defences" but also suggested lawyers refrain from making any claim or defense that "ought not, to be sustained," for aiding a client then "would be lending [the lawyer] to a dishonourable use of legal means."[209]

Honor also led Hoffman to include resolutions advising lawyers to refrain from pleading the statute of limitations or the defense of infancy as the sole defense against an honest demand, even though he was aware that the law permitted those defenses. The lawyer "shall claim to be the sole judge . . . of the occasions proper for their use."[210] Further, Hoffman urged that a lawyer not "use [his] endeavours to arrest, or to impede the course of justice, by special resorts to ingenuity" those charged with crimes, the evidence of which left "no just doubt of their guilt."[211] It was inappropriate to defend one of such "atrocious character, who [had] violated the laws of God and man," because the accused's actions had left him "entitled to no such special exertions from any member of our pure and honourable profession."[212] The most one could undertake for such a man

207. *Id.* at 759 (Resolution XXII).

208. *See id.* at 798 (Resolution XVIII).

209. *See* 2 HOFFMAN, LEGAL STUDY: 1836, *supra* note 4, at 754 (Resolutions X and XI).

210. *See id.* at 754-55 (Resolutions XII and XIII); *see also The Good Advocate*, 1 J.L. 58, 58 (1830) ("The good advocate is one who will not plead the cause wherein his tongue must be confuted by his conscience."). This quote is taken from a 1642 English work by Thomas Fuller, though the *Journal of Law* does not reference it. *See* ALLYSON N. MAY, THE BAR AND THE OLD BAILEY, 1750–1850, at 206 (2003). For a sensitive and clear-eyed assessment of the views of lawyers from Hoffman's time to the present on this question, see Thomas L. Shaffer & Robert F. Cochran, Jr., *"Technical" Defenses: Ethics, Morals, and the Lawyer as Friend*, 14 CLINICAL L. REV. 337 (2007).

211. 2 HOFFMAN, LEGAL STUDY: 1836, *supra* note 4, at 755 (Resolution XV).

212. *Id.* at 756.

was "a fair and dispassionate investigation of the *facts* of their cause."[213]

The understanding of the lawyer's duty of zealous representation underwent a transition in the 1830s. Philadelphia lawyer David Paul Brown wrote in his 1856 memoir, "[a] lawyer is not morally responsible for the act or motive of a party, in maintaining an unjust cause, but he *is* morally responsible, if he does it knowingly, however he may 'plate sin with gold.'"[214] Brown was a zealous advocate whose career spanned the transition from an ethic of honor to an ethic of conscience. In his *Golden Rules for the Examination of Witnesses*, he wrote regarding cross-examination, "in all this, never be unmindful of your own dignity. . . . bear all the powers of your mind—not that *you* may shine, but that *virtue* may triumph, and your *cause* may prosper."[215] In 1832, Brown represented Lucretia Chapman, accused of murdering her husband by poisoning him.[216] Brown obtained a not guilty verdict for Chapman with such zeal that the prosecutor believed he had "overstepped the bounds of courtroom propriety."[217] Brown and others, including George Sharswood, hid behind the word "knowingly," and the phrase "maintaining an unjust cause."[218] If the lawyer did not know the cause was unjust, he could continue to act on behalf of the client, allowing the law to shape the verdict. In defending one accused of a crime, rather than aiding a plaintiff or defendant in maintaining an unjust cause, lawyers writing in the 1840s and 1850s believed that defense counsel should exercise zeal even when the defendant

213. *Id.* Hoffman was involved in one well-known criminal case, but his practice was largely civil. *See David Hoffman: A Biographical Sketch*, *supra* note 4, at 25.

214. 2 DAVID PAUL BROWN, THE FORUM; OR FORTY YEARS FULL PRACTICE AT THE PHILADELPHIA BAR 30 (Philadelphia, Robert H. Small 1856).

215. David Paul Brown, *Golden Rules for the Examination of Witnesses*, *reprinted in* JAMES RAM, A TREATISE ON FACTS AS SUBJECTS OF INQUIRY BY A JURY 309, 311 (John Townshend ed., New York, Baker, Voorhis & Co., 2d Am. ed. 1870).

216. For a detailed account of the alleged crime and subsequent criminal trials, see LINDA WOLFE, THE MURDER OF DR. CHAPMAN: THE LEGENDARY TRIALS OF LUCRETIA CHAPMAN AND HER LOVER (2004).

217. *Id.* at 198.

218. BROWN, *supra* note 214, at 30; *see also* SHARSWOOD, *supra* note 13, at 26.

had confessed his guilt to the lawyers.[219] This specific issue arose in the infamous *Courvoisier* case in London in 1840.[220]

Benjamin Courvoisier, a servant, killed his master. Before the second day of a three-day trial, he confessed his guilt to his lawyer, Charles Phillips, but refused to plead guilty.[221] After informing trial judge Baron Parke of Courvoisier's confession, Phillips was told to continue to defend Courvoisier, using "all fair arguments arising on the evidence."[222] Courvoisier was found guilty and sentenced to die.[223] During the very short period before he was hanged, he publicly confessed his guilt and, on at least one occasion, informed the public of his prior confession to Phillips regarding the murder.[224] Although one early newspaper praised Phillips for defending Courvoisier with "honourable zeal,"[225] a letter to the *London Times*, published five days after the trial ended, stated, "he who defends the guilty, knowing him to be so, forgets alike honour and honesty."[226] A decade later, Phillips's actions were the subject of extensive commentary in American publications.[227] The propriety of Phillips's actions again was addressed, and American and British lawyers generally agreed they owed a duty to defend the guilty client with honorable zeal.

Hoffman knew that a lawyer's refusal to defend on the grounds of infancy or the statute of limitations was not accepted lawyer behavior. First, Hoffman himself had been involved in a case in 1830 in which the opposing party successfully asserted the statute of limitations.[228] Second, attorneys had successfully

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219. *See* SHARSWOOD, *supra* note 13, at 31-33.

220. *See generally* DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER 19-39 (1973) (detailing the *Courvoisier* case); *see also* Ariens, *supra* note 6, at 375-80 (discussing the *Courvoisier* case).

221. MELLINKOFF, *supra* note 220, at 132-33. Courvoisier was apparently able to use expensive and well-known counsel through the beneficence of Sir George Beaumont, who employed Courvoisier's uncle as his butler, and through fundraising among London-based foreign servants. MAY, *supra* note 210, at 213.

222. MELLINKOFF, *supra* note 220, at 139-40. Parke sat on the case "to assist [Judge] Tindal but did not try the case." MAY, *supra* note 210, at 214.

223. MELLINKOFF, *supra* note 220, at 123-24.

224. *Id.* at 126, 131.

225. *Id.* at 141.

226. *Id.* at 142.

227. *See* Ariens, *supra* note 6, at 379-80 (discussing published articles).

228. *See* State Use of Mayor and City Council of Baltimore v. Boyd, 2 G. & J. 365, 366 (Md. 1830).

pled the statute of limitations in Maryland as early as 1808.[229] Third, Maryland lawyers successfully made an infancy defense as early as 1820,[230] and a classic infancy case was decided in 1833 by the Maryland Court of Appeals, which heard the case after a decision by the equity chancellor holding the infancy defense properly invoked.[231] Hoffman was well aware his *Resolutions* instructed a lawyer not to make a permissive, but dishonorable, legal argument on his client's behalf. The lawyer decided how far to go in representing a client, and defending a client on the sole ground of the statute of limitations was dishonorable—an act of knavery. A lawyer was never a mere agent of a client, and he acted to meet the standards of honor, not the more practical, or possibly venal, interests of his client. Consequently, a lawyer's ability to defend on grounds of the statute of limitations or infancy did not make those actions honorable, and a lawyer who valued his honor would not make such pleas.

Thus, the mortar that bound Hoffman's *Resolutions* was the concept of honor. Honor required a lawyer to decline to make legal claims that "ought not, to be sustained."[232] The ethic of honor joined private and public morality, for a gentleman's identity was dependent on his public reputation. Hoffman and other Maryland lawyers of the time were gentlemen, and their reputation rested on their public actions. A lawyer both exercised honorable zeal in representing a client and acted to obtain "substantial justice [for] all parties."[233] In addition to using "honour" and its cognates thirteen times in his introductory essay, Hoffman used "honourable" or its opposite, "dishonourable," eleven times in the *Resolutions*.[234]

However, Hoffman's views quickly faded. In American law journals of the 1840s, lawyers discussed the propriety of lawyers' conduct in terms of conscience.[235] In an 1839 speech

229. *See* Ratrie v. Sanders, 2 H. & J. 327, 327 (Md. 1808); Poe v. Conway Adm'r, 2 H. & J. 307, 307 (Md. 1808).

230. *See* Davis v. Jacquin, 5 H. & J. 100, 100-01 (Md. 1820).

231. *See* Clagett v. Salmon, 5 G. & J. 314 (Md. 1833).

232. 2 HOFFMAN, LEGAL STUDY: 1836, *supra* note 4, at 754 (Resolution XI).

233. *See* Bloomfield, *supra* note 3, at 684.

234. *See* 2 HOFFMAN, LEGAL STUDY: 1836, *supra* note 4, at 725-75.

235. *See, e.g.*, *The Lawyer, His Character*, 2 PA. L.J. 185, 187-88 (1843) (reprinting a book review from Ireland on the behavior of British lawyers and noting the principle of

to students at Cincinnati College, Timothy Walker defended a lawyer's representation of "a bad cause" on rule of law grounds, stating that as long as a lawyer took "no dishonorable advantage, [he] stand[s] justified at the bar of [his] own conscience, whatever others may think of [his] conduct."[236] The Pennsylvania Supreme Court also declared, "[t]he high and honourable office of a counsel would be degraded to that of a mercenary, were he compelled to do the biddings of his client against the dictates of his conscience."[237] In 1846, the *Monthly Law Reporter* asked "to be delivered from self-styled *conscientious lawyers*, who will engage for no parties that are not morally right."[238] George Sharswood's 1854 *A Compend of Lectures* discussed how to "assist the [lawyer's] mind in coming to a safe conclusion *in fore conscientiae*, in the discharge of [his] professional duty" while representing a client.[239]

Once the lawyer agreed to represent a client, he did so with "warm zeal."[240] Sharswood used *Courvoisier* as a paradigmatic example of a lawyer acting ethically because he represented to the best of his abilities a client who had privately confessed his guilt.[241] An unsigned review of David Paul Brown's *The Forum* in the *Southern Literary Messenger* echoed this view.[242] The author discussed Brown but mainly tackled the larger issue of "the ethics of the legal profession."[243] He also made several points that suggested Hoffman's ethical precepts spoke to a past ideal. First, although the article positively cites Hoffman's "excellent treatise on a course of legal study," it does so only to quote Hoffman's view that law students should be acquainted with the Bible, not to discuss Hoffman's *Resolutions*.[244] Second, the article distinguishes between the amoral practice of undertaking an "unjust cause" and the "extreme case" that "even

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"conscience" in lawyers); David Dudley Field, *The Study and Practice of the Law*, 14 U.S. DEM. REV. 345, 349 (1844) (noting actions that may affect the lawyer's "conscience").

236. Walker, *supra* note 11, at 547.

237. Rush v. Cavenaugh, 2 Pa. 187, 189 (1845).

238. *The Practice of the Bar*, *supra* note 11, at 241.

239. *See* SHARSWOOD, *supra* note 13, at 30. *In fore conscientiae* translates to "in the tribune of his conscience." BLACK'S LAW DICTIONARY 701 (5th ed. 1979).

240. SHARSWOOD, *supra* note 13, at 23-24.

241. *Id.* at 40-43.

242. *See generally Christianity in the Legal Profession*, 27 S. LITERARY MESSENGER 66 (1858) (reviewing BROWN, *supra* note 214).

243. *Id.* at 66.

244. *Id.* at 68.

the guilty man should be defended."[245] The latter is proper not only because it is a Christian action, but also because defending the guilty client by the law repels the perfidy of lynch law.[246] Third, while rejecting Lord Brougham's view that a lawyer is loyal to his client, even if such action would "involve his country in confusion for his client's protection,"[247] the author generally defends the practice of law, including criminal law, as "a high and honourable and Christian calling."[248] Fourth, the author notes that the "extreme case" of the guilty client is "usually put to the lawyer as a test of conscience."[249] In each of these examples, conscience is an inner test of one's identity, based on the individual's own standards, not society's. Hoffman uses the word "conscience" just three times in his writing on professional deportment, compared with the twenty-four uses of "honor" or its variants.[250] As Bertram Wyatt-Brown notes about the end of the ideal of honor in the mid-nineteenth century, "[i]n moral terms, conscience replaced honor, guilt replaced shame, that is, inner self-controls rather than public opinion were supposed to govern how one acted."[251] This shift made Hoffman of slight continuing interest to practicing lawyers, but of little use when lawyers considered the bounds of the ethics of advocacy.

Hoffman was fifty-one when the second edition of *A Course of Legal Study* was published. His final lecture had been given over three years earlier, in 1833, and although listed as a

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245. *Id.* at 70-72.

246. *See id.* at 71-72.

247. *Christianity in the Legal Profession*, *supra* note 242, at 70-71. As prince, and before his arranged marriage to Queen Caroline, George IV had secretly and unlawfully married a Catholic widow, Maria Fitzherbert. If the public had learned, George would have forfeited his crown. In defending Queen Caroline against George's petition for a divorce on the ground of adultery, Brougham implicitly threatened exposure of that fact by stating, in part, "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client." *See* 2 CAUSES CÈLEBRES: TRIAL OF QUEEN CAROLINE 3 (New York, James Cockcroft & Co. 1874). Brougham's views were officially rejected by American lawyers until the development of the modern American legal profession in the 1960s. *See generally* Michael Ariens, *Brougham's Ghost*, 35 N. ILL. U. L. REV. (forthcoming 2015).

248. *Christianity in the Legal Profession*, *supra* note 241, at 71.

249. *Id.* at 72; *see also* BROOKE, *supra* note 12, at 14 ("[T]he question is, whether, in such cases, a lawyer can, with a good conscience, prosecute the *legal* claim, directly against the *moral* right.").

250. *See generally* 2 HOFFMAN, LEGAL STUDY: 1836, *supra* note 4, at 744-75.

251. WYATT-BROWN, *supra* note 188, at 311.

lawyer in the annual *Baltimore Directory*, his law practice was moribund.[252] What was worse for Hoffman's reputation was the evanescent reaction to the second edition—only two reviews were published.[253] The Boston-based *American Jurist and Law Magazine* published a lengthy review of the second edition, but the review spent merely the final paragraph on Hoffman's *Resolutions*.[254] The second significant review was in the *Biblical Repertory and Princeton Review*.[255] Much of the review was an extended digression on the value of study for ministers in training. The remainder praised Hoffman's rules of professional deportment but, instead of analyzing them, merely quoted many resolutions favorably, including those in which Hoffman refused to make a statute of limitations defense, involve an infancy defense, or use the "artifices of eloquence" to aid those of "atrocious character."[256]

Hoffman's *Miscellaneous Thoughts* was published the next year.[257] The *North American Review* ostensibly reviewed it but spent the bulk of its review praising the second edition of *A Course of Legal Study*.[258] The review, however, did not discuss Hoffman's *Resolutions*, and the second edition received only a cursory review. Hoffman's excuse was that the second edition "was only very partially *published*."[259]

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252. *See* Shaffer, *supra* note 4, at 128; *see also supra* note 118 and accompanying text.

253. All Hoffman received from the *North American Review*, which had published Joseph Story's thirty-three page review of the first edition, was a simple notice of publication alongside other books. *See Quarterly List of New Publications*, 43 N. AM. REV. 283, 285 (1836). Unsurprisingly, the *United States Magazine and Democratic Review* did not review the second edition.

254. *See* F.J.T, *Hoffman's Course of Legal Study*, 15 AM. JURIST & L. MAG. 321, 341 (1836) (book review) (indicating delight with the resolutions and noting that "[u]pon a future occasion we design to make this division the text for a separate article"). No such article was ever published.

255. *See generally* Charles Hodge, *Review, A Course of Legal Study*, 9 BIBLICAL REPERTORY AND PRINCETON REV. 509, 509-24 (1837).

256. *Id.* at 519-20.

257. *See David Hoffman Time Line*, *supra* note 104, at 54.

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

259. DAVID HOFFMAN, A COURSE LEGAL STUDY OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY, at iii (Philadelphia, Thomas, Coperthwait & Co. 2d ed. 1846) [hereinafter HOFFMAN, LEGAL STUDY: 1846]. He made the same claim in GRUMBLER, *supra* note 137, at 3.

A Course of Legal Study was reprinted in 1846.[260] The same year, his book *Hints on the Professional Deportment of Lawyers* ("*Hints*") was published, which reprinted Hoffman's previous material on legal ethics.[261] By then, legal and literary publishing had changed dramatically. The *American Jurist and Law Magazine* and the Philadelphia-based *American Law Magazine* no longer existed.[262] Law journals that remained in existence included the *Monthly Law Reporter*, published in Boston, the *Pennsylvania Law Journal* and the *Legal Intelligencer*, both published in Philadelphia, the Cincinnati-based *Western Law Journal*, and the *New York Legal Observer*.[263] These journals provided practical advice to practicing lawyers. None printed articles on broad jurisprudential topics.[264] Whig-oriented publications, such as the *North American Review* and the *American Whig Review*, took no notice of the reprinted *A Course of Legal Study* or *Hints*.[265] In *Miscellaneous Thoughts*, the publisher listed reviews of the second edition of *A Course of Legal Study*.[266] After listing several positive French and English reviews, the publisher wrote, "American notices of this second edition are equally numerous and laudatory."[267] But these "numerous" reviews consisted merely of mentions of the reviews listed above, a brief review by the *National Gazette*, a reprinting in the *Baltimore American* of the *North American Review's* final paragraph, and a letter to the editor of the *Baltimore American* commending the *London Law Review's* assessment.[268] In reality, it was a slender selection.

Michael Hoeflich traced the price of *A Course of Legal Study* from the 1840s through 1860.[269] He found its price slightly declined over time, even in more remote parts of the

260. *See* HOFFMAN, LEGAL STUDY: 1846, *supra* note 259, at iii.
261. *See David Hoffman Time Line*, *supra* note 104, at 55.
262. These periodicals were last published in 1843 and January 1846, respectively.
263. *See* Ariens, *supra* note 6, at 363.
264. *See id.*
265. *Id.*
266. *See* GRUMBLER, *supra* note 137, at 7-11.
267. *Id.* at 8.
268. *Id.* at 8-11.
269. M. H. HOEFLICH, LEGAL PUBLISHING IN ANTEBELLUM AMERICA 65-67 (2010).

nation.[270] One reason for this decline was its "lost popularity."[271]

In 1835, a British lawyer named Samuel Warren published *A Popular and Practical Introduction to Law Studies*.[272] A second edition was published in 1845 and a third in 1863.[273] The first American edition of Warren's book was published in Philadelphia in 1836.[274] Warren's emphasis on the "popular" and the "practical" was a world away from Hoffman's intellectually wide-ranging *A Course of Legal Study*. Warren's *Introduction* became popular in the United States, eclipsing *A Course of Legal Study*,[275] and in 1848 Warren's book *The Moral, Social, and Professional Duties of Attornies and Solicitors* was published.[276] Hoffman was ignored by popular magazines and professionally displaced by Warren.

As for Hoffman's *Hints*, it had no impact whatsoever. It was neither reviewed in any legal publications nor in any of the usual literary magazines. It just disappeared. In 1847, Hoffman moved to England.[277] He returned to the United States in 1854, the year in which he died.[278]

III. LOST

A. Forgotten

Hoffman's influence waned because his views of professional deportment represented the past.[279] By the 1850s, most lawyers who wrote about legal ethics rejected the centrality of honor in favor of conscience, and conscience allowed a

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270. *Id.*

271. *Id*. at 67.

272. *See* SAMUEL WARREN, A POPULAR AND PRACTICAL INTRODUCTION TO LAW STUDIES (London, A. Maxwell 1835).

273. *See* C. R. B. Dunlop, *Samuel Warren: A Victorian Law and Literature Practitioner*, 12 CARDOZO STUD. L. & LITERATURE 265, 271 (2000).

274. *See* SAMUEL WARREN, A POPULAR AND PRACTICAL INTRODUCTION TO LAW STUDIES (Philadelphia, J.S. Littell 1st Am. ed. 1836).

275. HOEFLICH, *supra* note 269, at 67 (stating the book "gained a wider audience in the United States").

276. *See* SAMUEL WARREN, THE MORAL, SOCIAL, AND PROFESSIONAL DUTIES OF ATTORNIES AND SOLICITORS (Edinburgh and London, William Blackwood & Sons 1848).

277. *David Hoffman Time Line*, *supra* note 104, at 55.

278. *Id.*

279. Dean Steve Sheppard thoughtfully suggested that Hoffman also faded because his books lacked a proper institutional platform, and that his approach to law and legal study was anachronistic.

lawyer to bond more tightly, though not exclusively, with the interests of his client.[280] Lawyers sometimes justified this change by citing Sharswood, as his views echoed those of most other lawyers writing on the subject.[281] American lawyers implicitly concluded Hoffman's *Resolutions* ill-fit for the times.

Sharswood was a life-long Philadelphian.[282] He was appointed an associate judge of the district court in 1845 and was named its presiding judge three years later.[283] In October 1850, he gave his first lecture as Professor at the newly reinstituted Department of Law at the University of Pennsylvania.[284]

In 1854, Sharswood began his law school lectures with a focus on legal ethics.[285] This lecture became part of *A Compend of Lectures on the Aims and Duties of the Profession of Law*, published later that year.[286] In addition to informing students that a "[h]igh moral principle is [the young lawyer's] only safe guide,"[287] he cautioned his readers and listeners to beware that "these objects of ambition, wealth, learning, honor, and influence, worthy though they be, [are of but] factitious importance."[288]

Sharswood accepted the position that "the lawyer is not merely the agent of the party; he is an officer of the court."[289] Even so, the lawyer was "not morally responsible for the act of the party in maintaining an unjust cause," for the lawyer's role

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280. *See* SHARSWOOD, *supra* note 13, at 130.

281. *See, e.g.*, *Lawyer, His Character*, *supra* note 235, at 195; Walker, *supra* note 11, at 547.

282. Joel Fishman, *Sharswood, George*, *in* YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW, *supra* note 4, at 491, 491-92; *see also* Samuel Dickson, *George Sharswood*, *in* 6 GREAT AMERICAN LAWYERS, *supra* note 5, at 121, 132; Samuel Dickson, *George Sharswood—Teacher and Friend*, 55 AM. L. REG. O.S. 401 (1907) (discussing Sharswood's career as a law professor and his views on legal education). On the Philadelphia bar of this time, see ROBERT R. BELL, THE PHILADELPHIA LAWYER: A HISTORY, 1735–1945, at 106-56 (1992) and Gary B. Nash, *The Philadelphia Bench and Bar: 1800–1861*, 7 J. COMP. STUD. SOC'Y & HIST. 203 (1965).

283. Fishman, *supra* note 282, at 491.

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

285. *See* Edwin R. Keedy, *George Sharswood—Professor of Law*, 98 U. PA. L. REV. 685, 692 (1950).

286. *See id.*

287. SHARSWOOD, *supra* note 13, at 9.

288. *Id.* at 106.

289. *Id*. at 26.

was to assist the court and jury in reaching its decision.[290] Furthermore, "[t]he lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the function of both judge and jury."[291] These conclusions all ran contrary to Hoffman.

Sharswood believed it was the duty of the lawyer to plead the statute of limitations on behalf of the client, even when the client "knows that he honestly owes the debt sued for and that the delay has been caused by indulgence or confidence on the part of his creditor."[292] Though the client "ought not to plead the statute," if he wished to do so, the lawyer should raise it, and the case would be decided on the law.[293] Sharswood also accepted the duty of the lawyer to represent the guilty client, for such a person should be convicted only upon "legal evidence."[294] The limits of the defense lawyer's representation were as expressed in *Courvoisier*; "It is [the lawyer's] duty . . . to use ALL FAIR ARGUMENTS ARISING ON THE EVIDENCE."[295]

Sharswood avoided canons, resolutions, rules, and the like. His statement of high moral principle in the practice of law remained in essay form. His acceptance of a greater, though not exclusive, focus on the lawyer's duty of zealous representation of his client fit the times and went well beyond Hoffman's honor-based interpretation of the lawyer's duty to a client.[296] For much of the latter half of the nineteenth century, Sharswood's *Essay* was the dominant source for understanding legal ethics.

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290. *Id.*

291. *Id.*

292. SHARSWOOD, *supra* note 13, at 25-26.

293. *Id*. at 26.

294. *Id*. at 31.

295. *Id*. at 44.

296. *See generally* Ariens, *supra* note 6 (discussing the duty and its related ethical implications in detail). An appeal couched in very similar terms is found in John D. Works, *Open Letters: More About "Lawyers' Morals"—The Responsibility of Laymen*, 37 THE CENTURY MAG. 475, 475-76 (1889) ("But the distinction between *legal* and *moral* right should not be overlooked. . . . For example, a debt may be barred by the statute of limitations. The defendant who is sued is in a moral sense still liable, as the debt is unpaid; but the statute of limitations having run, he has a legal defense which his attorney is bound, as a matter of duty, to interpose for him.").

B. Other Voices

A number of legal ethics essays, lectures, and printed speeches from 1854 through the end of the nineteenth century used Sharswood's *Essay* as their guide. Those that did not still largely echoed Sharswood's views: (1) a lawyer representing a client in a civil matter owed a duty to a client to use any proper legal claim or defense, such as the statute of limitations or the defense of infancy; and (2) a lawyer representing a person in a criminal matter owed him the duty of zealous representation, for no man should be convicted except upon legal evidence, and the lawyer was "to suggest all those reasonable doubts which may arise from the evidence as to his guilt, and to see that if he is convicted, it is according to law."[297] This latter duty, while breaking from Hoffman, did not extend as far as Lord Brougham's view of zeal.[298] When legal authors and speakers looked for an ethical counterpoint with which they disagreed, most used Brougham's speech in Queen Caroline's case. None mentioned Hoffman's less ambitious understanding of honorable zeal, and only a few advanced that position without naming Hoffman.

For example, William Allen Butler's February 1871 speech before a New York audience,[299] published later that year as *Lawyer and Client: Their Relation, Rights, and Duties* ("*Lawyer and Client*"), stated the following view adopted by most lawyers of Brougham's speech: "This was a high and somewhat rapid flight of oratory, far beyond any justifiable limit of duty or privilege. . . . It is rarely quoted, except to be condemned."[300] Other postbellum writers echoed Butler's view. Henry

297. SHARSWOOD, *supra* note 13, at 25-27, 31.

298. *See id.* at 28-29 (quoting and criticizing Brougham); *see also* WILLIAM P. WELLS, THE CONDITIONS OF THE LAWYER'S USEFULNESS 10 (Ann Arbor, John Moore 1875) (rejecting the view that a lawyer is solely an agent of his client). The extent of the shift in understanding of the lawyer's duty of loyalty to his client in the late nineteenth century is contestable. *Compare* Ariens, *supra* note 6, at 394-407 (concluding that the shift taking place in this period was driven by a focus upon the best interests of the client), *with* Mark DeWolfe Howe, *The Cravath Firm and Its Predecessors*, 60 HARV. L. REV. 838, 840-41 (1947) (book review) (arguing that the legal profession became one in which lawyers did whatever they could for their clients in order to gain wealth and power for themselves). *See generally* Ariens, *supra* note 247.

299. *See Local Miscellany*, N.Y. TRIBUNE, Feb. 4, 1871, at 8 (noting delivery of third in series of lectures by Butler on "relations arising between lawyer and client").

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

Sedgwick urged lawyers to "[f]orget the fallacious eloquence of Brougham."[301] Theodore Bacon summarized the consensus view in 1888, stating, "I do not deem it important here to controvert the extraordinary proposition enunciated by Lord Brougham upon the trial of Queen Caroline. . . . [I]t has seldom since been approvingly cited, unless by some advocate maintaining an unconscionable cause by reprehensible methods."[302]

Late-nineteenth century lawyers implicitly and explicitly followed Sharswood in supporting zealous representation on "rule of law" grounds. Joseph Cox concluded that a lawyer who believes his client is guilty maintains a duty to represent the client by using the legal principles that properly apply, because "[o]ur government is one of law."[303] This argument was echoed the following year by John Works in a long letter to the editors of *The Century*:

> Very few thoughtful men, whether lawyers or not, will at the present day contend that a lawyer violates any rules of professional ethics or commits any wrong to society by defending a criminal whom he knows to be guilty. To be tried and defended by counsel, in open court, is a constitutional right expressly guaranteed to every person charged with a criminal offense. No one, whether his attorney or not, has a right to assume his guilt. The law presumes his innocence. If he is unable to employ an

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301. HENRY D. SEDGWICK, THE RELATION AND DUTY OF THE LAWYER TO THE STATE 16 (New York, Baker & Godwin 1872).

302. Theodore Bacon, *Professional Ethics*, 17 J. SOC. SCI. 37, 41 (1883); *see also* DORMAN B. EATON, THE PUBLIC RELATIONS AND DUTIES OF THE LEGAL PROFESSION 22-23 (New Haven, Hodgson & Robinson 1882) ("No language can too strongly reprobate so detestable and barbarous a code of professional ethics, more becoming a band of pirates or brigands than a Christian officer of justice . . . ."); RICHARD HARRIS, HINTS ON ADVOCACY INTENDED FOR PRACTITIONERS IN CIVIL AND CRIMINAL COURTS 163 (William L. Murfree, Sr., ed., St. Louis, William H. Stevenson 3d Amer. ed. 1884) ("Lord Brougham's authority, however, on this point is very generally controverted."); HENRY WADE ROGERS, ADDRESS TO THE LAW CLASS OF MICHIGAN UNIVERSITY, JUNE 17, 1886, at 24 (n.p., 1886) ("[B]oth the judgment and the conscience of the profession reject the extreme opinion which was expressed by Lord Brougham in Queen Caroline's case."). A few late-nineteenth century writers considered the context of Brougham's speech, as did Sharswood. Noting that Brougham was defending Queen Caroline in a divorce demanded by King George IV, thus, "we imagine that his motive for advancing so extreme a theory was to palliate, in the eyes of the King, the vehemence of his advocacy against the King, by making it appear that he felt himself compelled thereto by his conceptions of an advocate's duty." *About the Profession and Practice of the Law*, 1 S. L. REV. 249, 279 (1872).

303. Joseph Cox, *Legal Ethics*, 8 OHIO ST. B. ASS'N REP. 95, 105-06 (1888).

> attorney, the court must appoint one to conduct his defense. The attorney has no legal or moral right to refuse to defend him on the ground that *he* knows him to be guilty, whether he is employed by the defendant or appointed by the court to appear for him. This duty requires him to make the defense for him fairly and justly, in the interest of society as well as of the prisoner.[304]

Butler's *Lawyer and Client* exemplified the shift between public honor and private conscience in thinking about how far the lawyer is amenable for the conduct of his client's case. Butler noted that the lawyer was required to act in accordance with any rules of the court, and that he was subject to praise or condemnation by the public as long as it properly understood the case and avoided a decision based on mere passion.[305] "But the lawyer is amenable, first of all and last of all and most of all, to his own conscience."[306] Henry Wade Rogers urged the 1886 law graduates at the University of Michigan to avoid any professional behavior that would "shock an enlightened conscience."[307] He also cited Rufus Choate on the view that no lawyer possessed a "duty to go into court, and contrary to his convictions assert what he did not believe to be true."[308] In discussing the distrust of lawyers among the public, including "highly intelligent men," Richard Harris noted the argument was "that several practices usual at the bar are contrary to good conscience."[309] This shift, however, was not unanimous. In an

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304. Works, *supra* note 296, at 476*; accord* D. H. CHAMBERLAIN, SOME OF THE PRESENT NEEDS AND DUTIES OF OUR PROFESSION 12, 14 (New York & London, G.P. Putman's Sons 1888). The "rule of law" view was contrasted by those who facilitated the rise of lynching in the postbellum period. *See* MICHAEL J. PFEIFER, ROUGH JUSTICE: LYNCHING AND AMERICAN SOCIETY, 1874–1947, at 94 (2004) ("Lynching across the postbellum United States underscored the difference between the criminal justice values held by many rural and working-class people, who sought harsh retribution closely supervised by the community, and those possessed by many middle-class people, who stressed the role of the state as neutral guarantor of justice, the observance of the forms of law, fairness, decorum, and humanitarian considerations.").

305. *See* BUTLER, *supra* note 300, at 57-59.

306. *Id.* at 64; *see also* Bacon, *supra* note 302, at 39 (worrying that "if a lawyer's conscience or a lawyer's honesty comes to be a current jest," then the legal profession's "moral debasement" will contaminate society as a whole); WM. E. CHANDLER, ADDRESS BEFORE THE GRAFTON AND COOS BAR ASSOCIATION 13 (Concord, Republican Press Ass'n 1888) (citing Butler in favor of a duty to "win victory . . . by all means which stop short of personal and professional dishonor").

307. ROGERS, *supra* note 302, at 23.

308. *Id.* at 24.

309. HARRIS, *supra* note 302, at 157.

1882 speech, Theodore Bacon, after rejecting Brougham, rejected Sharswood on the grounds of honor.[310] Sharswood believed a lawyer remained duty-bound to represent a client if, after taking on the matter, the lawyer found "his ardor chilled by dishonoring disclosures" of the client.[311] In such a case, Bacon concluded Sharswood's belief that the lawyer was required to continue representing the client was wrong.[312] Therefore, "a case which honorable counsel ought not to undertake with a knowledge of its character, and a case which, once undertaken, turns out to be of such a character" cannot be distinguished.[313] If the "lawyer of good repute" withdrew in such a case, any adverse consequence would properly fall on the client, not the lawyer.[314] However, Bacon's use of honor was a minority view.

The editors of the *Southern Law Review* favorably quoted Sharswood on why the lawyer's understanding of duty was not contrary to the public's interest, because "[t]he lawyer . . . is not merely the agent of the party[;] he is an officer of the court."[315] Publicly, nearly all lawyers by 1900 agreed that the lawyer zealously represented his client, but never acted solely as the client's agent.[316] The "hired gun" model was never promoted, and was regularly denounced by the elite bar, even as lawyers recognized that "pettifoggers" and "shysters" were willing to do most anything for a client.[317]

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310. *See* Bacon, *supra* note 302, at 43-44.

311. *Id.*

312. *Id.*

313. *Id.* at 44.

314. *Id.*; *see also* GEORGE W. MCCRARY, THE TRUE LAWYER 10 (Kansas City, H. N. Farey & Co. 1886) (following implicitly the approach of Sharswood and declaring it took a trial to determine which side was right and which was wrong, but also speaking repeatedly in terms of honor). A similar view is expressed in EATON, *supra* note 302, at 23 (quoting without citing Chief Justice John Bannister Gibson in *Rush v. Cavenaugh*, 2 Pa. 187, 189 (1845) for the proposition that "[t]he high and honorable office of Counsel would be degraded to that of a mercenary, were he compelled to do the biddings of his client against the dictates of his conscience").

315. *About the Profession and Practice of Law*, *supra* note 302, at 279.

316. This message was lost to some. *See* JOHN R. DOS PASSOS, THE AMERICAN LAWYER 142 (1907) (rejecting Brougham's doctrine but concluding "yet it has been relied on over and over again by lawyers, to cover all kinds of dishonest practices and defenses").

317. *See* CHARLES EDWARDS, PLEASANTRIES ABOUT COURTS AND LAWYERS OF THE STATE OF NEW YORK 128 (New York, Richardson & Co. 1867) (noting judge, jury, witnesses, and spectators were not "displeased that the old greasy pettifogger had the worst of it"); HENRY W. WILLIAMS, LEGAL ETHICS AND SUGGESTIONS FOR YOUNG COUNSEL 206 (1906) ("The needs of one's client can never relieve against crime. Such offences as perjury, the corruption of jurors, of witnesses, and the abstraction of papers from the files,

In all of the printed speeches and written articles concerning the American legal profession from the 1860s through 1900, none mentioned David Hoffman or his *Resolutions*. He was simply not a part of any debate on American legal ethics during that time.

C. Treatises on Ethics

The first treatise on legal ethics was written by Edward Weeks and published in 1878.[318] Though the treatise was a lengthy 698 pages, one reviewer noted the absence of "much information as to what things may be done by [an] attorney, and what not, in criminal cases."[319] Weeks's *Treatise* cited Sharswood three times, and Hoffman not at all.[320] It followed their general view that the lawyer was not merely an agent of the client, but rather "a client has no right to control his attorney in the due and orderly conduct of a suit; and it is his duty to do what the court would order to be done, though his client instruct him otherwise."[321] A second edition, published in 1892, also ignored both Hoffman and the issue of what may be done by a criminal defense attorney.[322]

George Warvelle's 1902 treatise looked closely at the duties owed by the lawyer to his client, opposing parties, the

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which are too frequently committed and which are sometimes connived at by a certain class of practitioners, cannot be defended on such grounds, either before the law or in morals."). Published in 1906, Williams wrote in the late-nineteenth century. *See* CAIT MURPHY, SCOUNDRELS IN LAW: THE TRIALS OF HOWE & HUMMEL, LAWYERS TO THE GANGSTERS, COPS, STARLETS, AND RAKES WHO MADE THE GILDED AGE (2010) (discussing the law firm of Howe and Hummel and its use of the methods noted by Williams); RICHARD H. ROVERE, HOWE & HUMMEL: THEIR TRUE AND SCANDALOUS HISTORY (1947) (further detailing the win-at-all costs mentality of the notorious law firm); *see also* JOHN A. FARRELL, CLARENCE DARROW: ATTORNEY FOR THE DAMNED 141 (2011) (noting Darrow's defense of lawyers charged with bribing jurors in 1906 and quoting a former law partner that, in some personal-injury cases in which Darrow represented plaintiffs, "[i]t was bribery all around").

318. *See generally* EDWARD P. WEEKS, TREATISE ON ATTORNEYS AND COUNSELLORS AT LAW (San Francisco, Sumner Whitney & Co. 1878).

319. *Book Notices: Weeks's Treatise on Attorneys and Counsellors at Law*, 13 AM. L. REV. 358, 359 (1879) (book review).

320. *See* WEEKS, *supra* note 318, at 54, 693, 716.

321. *Id.* at 50.

322. The preface to this edition states that the treatise was revised only to the extent required by changes in the law affecting the treatise's accuracy. CHARLES THEODORE BOONE, TREATISE ON ATTORNEYS AND COUNSELLORS AT LAW, at iv (San Francisco, Bancroft-Whitney Co. 2d ed. 1892).

court, and society.[323] In general, the duty was based on the interiority of conscience, not honor accorded by others. Ethical behavior "should be guided in a general way by recognized usages, the prevailing moral sentiment, and the suggestions of [the lawyer's] own conscience."[324] Warvelle specifically addressed the problem of the lawyer's knowledge of his client's guilt, accepted the consensus view, and concluded by endorsing the prevailing sentiment from *Courvoisier*.[325] Similarly, Warvelle followed Sharswood on using the defense of the statute of limitations, acknowledging that a lawyer "is under a duty to urge it in a suit brought to recover [a] debt."[326] Finally, Warvelle included a favorable summary of the actions of Phillips in *Courvoisier*.[327]

Hoffman's *Resolutions* was reprinted several times in the first two decades of the twentieth century, initially by the American Bar Association in 1907, and subsequently in a few treatises and casebooks.[328] Unfortunately, no reprint looked critically at the substance of Hoffman's *Resolutions*. It was simply published without comment. In general, that is about all one heard about Hoffman during the first seven decades of the twentieth century.

IV. FOUND

A. The Code of Professional Responsibility and Crisis in the American Legal Profession

Just three years after its adoption by the ABA, the 1969 Code of Professional Responsibility was adopted as law by forty-three states and the District of Columbia.[329] Four other state bar associations made the Code applicable to its members,

323. *See generally* GEORGE W. WARVELLE, ESSAYS IN LEGAL ETHICS (1902).

324. *Id.* at 35.

325. The lawyer may "use all fair arguments that may arise from the trial." *Id.* at 136.

326. *Id.* at 160.

327. *Id.* at 211-16.

328. *See Report of the Committee on Code of Professional Ethics*, 31 A.B.A. REP. 676, app. H at 717-35 (1907); *Hoffman's Fifty Resolutions in Regard to Professional Deportment*, 2 AM. L. SCH. REV. 230, 230-38 (1908); GLEASON L. ARCHER, ETHICAL OBLIGATIONS OF THE LAWYER, app. at 317-42 (1910); GEORGE P. COSTIGAN, JR., CASES AND OTHER AUTHORITIES ON LEGAL ETHICS, app. at 555-69 (William R. Vance ed. 1917).

329. *Report of the Special Committee to Secure Adoption of the Code of Professional Responsibility*, 97 A.B.A. REP. 740, 740-41 (1972).

while the remaining three states had not yet adopted it.[330] Canon 7, one of the nine Canons comprising the Code, was entitled: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."[331] This conclusion was justified on standard rule of law grounds. Any other approach would allow the public to determine whether an unpopular cause or client would find representation, and only full representation of the parties allowed the case to be decided on informed and dispassionate grounds.[332] Despite its extraordinary popularity, the Code was attacked early and often. An *ABA Journal* essay, revealingly titled *The Myth of Legal Ethics*, stated, "The Code of Professional Responsibility, as the Canons of Professional Ethics before it, is a treasure trove of moral platitudes."[333] Even a sympathetic reader found the Code "repeatedly biased in the ordering of its priorities."[334] These criticisms were a part of a larger crisis within the American legal profession.

In the preface to *Unequal Justice*, Jerold Auerbach wrote that the period between 1968 and 1974 were "terrible years."[335] Auerbach noted this period "was coming apart as legitimate authority was stripped from one institution after another—from university, government, presidency, military, police, prisons, courts, [and] law."[336]

By early 1973, over two dozen lawyers were enmeshed in the Watergate scandal.[337] In 1974, the Department of Justice concluded several provisions of the Code violated antitrust

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330. *Id.*

331. MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1969).

332. *See Report of the Special Committee on Evaluation of Ethical Standards*, 94 A.B.A. REP. 729, 774 (1969) [hereinafter *Ethical Standards*].

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

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

335. JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA, at xii (1976). For a detailed discussion of those terrible years, see Michael Ariens, *The Agony of Modern Legal Ethics, 1970-1985*, 5 ST. MARY'S J. ON MALPRACTICE & LEGAL ETHICS (forthcoming 2014).

336. AUERBACH, *supra* note 335, at xii (internal quotation marks omitted). Auerbach is likely referencing WILLIAM L. O'NEILL, COMING APART: AN INFORMAL HISTORY OF AMERICA IN THE 1960'S (1971).

337. LIEBERMAN, *supra* note 16, at 35. *See generally* JOHN J. SIRICA, TO SET THE RECORD STRAIGHT: THE BREAK-IN, THE TAPES, THE CONSPIRATORS, THE PARDON (1979) (a first-hand account of Judge John Sirica's role in the Watergate scandal); KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION (1997) (discussing the scandal and its aftermath).

laws,[338] and the next year the Supreme Court held that minimum fee schedules violated the Sherman Act.[339] Shortly thereafter, the Department of Justice filed an antitrust lawsuit against the ABA because the Code wholly banned lawyer advertising,[340] and in 1977, the Court held Arizona's ban on all lawyer advertising violated the First Amendment.[341] At the same time, many lawyers also found themselves victims of economic turmoil.[342]

The special committee drafting the Code intended it serve two functions: "The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor."[343] For "aspiring" lawyers the Code offered "Ethical Considerations." For less ethical lawyers, it provided "Disciplinary Rules".[344] Both the Ethical Considerations and Disciplinary Rules were subordinate to the Code's nine "axiomatic" Canons. By mid-1977, the decision to include both Ethical Considerations and Disciplinary Rules was directly attacked. L. Ray Patterson, then Dean of Emory University Law School, wrote in the *ABA Journal*, "[t]he time has come to renounce completely the fiction that ethical problems for lawyers are matters of ethics rather than law. The fiction pervades the Code of Professional Responsibility and is its major shortcoming."[345]

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338. *See Justice Department and Other Views on Prepaid Legal Services Plans Get an Airing Before the Tunney Subcommittee*, 60 A.B.A. J. 791, 791-93 (1974); *Justice Department Continues Its Contentions That the Houston Amendments Raise Serious Antitrust Problems*, 60 A.B.A. J. 1410, 1410-14 (1974).

339. Goldfarb v. Va. State Bar, 421 U.S. 773, 784-85, 793 (1975).

340. *See* Lawrence E. Walsh, *The Annual Report of the President of the American Bar Association*, 62 A.B.A. J. 1119, 1120 (1976); *Justice Department Charges Code Advertising Provisions Violate Federal Antitrust Laws*, 62 A.B.A. J. 979, 979 (1976).

341. Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977).

342. *See* RICHARD A. POSNER, OVERCOMING LAW 67 (1995) ("[T]he price of legal services fell (in real, that is, inflation-adjusted, terms), rather than . . . rose, between 1970 and 1985."); *see also* Richard H. Sander & E.Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 L. & SOC. INQUIRY 431, 448 tbl. 9 (1989) (noting that in constant 1983 dollars, median lawyer income fell from $47,638 in 1970 to $36,716 in 1980).

343. *Ethical Standards*, *supra* note 332, at 731.

344. *Id.* at 731-32.

345. Patterson, *supra* note 17, at 639.

B. The Model Rules of Professional Conduct

The ABA created a Special Committee on the Code of Professional Responsibility in 1977.[346] The committee broadened its mandate by deciding to write what became the Model Rules of Professional Conduct. It became the Commission on Evaluation of Professional Standards, also known as the Kutak Commission after its chair, Robert Kutak.[347] The Kutak Commission eliminated aspiring Ethical Considerations in favor of the view of ethics problems as problems of law.[348] In reference to this change, Kutak wrote in 1983, "[w]hat lawyers . . . have failed to appreciate is that ethics is not what the Model Rules concern; the Model Rules are about the law of lawyering."[349]

In the three years between the publication of the Discussion Draft and the ABA's adoption of the Model Rules, commentators engaged in strenuous debate over the extent of the lawyer's duty to a client.[350] This particularly arose in the context of the lawyer's duty to protect client information.[351] Model Rule 1.7 of the Discussion Draft, dated January 30, 1980, included in two instances in which a lawyer "shall" disclose information about a client, and four cases which the lawyer "may" but is not required to do so.[352]

This provision in the Discussion Draft was attacked by various critics.[353] The Proposed Final Draft of the Kutak

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346. *See Report to the Board of Governors to the House of Delegates*, 102 A.B.A. REP. 575, 581 (1977).

347. *Informational Report of the Board of Governors to the House of Delegates*, 103 A.B.A. REP. 640, 646 (1978); Robert J. Kutak, *The Law of Lawyering*, 22 WASHBURN L.J. 413, 413 (1983); Stephen E. Kalish, *David Hoffman's Essay on Professional Deportment and the Current Legal Ethics Debate*, 61 NEB. L. REV. 54, 55 (1981).

348. *See* Kalish, *supra* note 347, at 58.

349. Kutak, *supra* note 347, at 413.

350. *See* Kalish, *supra* note 347, at 56 (noting an attack by the Roscoe Pound-American Trial Lawyers Foundation).

351. *See id.*

352. MODEL RULES OF PROF'L CONDUCT R. 1.7 (Discussion Draft 1980).

353. *See, e.g.*, W. William Hodes, *The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739, 746 (1981); Editorial *A License to Squeal?*, WALL ST. J., Feb. 11, 1980, at 20. The Roscoe Pound-American Trial Lawyers Foundation offered an alternate Code proposing more stringent limits on disclosing client confidences. *See* Commission on Professional Responsibility of The Roscoe Pound-American Trial Lawyer's Foundation, *The American Lawyer's Code of Conduct Public Discussion Draft–June 1980*, TRIAL, Aug. 1980, at 44, 50.

Commission, released in May 1981, re-wrote the provision on the lawyer's duty to keep a client's confidences.[354] The Commission altered Rule 1.6 by removing all requirements of a lawyer to disclose a client confidence.[355]

The Model Rules displaced the view that ethical rules were "matters of personal conscience" by generating a "law of lawyering," leading to legal ethics being understood as positive law.[356] The Model Rules generally favored a lawyer's duty of loyalty to a client over the lawyer's duty as an "officer of the court."[357] Hoffman became a source for those attacking the liberal role morality of lawyers, found in both the Code and the Rules, by reviving an ethics of virtue, which such critics equated with Hoffman.

C. The Revival of David Hoffman

Beginning in the late 1970s, as the ABA moved to supplant the Code with its Model Rules, Hoffman's legal ethics became the subject of law review articles, particularly on a lawyer's duty to society as well as to his client.[358] Professor Stephen Kalish's commentary on the proposed Model Rules examined Hoffman's *Resolutions* and argued in support of the "officer of the court" concept.[359] L. Ray Patterson's 1980 article, *Legal Ethics*, used Hoffman and Sharswood to argue for a lawyer-client relationship that went beyond an agency relationship, to what he called a "reciprocal agency theory," which accepted the concept

354. MODEL RULES OF PROF'L CONDUCT R. 1.6 (Proposed Final Draft 1981).

355. *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.6 (Proposed Final Draft 1981), *with* MODEL RULES OF PROF'L CONDUCT R. 1.7 (Discussion Draft 1980). This provision was only slightly modified further in the Proposed Final Draft. *See Report of the Commission on Evaluation of Professional Standards*, 107 A.B.A. REP. 828, 833, 846-47 (1982) (reprinting Proposed Final Draft as Exhibit H).

356. Kalish, *supra* note 347, at 57.

357. The initial drafts of the Model Rules were more balanced regarding the lawyer's duty of loyalty to a client and her duty as an officer of the court than the final version approved by the ABA. *See generally* Ariens, *supra* note 335 (discussing changes in Model Rules from "working draft" to version approved in 1983).

358. *See generally* Bloomfield, *Legal Culture*, *supra* note 3; L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 912-13 (1980); Kalish, *supra* note 347.

359. Kalish, *supra* note 347, at 58-59.

that the lawyer's duty of loyalty to a client did not override the lawyer's duty as an officer of the court.[360]

Another important contributor to the revival of David Hoffman was Professor Thomas Shaffer. Shaffer first discussed Hoffman's legal ethics in his book *On Being a Christian and a Lawyer*.[361] Published in the midst of the ABA's tortuous debate on the Model Rules, this book was a corrective intended in part to refute the idea that legal ethics was merely a type of law. The book discusses the issue of "role" in the behavior of lawyers and clients and the relationship between role and morality. As Shaffer and Professor Robert Cochran wrote elsewhere:

> Our purposes . . . are to seek out and examine the moral standards clients and their lawyers bring to the law office, to hold those standards up as better than the minimum lawyer standards, and to identify a way that lawyers and clients can talk about and apply their standards in the law office on ordinary Wednesday afternoons."[362]

Shaffer's evaluation of Hoffman was neither to venerate nor to argue for Hoffman's ethical views. He instead sought to examine critically Hoffman's ideas in light of the dominant view that lawyers zealously represented clients. Shaffer accurately perceived Hoffman as ignoring any role of client conscience in the practice of law. In contrast, modern adversary ethics largely ignored any moral claims made by lawyers in representing clients. The legal profession was thus stuck between the radically incomplete views that the role of lawyer was solely as

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360. *See* Patterson, *supra* note 358, at 916-17. Hoffman re-emerged as historians considered the relation of republicanism and virtue in the founding and early national periods. Maxwell Bloomfield was trained in both history and law, and his essay on Hoffman considered the subject in light of republican ideas. *See generally* Bloomfield, *supra* note 3. For a historiography of republicanism, see Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY QTRLY. 49 (1972), modified in Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY QTRLY. 334 (1982), and Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11 (1992). I am deeply grateful to Dan Blinka for pointing out this chronological convergence.

361. *See generally* THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER (1981) (discussing Hoffman's legal ethics, particularly in the chapter titled "The Problem of Representing the Guilty").

362. SHAFFER & COCHRAN, *supra* note 19, at vi (footnotes omitted).

"agent" of or "godfather" to the client.[363] Shaffer provides an incisive assessment of both Hoffman and Sharswood, concluding, "[i]t is fair to say that modern standards would not admit of Sharswood's distinctions or Hoffman's reservations" in defending a guilty client.[364] Shaffer accepts the modern approach to defending the guilty, but rejects its justifications.

After writing about Hoffman's legal lectures in 1982, Shaffer published an essay titled *The Gentleman in Professional Ethics* in 1984.[365] Though Hoffman is referred to only tangentially, Shaffer's essay is a deeply knowledgeable study of the fatal flaws of the ethic of the gentleman, of whom Hoffman was the paradigmatic example. Shaffer also assessed Hoffman's *Resolutions* in his textbook *American Legal Ethics*, in an attempt to persuade students to think about the everyday moral work of lawyers rather than the boundaries of law enacted in the Model Rules.[366]

Yale law professor Geoffrey Hazard co-authored *The Law of Lawyering*.[367] In a 1978 book, he previously reported the critical comments of large-firm lawyers that the Code was an outdated relic.[368] Hazard also served as the Reporter for the Model Rules.[369] In a 1981 article defending the drafting process, Hazard explained the Commission's rejection of the tripartite structure of the Code in favor of rules, called the Code "anachronistic," and concluded that Hoffman and Sharswood's "ethical guidance consisted of Victorian moralizing at its worst."[370] He explained that the "beginning point for the Kutak

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363. Shaffer and Cochran delineated four approaches to moral issues in representing clients: (1) lawyer as godfather; (2) lawyer as hired gun; (3) lawyer as guru; and (4) lawyer as friend. *Id.* at 3-4.

364. SHAFFER, *supra* note 361, at 68.

365. *See generally* Thomas L. Shaffer, *The Gentleman in Professional Ethics*, 10 QUEEN'S L.J. 1 (1984).

366. *See* THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS, at xxv-xxvi (1985).

367. *See generally* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT (1985).

368. *See* GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 7 (1978).

369. Geoffrey C. Hazard, Jr., *Rules of Legal Ethics: The Drafting Task*, 36 RECORD B. ASS'N CITY OF N.Y. 77, 77 n. * (1981).

370. *Id.* at 80-82. Hazard wrongly dates Hoffman's "ethical precepts" as from 1817. *Id.* at 80. Even if he correctly used 1836, this still predates Queen Victoria's reign. And even allowing for some chronological leeway, Hazard is simply wrong to declare Hoffman's or Sharswood's views "Victorian," unless the only meanings he attributes to it are "old-fashioned" or "views I disagree with."

Commission [was] that adversarial representation of clients is in the public interest."[371] This last assertion was irrelevant. Earlier writers promoted adversarial representation as in the public interest.[372] That is why nearly all nineteenth-century lawyers used the word "zeal" and justified defending the guilty client on rule of law or anti-lynching grounds. The relevant question was when, if ever, does a lawyer's duty as an "officer of the court" override the lawyer's duty to zealously represent the client? The Model Rules provided an answer—rarely.

Hazard distilled the recent historical movement in legal ethics in his article *The Future of Legal Ethics*.[373] He concluded legal ethics were "norms [that] have become legalized."[374] Professor Hazard continued, "[t]he rules of ethics have ceased to be internal to the profession; they have instead become a code of public law enforced by formal adjudicative disciplinary process[es]."[375]

D. The Professionalism Crisis

Hazard was right. Legal ethics were a matter of law, and lawyers began seeking its boundaries. By 1980, "[t]he prevailing notion among lawyers seem[ed] to be that the lawyer's duty of loyalty to the client [was] the first, the foremost, and, on occasion, the only duty of the lawyer."[376]

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371. *Id.* at 93.

372. *See, e.g.*, Monroe H. Freedman, *Are There Public Interest Limits on Lawyers' Advocacy?*, *in* 2 SOCIAL RESPONSIBILITY: JOURNALISM, LAW, MEDICINE 31, 31-33 (1976).

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

374. *Id.* at 1241 (internal quotations omitted).

375. *Id.*; *see also* Geoffrey C. Hazard, Jr., *Law, Morals, and Ethics*, 19 S. ILL. U. L.J. 447, 453 (1995) ("'Law' and 'morals' are thus at opposite ends of the normative spectrum in terms of form, mutual intelligibility, and as mechanisms of personal and social action. In between law and morals are 'ethics.'"); Geoffrey C. Hazard, Jr., *Foreword: The Legal Profession: The Impact of Law and Legal Theory*, 67 FORDHAM L. REV. 239, 244 (1998) (noting "traditional understanding" of the legal profession that lawyer conduct norms were rules of ethics rather than law). *But see* Geoffrey C. Hazard, Jr. & Douglas W. Pinto, Jr., MORAL FOUNDATIONS OF AMERICAN LAW: FAITH, VIRTUE, AND MORES 179 (2013) (concluding, "[w]e yearn for latter-day Jethroes: 'Able people such as fear God, people of truth, hating covetousness'"). For a thorough study, see Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics-I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469 (2001), and Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics-II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205 (2002).

376. Patterson, *supra* note 358, at 918.

Several critics urged that lawyers seek an ethic of justice, one that differed from "a professional vision based only on client service and the bottom line."[377] The liberal conception was that an autonomous client selected his legal goals, which the lawyer then worked to effectuate. In this liberal view, lawyers were thus not accountable to the public for the goals of their clients, a view accepted in both Canon 7 of the Code and in the Model Rules. Those promoting an ethics of virtue found the moral nonaccountability of lawyers a fatally flawed understanding of legal ethics.[378] Hoffman's *Resolutions* served as a contrary view of legal ethics, one founded in virtue.[379]

In the last half of the l980s, the problem of the "moral nonaccountability" of lawyers became acute, as some in the profession reacted to perceived adversarial excesses. Just a year after the adoption of the Model Rules, the ABA created a Commission on Professionalism to combat the possibility that "the Bar might be moving away from the principles of professionalism and that it was so perceived by the public."[380] In 1986, the Commission issued a report discussing the extensive changes to the legal profession since 1960.[381] The creation of more formal disciplinary processes resulted in lawyers taking "the rules more seriously" than before.[382] But the move from the Code to the Rules also resulted in a tendency of lawyers "to look at nothing but the rules."[383] The House of Delegates resolved to distribute this report to law schools, judges, and state and local bar associations. This kicked off the "professionalism crusade."[384]

Two years later, the Commission on Professionalism resolved that it recommend to state and local bar associations that they adopt a lawyers' creed of professionalism to battle

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377. LUBAN, *supra* note 19, at xvii-xviii.

378. *See, e.g.*, *id*. at xx.

379. HOFFMAN, *supra* note 136, at 24-25.

380. *Report of the Commission on Professionalism*, 111 A.B.A. REP. NO. 2, at 369, 373 (1986).

381. ABA Comm'n on Professionalism, *"... In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 254 (1986).

382. *Id.* at 259; *see also* Vincent R. Johnson, *Justice Tom C. Clark's Legacy in the Field of Legal Ethics*, 29 J. LEGAL PROF. 33, 37 (2004-2005) (discussing history of reform of lawyer disciplinary processes beginning with ABA's Clark Report).

383. ABA Comm'n on Professionalism, *supra* note 381, at 259.

384. For a critical review, see Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995).

"abuses . . . fostered by excessive zeal, a win at any cost mentality, scorched earth tactics, and the apotheosizing of playing hard ball."[385] When it so resolved, the House of Delegates added a second resolution that stated the following: "That nothing contained in such a creed shall be deemed to supersede or in any way amend the Model Rules of Professional Conduct or other disciplinary codes, alter existing standards of conduct against which lawyer negligence might be judged or become a basis for the imposition of civil liability of any kind."[386] The second resolution ensured that the lawyer's creed of professionalism was not an admonition to lawyers to "behave, or else." Instead, it was aspirational, just as the rejected Ethical Considerations of the 1969 Code were aspirational. That the ABA was reviving an approach it had killed less than a decade earlier did not appear confounding to it. The rules remained the rules. Like other creeds, the lawyer's creed was made for believers, and was a matter of no concern to unbelievers. Unlike other creeds, it was difficult to discern how lawyers could use it to proselytize their fellow brothers and sisters of the bar.

Some states tried to avoid the problem of faith by making professionalism a rule. In 2008, Arizona defined "unprofessional conduct" as "substantial or repeated violations of the Oath of Admission to the Bar or the Lawyer's Creed of Professionalism of the State Bar of Arizona," making such conduct subject to discipline.[387] In 2013, the Florida Supreme Court adopted a *Code for Resolving Professionalism Complaints*, and followed Arizona in defining "unprofessional conduct" as "substantial or repeated violations of the *Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules Regulating The Florida Bar, or the decisions of The Florida Supreme Court*."[388] Thus, in those

385. *Report No. 2 of the Section of Tort and Insurance Practice*, 113 A.B.A. REP. NO. 2, at 589, 589 (1988) (internal quotation marks omitted).

386. *Proceedings of the 1988 Annual Meeting of the House of Delegates*, 113 A.B.A. REP. NO. 2, at 4, 25 (1988).

387. ARIZ. SUP. CT. R. 31 (West 2014); *see also* Amelia Craig Cramer et al., *Civility for Arizona Lawyers: Essential, Endangered, Enforceable*, 6 PHX. L. REV. 465, 482 (2012) (detailing the history of the amendment).

388. *In re* Code for Resolving Professionalism Complaints, 116 So. 3d 280, 282 (Fla. 2013).

states the law of lawyering now encompasses the Professionalism Creed.

A 1983 amendment to Federal Rule of Civil Procedure 11, intended "to deal with the abuses that undermined civility and professionalism," instead "may have contributed to further undermining the public's confidence in the profession as well."[389] The goal of amended Rule 11 was to inculcate civility in civil litigation. Its unintended consequence was "a deleterious effect on lawyer relations."[390] Concomitantly, the 1980s also saw a rise in efforts to disqualify opposing counsel on conflict-of-interest grounds. In his 1986 treatise *Modern Legal Ethics*, Charles Wolfram wrote, "[t]he motion for a judicial order disqualifying a lawyer in pending litigation because of conflict is a traditional remedy that has come into prominence in recent years."[391] In Texas, for example, appellate decisions on orders disqualifying counsel on conflict-of-interest grounds were first issued in the late 1980s.[392] By the end of the 1980s, lawyers began to write ruefully about the deleterious consequences of "Rambo-style" litigation tactics to the profession of law. While some of these tactics might violate enforceable rules, others simply made litigation even more onerous and expensive, heightening the professionalism crisis.[393]

In 1988, the Section on Professional Responsibility of the Association of American Law Schools organized its annual program around professionalism,[394] and the American Bar

389. Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 590 (1998). *See generally* Carol Rice Andrews, *Ethical Limits on Civil Litigation Advocacy: A Historical Perspective*, 63 CASE W. RES. L. REV. 381 (2012) (discussing the history of ethics in civil litigation).

390. Vairo, *supra* note 389, at 627.

391. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.1.7 (2d ed. 1985). *See generally* Charles W. Wolfram, *Former-Client Conflicts*, 10 GEO. J. LEGAL ETHICS 677 (1997) (citing cases largely dating from the 1980s or later).

392. *See* NCNB Tex. Nat'l Bank v. Coker, 765 S.W.2d 398, 399-400 (Tex. 1989); Petroleum Wholesale, Inc. v. Marshall, 751 S.W.2d 295, 301 (Tex. App. 1988).

393. *See* Curtin, *supra* note 19, at 8; Paul Marcotte, *Reining in Rambo*, 75 A.B.A. J., Nov. 1989, at 43, 43; Thomas J. Paprocki, *Ethics in the Everyday Practice of Law*, 35 CATH. LAW. 169, 171 (1991); Reavley, *supra* note 19, at 646; Sayler, *supra* note 19, at 79-81; Bradley W. Foster, Comment, *Playing Hardball in Federal Court: Judicial Attempts to Referee Unsportsmanlike Conduct*, 55 J. AIR L. & COM. 223, 224 (1989).

394. *See* Atkinson, *supra* note 384, at 261 n.4.

Foundation held a conference on the subject.[395] Courts and bar associations also focused on professionalism.[396] The professionalism crisis resulted in a flood of books[397] and articles[398] alternately regretting or fearing the shift of law from a profession to a business.[399] And at least 140 state or local bar associations adopted some professionalism creed between 1986 and 2007.[400]

In this maelstrom, David Hoffman has served a purpose. He is a reminder of a past in which ethics and morality were intertwined, and both served the idea of law as a profession. He also represented a past ideal of virtue ethics, in contrast to the role morality of modern liberal legal ethics. Hoffman's ethos was of less interest to legal scholars than the fact that Hoffman served as a symbol of a worthy tradition. Legal scholars often referred to his *Resolutions* from the 1980s on, but ordinarily to support an argument about a smaller or larger aspect of unprofessional lawyer behavior, or about the moral qualities to be fostered in American lawyers. Hoffman was used instrumentally by those who often argued on non-instrumental grounds for a return to a moral "golden age" on the past. On these grounds, the law of lawyering won both the battle and the war.

V. CONCLUSION

The debate on the Model Code continues, though the ABA, through its Ethics 2000 Commission and later efforts, has

395. *See* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION, at ix (Robert L. Nelson et al. eds., 1992). This September 1988 Conference led to the book.

396. *See* Philip A. Lacovara, *Lawyers and Professionalism*, 3 WASH. LAWYER 6, 6-7 (1988).

397. *See, e.g.*, MARY ANN GLENDON, A NATION UNDER LAWYERS (1994); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993); SOL M. LINOWITZ & MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994).

398. *See, e.g.*, *Conference on the Commercialization of the Legal Profession*, 45 S.C. L. REV. 883 (1994); *Professionalism in the Practice of Law: A Symposium on Civility and Judicial Ethics in the 1990s*, 28 VAL. U. L. REV. 513 (1994).

399. Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911, 911 (1996) ("The legal profession is dead or dying. It is rotting away into an occupation.").

400. Donald E. Campbell, *Raise Your Right Hand and Swear to be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 141-42 (2011).

largely nibbled around the corners.[401] Inculcating virtuous conduct within the American legal profession also continues, but again only in a small, incremental fashion. The professionalism debate is never-ending, though it is now considered in light of the impact of the Great Recession on the American legal profession. A profession constantly in crisis[402] faces another—what is it, and what is it to be; or rather, what *are* lawyers to be, for the future may be several discrete professions, a pluralistic society of lawyers,

One possibly surprising lesson to take from Hoffman's life is to reject "declinist" thought. Hoffman's fear of the rabble and Jacksonian democracy, as well as personal loss, led him from the legal profession. That fear may also have led to his insistence on arguing in some of his *Resolutions* for a lawyering tradition that never was, one based on a professional exclusivity that was quickly disappearing. Changes in the modern American legal profession may result in decline, but such a result is not fated.[403]

It may be that "[t]hings fall apart; the centre cannot hold."[404] Transformations of the legal profession have been taking place for more than four decades,[405] and predictions of major transformations "within the next decade or so"[406] are simply a reminder that instability is a constant for lawyers.

401. *See* Ariens, *supra* note 18, at 295-300 (listing notable events from 1997–2008).

402. *See* Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925–1960*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES, *supra* note 395, at 144, 144-45.

403. *See generally* THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER (2010) (discussing the ebb-and-flow nature of the legal profession).

404. William Butler Yeats, *The Second Coming*, *in* WILLIAM BUTLER YEATS: POETRY FOR YOUNG PEOPLE 42, 42 (Jonathan Allison ed. 2002).

405. *See* Ariens, *supra* note 6, at 444-51 (discussing end of "golden age" and rise of professional anxiety since 1970).

406. MORGAN, *supra* note 403, at 217.