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## ARTICLE

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### Ethics and the “Root of All Evil” in Nineteenth Century American Law Practice

**Abstract.** This Article discusses the bifurcated notions on the purpose of working as an attorney—whether the purpose is to attain wealth or whether the work in and of itself is the purpose. This Article explores the sentiments held by distinguished and influential nineteenth-century lawyers—particularly David Hoffman and George Sharswood—regarding the legal ethics regarding attorney’s fees and how money in general is the root of many ethical dilemmas within the arena of legal practice. Through the texts of Hoffman and Sharswood, we find the origins of the ethical rules all American attorneys are subject to in their various jurisdictions.

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## I. INTRODUCTION

The American Bar (also referred to herein as “the Bar”) has always been somewhat bifurcated on whether lawyers are members of a profession in which money is the reward for good work, or a business in which the pursuit of money is the purpose of the work itself. In the first half of the nineteenth century, lawyers were brought up on William Blackstone’s *Commentaries on the Laws of England*.<sup>1</sup> In it, Blackstone made the point that lawyers were gentlemen and professionals, and too avid a pursuit of wealth in the practice of law was neither gentlemanly nor professional.<sup>2</sup> Indeed, Blackstone took this so far as to comment that a lawyer could not sue a client for an unpaid fee.<sup>3</sup> In this regard, lawyers were unique among working people. The language of the law, too, reinforced the idea that lawyers were gentlemen for whom a fee was not the principle motivation for their work.<sup>4</sup> Members of the elite bar referred to legal practitioners who chased after fees and the accumulation of wealth as “pettifoggers” and “tavern lawyers,” terms of derogation and contempt.<sup>5</sup>

Indeed, I suggest today that there has been a significant philosophical divide amongst American lawyers for more than two centuries. That divide is based upon the perception of whether the law is a “business” where the profit motive is central to our activities as lawyers,<sup>6</sup> or whether the law is a “profession” in which monetary rewards are certainly important, but the primary motivation for law practice is something other than money, for instance, public service or maintenance of the legal

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1. WILLIAM BLACKSTONE, COMMENTARIES (1765).

2. *See id.* at 300 (illustrating the pursuit of fees goes against the behavior by which a lawyer should conduct themselves).

3. *Id.*

4. *See generally id.* at 300 (positing that lawyers should not pursue fees because the principal purpose of their work is not to make money).

5. *See* MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776–1876, 43–4 (1976) (characterizing lawyers who went after clients for unpaid fees as greedy); *cf.* Gerard W. Gawalt, *Anti-Lawyer Sentiment in Massachusetts, 1740–1840*, AM. J. LEGAL HIST., Oct. 1970, at 283, 283–84 (explaining how society viewed lawyers as problems due to the usage of their background, influence, and intelligence as ways to propel them into prominent political and judicial positions). For visual representations of pettifoggers, also known as subpar legal practitioners, *see generally* M.H. Hoeflich, *Lawyers, Fees, & Anti-Lawyer Sentiment in Popular Art, 1800–1925*, GREEN BAG, Winter 2001, at 147, 150–55 (showing images that depict the societal view of lawyers during that time period). *See generally* M.H. HOEFLICH, THE LAW IN POSTCARDS & EPHEMERA, 1890–1962 (2012) (providing postcards which depict typical lawyer sentiments at the time).

6. *See, e.g.*, Champ Andrews, *The Law—A Business or a Profession?*, 17 YALE L.J. 602, 605 (1908) (describing the general dispute regarding whether the law is seen more as a profession or as a business).

system, or simply the pursuit of an old and honorable profession.<sup>7</sup>

I suggest for most of the nineteenth century, the elite members of the Bar in the United States argued that the acquisition of wealth was not a principal purpose of the law practice and that these very same elite lawyers held lawyers for whom the pursuit of wealth was a principal purpose in low regard.<sup>8</sup> Indeed, I propose the development of ethical rules for the Bar in the late nineteenth and early twentieth centuries stemmed, in large part, from a desire to set the law practice at a distance from other trades and professions by limiting the business aspects of practice.<sup>9</sup> I also posit a prime motivation for the adoption of these codes was to combat the popular perception, expressed in literature and popular art, that all lawyers were, in fact, money-grubbing pettifoggers who would do anything for a fee, even that which was immoral or illegal.<sup>10</sup> At the same time, I also postulate that the legal profession's arguments against greed derive, or at least, parallel, similar arguments made by those who were writing about and engaged in mercantile pursuits in nineteenth-century America. Indeed, one of the great ironies of the legal profession's attempts to distance itself from charges that lawyers were simply wealth-seeking businessmen is that businessmen and writers on business were also attempting to dispel popular perceptions that the only purpose of business was to accumulate wealth no matter what the social consequences. In effect, I suggest that legal ethics and business ethics were developing in quite similar ways in the United States in the nineteenth century.

## II. LEGAL ETHICS IN THE NINETEENTH CENTURY

There were no official codes or rules of legal ethics during virtually all of the nineteenth century. This does not mean, however, that lawyers were not concerned with the subject. In fact, legal ethics was of great concern to many members of the American Bar in the United States during this period.<sup>11</sup> One finds virtually all of the concepts and rules central to legal

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7. *Id.*

8. See Michael Ariens, *Lost and Found: David Hoffman and the History of American Legal Ethics*, 67 ARK. L. REV. 571, 584 (2014) (discussing the sentiments of some notable lawyers regarding legal ethics in the nineteenth century).

9. 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY: ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 774 (Philadelphia, Thomas, Cowperthwait & Co. 1846) (reviewing the historical background of the ethical rules).

10. See *id.* at 611 (rejecting and refusing to promote a model of advocacy where the lawyer was essentially a "hired gun," but recognizing there were some lawyers that were willing to do just about anything for their clients).

11. 2 HOFFMAN, *supra* note 9, at 752–77 (reprinting the 1836 edition); see M.H. Hoeflich, *Legal*

ethics in the twenty-first century in the legal literature of the nineteenth century. Preeminent among these nineteenth century American writings are two: David Hoffman's *Fifty Resolutions on Professional Deportment*,<sup>12</sup> first published in 1836 as part of his *A Course of Legal Study*,<sup>13</sup> and Judge George Sharswood's *An Essay on Professional Ethics*,<sup>14</sup> first published in 1854. It is not insignificant that the authors of these works were both experienced lawyers as well as law professors. Hoffman was a professor at the short-lived law school affiliated with the University of Maryland in Baltimore<sup>15</sup> and Sharswood was a professor at the law school at the University of Pennsylvania in Philadelphia.<sup>16</sup> Both men were also members of the legal elite—successful lawyers and law professors in major eastern urban centers.<sup>17</sup> Both wrote their works for the purpose of educating future lawyers and both supported the highest aspirations of the Bar at the time.<sup>18</sup>

David Hoffman was born in Baltimore, Maryland in 1784.<sup>19</sup> He attended St. John's College in Annapolis and then studied law in Baltimore and London before establishing himself as a lawyer in Baltimore.<sup>20</sup> He was appointed as a professor of law at the University of Maryland and, in the next few years, published a series of lectures as well as the first

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*Ethics in the Nineteenth Century: The "Other Tradition"*, 47 U. KAN. L. REV. 793, 793–99 (1999) [hereinafter Hoeflich, *Other Tradition*] (providing statements regarding legal ethics from various attorneys, including Hoffman). Though lawyers concerned themselves with legal ethics, one should not take it for granted that Hoffman's thoughts were "representative either of practice at the time or the consensus of republican legal elites on the[ir] specific legal duties . . . ." Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397, 1415–16 (2003).

12. 2 HOFFMAN, *supra* note 9, at 752–75.

13. *Id.*

14. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (F. & J. W. Johnson & Co. 1854).

15. Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 678 (1979) [hereinafter Bloomfield, *David Hoffman*] (giving biographical information on Hoffman's professional life).

16. George W. Wickersham, *Judge Sharswood*, 62 U. PA. L. REV. 615, 615–16 (1914) (announcing the professional career of Judge Sharswood).

17. *See* Bloomfield, *David Hoffman*, *supra* note 15, at 674, 678 (explaining Hoffman was born "into a prosperous mercantile family" and after sitting for the bar "built up an enviable practice in the state and federal courts, while enhancing his social status through his marriage."); *see also* Wickersham, *supra* note 16, at 615 ("During eighteen years . . . in addition to the arduous labors of a judge of a court of first instance, he discharged the duties of a professor of law in the University of Pennsylvania.")

18. *See e.g.*, Bloomfield, *David Hoffman*, *supra* note 15, at 674, 686 (emphasizing the large impact Hoffman had on the practice of law); Wickersham, *supra* note 16, at 615 (outlining the contributions Judge Sharswood has made to the legal field).

19. Bloomfield, *David Hoffman*, *supra* note 15, at 674.

20. *Id.* at 674–75.

substantial American work on legal education, *A Course of Legal Study*, in 1817.<sup>21</sup> This volume was immediately hailed as a major work and was reprinted in an expanded form in 1836.<sup>22</sup> As part of the expanded edition, Hoffman included the first American rules of legal ethics, what he called his *Rules of Professional Deportment*, which he termed an “auxiliary subject.”<sup>23</sup> Hoffman included fifty rules in this work, many of them virtually the same as the particular state sanctioned rules of professional conduct to which American lawyers are subject today.<sup>24</sup> One rule, however, the forty-ninth, is quite different and begins by saying, “Avarice is one of the most dangerous and disgusting of vices.”<sup>25</sup>

Hoffman’s forty-ninth rule continues:

Fortunately its presence is oftener found in age, than in youth; for if it be seen as an early feature in our character, it is sure, in the course of a long life, to work a great mass of oppression, and to end in both intellectual and moral desolation. Avarice gradually originates every species of indirection. Its offspring is meanness; and it contaminates every pure and honourable principle. It can consist with honesty scarce for a moment, without gaining the victory. Should the young practitioner, therefore, on the receipt of the first fruits of his exertions, perceive the slightest manifestation of this vice, let him view it as his most insidious and deadly enemy. Unless he can then heartily, and thoroughly eradicate it, he will find himself, perhaps slowly, but surely, capable of unprofessional—mean—and finally, dishonest acts;—which, as they cannot be long concealed, will render him conscious of the loss of character; make him callous to all the nicer feelings; and ultimately so degrade him, that he consents to live upon arts, from which his talents, acquirements, and original integrity would certainly have rescued him, had he at the very commencement fortified himself with the resolution to reject all gains, save those acquired by the most strictly honourable and

21. *Id.* at 678.

22. 2 HOFFMAN, *supra* note 9, at 752–77; see Bloomfield, *David Hoffman*, *supra* note 15, at 678 (“This volume, which won for its author international acclaim, provided the student with a systematic bibliographical guide to every branch of law.”).

23. 2 HOFFMAN, *supra* note 9, at 752–77. The only time Hoffman refers to professional deportment in the book’s first edition is in a section deemed “Auxiliary Subjects.” Ariens, *supra* note 8, at 584 (citing DAVID HOFFMAN, A COURSE OF LEGAL STUDY: RESPECTFULLY ADDRESSED TO THE STUDENTS OF LAW IN THE UNITED STATES 324 (Baltimore, Coale & Maxwell 1817)).

24. See generally 2 HOFFMAN, *supra* note 9, at 752–77 (illustrating the similarities between many of the rules of professional deportment created by Hoffman and the rules of professional conduct already followed by lawyers at the time); see also MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 2013).

25. 2 HOFFMAN, *supra* note 9, at 774.

professional means. I am therefore, firmly resolved, never to receive from any one, a compensation, not justly and honourably my due; and if fairly received, to place on it no undue value; to entertain no affection for money, further than as a means of obtaining the goods of life—the art of *using money* being quite as important for the avoidance of avarice, and the preservation of a pure character, as that of *acquiring it*.<sup>26</sup>

I think it is not an exaggeration to say that based on the language of this rule, Hoffman viewed greed as the worst possible characteristic of a lawyer and believed that a greedy lawyer would “find himself, perhaps slowly, but surely, capable of unprofessional—mean—and, finally, dishonest acts.”<sup>27</sup> A lawyer’s compensation, according to Hoffman, must be honorably received.<sup>28</sup> Anything else is unprofessional and a sign of a degraded character.<sup>29</sup>

Judge George Sharswood was much indebted to Hoffman in his *An Essay on Professional Ethics*, although he did not agree with Hoffman on every point.<sup>30</sup> Judge Sharswood also did not make quite as broad pronouncements on avarice as Hoffman, but he did make it quite clear that greed was not an acceptable characteristic of a lawyer. In the section of his essay on professional compensation, Judge Sharswood focused on two questions: (1) whether a lawyer should sue his client for a fee;<sup>31</sup> and (2) whether a lawyer should take a contingent fee.<sup>32</sup> On the first question Judge Sharswood generally decided it is better that a lawyer lose his fee than sue his client.<sup>33</sup> On the second question, Judge Sharswood firmly denounced the notion that a lawyer might base his fee on success in a case as akin to the common law wrongs of barratry and champerty.<sup>34</sup> But Judge Sharswood’s reasons for these opinions strongly echo Hoffman’s comments on avarice. He says:

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26. *Id.* at 774–75.

27. *Id.* at 774.

28. *Id.* at 774–75.

29. *Id.*

30. *See* SHARSWOOD, *supra* note 14, at 9 (identifying the general subjects of the essay as (1) “[t]hose duties which the lawyer owes to the public or commonwealth” and (2) “[t]hose which are due from him to the court, his professional brethren, and his client”).

31. *See id.* at 153–54 (recognizing an attorney should be compensated for the work the attorney does if the client is able to pay, “[b]ut it must be an extraordinary—a very particular case—that will justify an attorney resorting to legal proceedings, to enforce the payment of fees”).

32. *See id.* at 155–56 (arguing contingent fee agreements “are a very dangerous tendency” for an attorney to get into, and therefore “to be declined in all ordinary cases”).

33. *Id.* at 154.

34. *Id.* at 156–57.

The question really is, what is best for the people at large[]—what will be most likely to secure them a high-minded, honorable Bar? It is all-important that the profession should have and deserve that character. A horde of pettifogging, custom-seeking, money-making lawyers, is one of the greatest curses with which any state or community can be visited.<sup>35</sup>

In a similar vein, Judge Sharswood quotes Edward Gibbon's description in his *Decline and Fall of the Roman Empire*<sup>36</sup> of the changes in the Roman legal profession over time from a group of learned men to that of tradesmen:

The noble art, which had once been preserved as the sacred inheritance of the patricians, was fallen into the hands of freedmen and patricians, who, with cunning rather than with skill, exercised a sordid and pernicious trade.<sup>37</sup>

Sharswood's comment upon this passage is revealing:

Is not this probably the history of the decline of the profession in all countries from an honorable office to a money-making trade?<sup>38</sup>

Underlying these passages from both Hoffman and Sharswood is a very specific notion of the legal profession and what is required of a lawyer. The legal profession is not a trade to be entered upon for the sake of acquiring wealth. Certainly, there is nothing wrong with becoming wealthy as a lawyer, but the acquisition of wealth should not be the lawyer's primary goal. If a lawyer does seek wealth above honor, then the lawyer will be led, according to both Hoffman and Sharswood, to act in dishonorable ways much to the discredit of the lawyer personally and of the profession as a whole.<sup>39</sup>

In the social and professional context in which both Sharswood and Hoffman were living, a lawyer who was avaricious would run the danger of taking unjust cases which both believed, to varying degrees, to be unethical.<sup>40</sup> These men adhered to the nineteenth century tradition that

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35. *Id.* at 150.

36. 2 EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* (1776).

37. SHARSWOOD, *supra* note 14, at 144 (quoting 2 EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* 204 (1776)).

38. *Id.* at 145.

39. Ariens, *supra* note 8, at 585–86.

40. *Id.* at 611.



lawyers should not take on all civil cases regardless of their merits and regardless of the justness of the cause (criminal cases were viewed differently). Instead, both Hoffman and Sharswood believed that lawyers should exercise their skills and talents selectively and screen clients whom he took on.<sup>41</sup> A lawyer who was out only for the money to be earned would inevitably take on cases that lacked merit or that were unjust—a result that both Hoffman and Sharswood deemed to be highly unethical.<sup>42</sup> Essentially, a lawyer acted ethically if, in the course of his practice, he acquired wealth as a consequence of being a good lawyer, while a lawyer who practiced law to acquire health did not.

In the decades following the publication of Hoffman's and Sharswood's texts, their ideas became enshrined in the conventional wisdom of the American Bar.<sup>43</sup> Among the post-Civil War works written about legal ethics by members of the Bar, several stand out, but one of the most important was William Allen Butler's *Lawyer and Client: Their Relation, Rights & Duties*<sup>44</sup> published by Appleton & Company at New York in 1871.<sup>45</sup> Butler was a leader of the New York and American Bars, and was the son of the prominent New York lawyer, B.F. Butler, and during his career he served as president both of the American Bar Association and the Association of the Bar of the City of New York.<sup>46</sup> He was the senior partner of a leading New York law firm, Butler, Stillman & Hubbard, and was also a well known poet and essayist.<sup>47</sup> Thus, one may justly suggest that his *Lawyer and Client* represented the ideas of the highest level of the American Bar.

Not surprisingly, Butler's discussion of lawyers' fees and the acquisition

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41. "Hoffman thought that the lawyer should 'ever claim the privilege of solely judging' whether and how far to pursue his clients' cases and that he should not pursue cases if he concluded that the client ought to lose." Daniel Markovits, *Legal Ethics from the Lawyer's Point of View*, 15 YALE J.L. & HUMAN. 209, 214 n.6 (2003) (citing 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY: ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 752–775 (Baltimore, Joseph Neal 1836)). "Sharswood may have held similar views, for example that a lawyer 'should throw up his brief sooner than do what revolts against his own sense of honor and propriety.'" *Id.* (citing 3 GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 74–75 (T. & J.W. Johnson 1874)).

42. *See id.* at 214 n.6 (discussing how Hoffman and Sharswood viewed lawyers who were primarily out for money).

43. Much of what the American Bar has adopted for its model rules of professional conduct came from thoughts on attorney ethics by Hoffman and Sharswood. *See generally* MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2013).

44. WILLIAM ALLEN BUTLER, *LAWYER AND CLIENT: THEIR RELATION, RIGHTS & DUTIES* (Appleton & Co. 1871).

45. *Id.*

46. *Id.*

47. WILLIAM ALLEN BUTLER, *A RETROSPECT OF FORTY YEARS, 1825–1865* 211–13 (1911).

of wealth come at the very end of his text as befitting a subject far less important than the lawyer’s responsibilities to his client. His discussion begins with a consideration of whether a lawyer should sue a client for his fee, much like Sharswood. In this context, he opines:

But while I believe that our courts are right in holding that the services of counsel may be a matter of contract equally with all other kinds of service, and that the legal laborer is worthy of his hire, *it should not be forgotten for a moment that the true motive and spur of effort on the part of the lawyer is something far beyond the pecuniary result of his efforts.*<sup>48</sup>

And:

It is not for the fee of his client, not even for the professional repute which follows success, and which is dearer than money, that a lawyer truly gives his days and nights to his client’s cause. It is to satisfy his own sense of duty, and for this he will go far beyond the service which would be doled out for a stipulated price.<sup>49</sup>

Butler’s sentiments, like those of Sharswood and Hoffman, are noble and honorable in almost a Roman fashion—the lawyer is above commerce.<sup>50</sup> He discharges the duties of his profession in pursuit of a far higher ideal than money.<sup>51</sup> But today we must recognize that these were what we would term aspirational statements and the reality of law practice for the vast majority of lawyers—lawyers who did not have independent wealth and come from families in the upper echelons of American society, what we would today characterize as “the one percent”—was quite different. These lawyers, whom men like Butler called pettifoggers, were lawyers who did not attend expensive law schools, who did not join family law firms, and could not depend upon established social and familial networks for clients.<sup>52</sup> One can imagine, the vast majority of lawyers during the period depended upon their practices for their daily bread and often succumbed to the temptations Hoffman, Sharswood, and Butler warned against because they simply had no choice. And among this vast majority of lawyers who were honest and simply trying to make a living there were also a few—perhaps more than a few—who made the

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48. BUTLER, *supra* note 44, at 3–4 (emphasis added).

49. *Id.* at 74.

50. *Id.*

51. *Id.* at 73–74.

52. *Id.*

acquisition of wealth the central purpose of their lives and practice. It was these lawyers who did fall into dishonesty and unethical practice and who gave the legal profession a bad public image.

In 1896, Samuel A. Wandell, a young, established New York lawyer published a popular book for the Bar as a guide to practice.<sup>53</sup> It was more than simply a guide to legal ethics. Instead, it was what we might today call a general introduction to the practice of law for lawyers who did not come from elite social or educational backgrounds.<sup>54</sup> By the 1890s, several waves of immigrants to the United States were bringing about substantial social and political change.<sup>55</sup> One can imagine, many of the sons and daughters of these immigrants desired to become lawyers, much to the worry of the elite Bar who feared that the immigrants would not embrace the elite's ideals of practice. Wandell's book was very clearly intended for these new applicants to the profession.<sup>56</sup> The advice that the book contains reflects this. One finds nuggets such as "you should not be careless or negligent about your personal appearance"<sup>57</sup> and "you should not suffer your office to become disorderly."<sup>58</sup> Wandell's advice about money and practice is equally simple and forthright and in the tradition of his elite predecessors:

You should not practice law with the idea that your profession is only designed as a means of money getting; you should not devote your whole life to the abject service of Mammon. There are lawyers who, it seems, erect a golden calf in the office as soon as they are admitted to the bar, and who spend their best energies and talents in its worship. Yours is a calling of dignity and honor, and you should honor your vocation. You might as well hang out the three balls which denote the calling of the pawn-broker, as to develop into a scheming, flinty-hearted lawyer, whose sole desire is personal

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53. SAMUEL H. WANDELL, "YOU SHOULD NOT": A BOOK FOR LAWYERS, OLD AND YOUNG, CONTAINING THE ELEMENTS OF LEGAL ETHICS (Michael H. Hoeflich ed., Law Exchange 2014) (1896).

54. *Id.* at 1.

55. See Faye Hipsman & Doris Meissner, *Immigration in the United States: New Economic, Social, Political Landscapes with Legislative Reform on the Horizon*, MIGRATION POLICY INSTITUTE (Apr. 16, 2013), <http://www.migrationpolicy.org/article/immigration-united-states-new-economic-social-political-landscapes-legislative-reform> (profiling the U.S. foreign-born population and elucidating the peak of the foreign-born percentage of the U.S. population was fifteen percent between 1890 and 1910).

56. WANDELL, *supra* note 53, at 1.

57. *Id.*

58. *Id.* at 7.

aggrandizement and wealth.<sup>59</sup>

### III. BUSINESS ETHICS IN NINETEENTH CENTURY AMERICA

At the beginning of the nineteenth century, the United States was primarily a rural nation and its economy was based, to a large extent, on agricultural pursuits.<sup>60</sup> By the end of the nineteenth century, the population shift from the countryside to urban centers was well underway and the American economy was rapidly becoming the largest in the world due to America’s rapid industrialization.<sup>61</sup> Part and parcel of these changes was a shift in the way Americans defined success.<sup>62</sup> In the early part of the century, the majority of Americans lived in the country and small villages and considered themselves successful if they owned small farms or were small town merchants.<sup>63</sup> By the 1830s, the American ideal of success seemed to be changing radically as tens of thousands of young men were abandoning rural and small town America for the big cities carrying with them dreams of becoming wealthy merchants, industrialists, and entrepreneurs.<sup>64</sup> Success became a mainstay of American aspirations and wealth—wealth that need not be inherited but that could be acquired by every individual through diligence and hard work, became the paradigmatic characteristic of success.<sup>65</sup> America was becoming a land of unlimited aspirations and unbridled ambition.<sup>66</sup>

Although businessmen did not have professional organizations or links to an organized state entity like the courts, there were a large number of writers who published books and articles intended to guide young clerks and others involved in mercantile pursuits.<sup>67</sup> These guides provided advice on everything from how a young businessperson should dress, to the types of entertainment in which they should indulge, to how they should comport themselves in both their professional and private lives.<sup>68</sup>

59. *Id.* at 3.

60. *See generally* GABRIEL ABEND, *THE MORAL BACKGROUND: AN INQUIRY INTO THE HISTORY OF BUSINESS ETHICS* 10–12 (2014).

61. *See id.* at 10–12 (discussing the effects in urban areas due to the Industrial Revolution).

62. *Id.*

63. *Id.*

64. *Id.*; *see*, M.H. Hoeflich, *The Christian Origins of American Legal Ethics*, 86 KAN. BAR J. 49, 50–51 (2017), (developing a corresponding theme in a related context).

65. *Id.*

66. *Id.* at 9–10 (describing the period around the 1850s as “the transformation of America”).

67. *See id.* at 122–23 (discussing literature advising “young men entering mercantile life”).

68. *See* THOMAS AUGST, *THE CLERK’S TALE: YOUNG MEN AND MORAL LIFE IN NINETEENTH-CENTURY AMERICA* 4 (2003) (discussing conduct books from the nineteenth century used for businessmen development).

These guides sought to produce a class of young clerks and business entrepreneurs who would not only achieve financial success, but also in so doing, raise the public perception of business as a worthwhile occupation.<sup>69</sup> Underlying these guides were the aspirations of senior, successful members of the business community to achieve high social status as well as to present themselves as representing the highest levels of civic and Christian ethics.<sup>70</sup> Throughout the nineteenth century, there appeared a torrent of how-to books, articles, and even novels that extolled the virtues of the successful businessperson and provided guidance to young aspirants on achieving business success.<sup>71</sup>

It is not at all surprising that the ideals for behavior, both professional and private, espoused by this aspirational business literature were very much the same—taking into account the different demands on lawyers and merchants—for lawyers and those occupied in business pursuits.<sup>72</sup> And, again, just as the guides for young lawyers condemned greed as a professional motivation,<sup>73</sup> so did the guides for young clerks and those engaged in business.<sup>74</sup> Wealth was good; greed was evil.

Throughout the business literature of the nineteenth century, there is a strong theme: the acquisition of wealth is a positive activity.<sup>75</sup> Businesspeople who succeed can be virtuous in their dealings.<sup>76</sup> It is not necessary to descend into trickery, fraud, or dishonest dealing to become wealthy.<sup>77</sup> Indeed, greed makes people forget their ethical duties to

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69. See *id.* at 4 (discussing guide books focused on perception, including the importance of character traits such as “citizenship . . . honor, reputation, morals, manners, [and] integrity”).

70. See, e.g., ABEND, *supra* note 60, at 124 (“[B]ecause Christian business ethics approaches focus on motives . . . they can turn out to have a surprisingly good implication—surprisingly good if you are an employer or principal, anyway.”).

71. See, e.g., *id.* at 123 (describing literature promoting true honesty as a virtue in business). Abend lists categories of “morally acceptable motives” including principle, love of God, love of virtue, and love of right. *Id.* at 124. Abend also lists several characteristics as “morally unacceptable” including “policy, expediency, self-interest, self-love, pride, vanity, and love of praise.” *Id.*

72. See *id.* at 231 (discussing nineteenth century literature asserting it would be a happy day when business schools test students the way law schools test students).

73. See *id.* at 24 (describing lawyers as those who care about society, and “not only about making fat profits”).

74. See *id.* at 253 (“Prominent businessmen were accused of greed and selfishness.”).

75. See, e.g., *id.* (discussing literature which “addresses not only the proper use of a person’s money and material possessions, but also their proper acquisition, as well the proper use of her talents, time, and soul . . . [this] is a common tool in the toolkit of the Christian business ethicist”).

76. See Markovits, *supra* note 41, at 223 (“[R]ecall[ing] the venerable Aristotelian tradition that constructed an entire ethical theory around the idea that virtue promotes the general well-being or flourishing . . . of the virtuous.”).

77. Cf. *id.* (“[A] person’s ethics and her first-personal success are intertwined . . . so that a person does well by doing good . . .”).

society.<sup>78</sup> Greed causes businesspeople to cheat their customers, to make false claims, and to descend into the worst morasses of lost virtue.<sup>79</sup> Just about any nineteenth century businessperson who read books about business, business periodicals like Freeman Hunt’s *Merchants Magazine*,<sup>80</sup> any of the hundreds of biographies of successful businessmen, or novels about young men who began as clerks with no property who through hard work and virtuous behavior became titans of business, would have quickly imbibed the doctrine that wealth acquired honestly and for the proper purposes was a positive good, while wealth acquired solely for the purpose of becoming rich (i.e. as a result of greed) was a social evil.<sup>81</sup> The Christian religion also fostered virtuous business practices and the acquisition of wealth for good purposes and not simply from greed, as was the doctrine stated in such books as Henry Augustus Boardman’s *The Bible in the Counting House*.<sup>82</sup>

Thus, the young lawyer and the young merchant clerk were both exposed to the same moral imperatives: be successful, achieve this success honestly through hard work and moral behavior, and eschew naked greed and the love of money for its own self.<sup>83</sup> In spite of these shared aspirations, by the end of the nineteenth century—what has been called the “Gilded Age”<sup>84</sup>—had arrived and the growth of large industries such as steel, oil, and, above all, railroads, had created a new type of businessman, the new “robber barons,” men who sought to increase their personal fortunes and worldly power to levels not before known in the

78. See e.g., Brandon Keim, *Greed Isn’t Good: Wealth Could Make People Unethical*, WIRED (Feb. 27, 2012, 4:12 PM), <https://www.wired.com/2012/02/income-and-ethics/> (discussing a study which concluded unethical behavior is driven in part by greed).

79. Cf. *id.* (“[Greed] insulates people from the consequences of their actions, reduces their need for social connections and fuels feelings of entitlement, all of which become self-reinforcing cultural norms.”).

80. Freeman Hunt, *The Merchant’s Magazine and Commercial Review* (1912)

81. See e.g., *id.* at 138 (“The good merchant is not in haste to be rich . . . [h]e recollects that he is not merely a merchant, but a man; and that he has a mind to improve, a heart to cultivate and a character to form.”).

82. HENRY A. BOARDMAN, *THE BIBLE IN THE COUNTING HOUSE: A COURSE OF LECTURES TO MERCHANTS* (Lippincott, Grambo & Co. 1853). “It is as much the law of the ‘true riches’ to diffuse themselves, as it is of cupidity to hoard. And the more a merchant possesses of this incorruptible wealth, the more he will be inclined to share it with others. The opportunities for this, in an extensive business, are equally varied and important.” *Id.* at 360.

83. See *id.* at 236 (“[A young man should be i]mpelled to diligence and constancy . . . [and] steadily advancing towards honour and usefulness, as the other is sinking into disgrace and contempt.—It cannot be too often reiterated in the ears of our young men, that *this* is the true path to success.”)

84. See HUGH ROCKOFF, *GREAT FORTUNES OF THE GILDED AGE* 3 (2008) (discussing the origins of the Gilded Age during the late 1800s).

United States.<sup>85</sup> These new industrialists required a new type of lawyer, one who would be slavishly loyal to their business clients and use whatever means, no matter how problematic, to achieve their clients' goals.<sup>86</sup> And the reward for these lawyers was a level of wealth and professional success that was also unprecedented.<sup>87</sup>

#### IV. THE AVARICIOUS LAWYER IN NINETEENTH CENTURY LITERATURE

Most of us, when we think of lawyers in nineteenth century literature, tend to immediately think of the lawyers of Charles Dickens.<sup>88</sup> Dickens's lawyers are pompous, often rather stiff members of the English Bar whose legal machinations delay or prevent justice entirely.<sup>89</sup> But there also existed American writers in the nineteenth century who wrote about the American Bar and are far less well known than Dickens. Here, I want to look at several of those lesser known American writers and their works on lawyers and the legal profession, for such an examination makes it clear how much the American public generally distrusted lawyers.

In 1808, George Watterston, a Washington lawyer who went on to become the first Librarian of Congress, published one of the first American lawyer novels, *The Lawyer, or Man as He Ought Not to Be*.<sup>90</sup> The title very much reflects Watterston's view of lawyers as reflected in his text. The central character in the book is one Morcel of a Maryland "family neither illustrious for its antiquity, nor conspicuous for its virtue."<sup>91</sup> He is an evil character from his birth. He characterizes himself as follows:

I very early began to evince a strong propensity for

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85. See *id.* at 10 (examining robber barons and the Gilded Age's effect on farm machinery, oil, meat packing, steel and cigarettes).

86. Cf. Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. 239, 264 (2003) (acknowledging the Gilded Age represented a period of social conflict and the importance of lawyers establishing "neutral and objective" rules to achieve societal unity).

87. See *id.* at 256 (recognizing a lawyer's wealth in the Gilded Age and assuring the justness and worthiness of the legal profession).

88. See generally John Marshall Gest, *The Law and Lawyers of Charles Dickens*, 53 AM. L. REG. 401 (1905) (discussing the works and lawyers of Charles Dickens).

89. Cf. *id.* at 405 (explaining how Dickens' aim was "ridicule, satirize, and caricature all that he disliked and despised," and how he "saw much in the law and lawyers of England to dislike and despise").

90. GEORGE WATTERSTON, *THE LAWYER, OR, MAN AS HE OUGHT NOT TO BE* (Pittsburgh, Zadok Cramer 1808).

91. *Id.* at 9.

Cunning and dissimulation. . . .<sup>92</sup>

As a result of this early glimpse of his character, Morcel’s father determined that he should become a lawyer. The father, according to Morcel:

labored incessantly to impress upon my mind the inutility of virtue, and the necessity of deception and hypocrisy, to a man destined as I was for the profession of the law. It was of no consequence, he said, whether the conduct of a lawyer were strictly consistent with the principles of integrity or not, for he would not, on that account, be more generally esteemed or more eminently conspicuous at the bar. The possession of wealth, he taught me to regard as the opus magnum of human life, and to obtain it, every faculty, both of body and mind, should be exerted, and every practice resorted to, however mean and contemptible, that would, in the smallest degree, contribute to the accomplishment of that end.<sup>93</sup>

Throughout the rest of the short novel, Morcel lives up to his early failings and in his greedy quest for wealth destroys several lives, including that of a young woman whom he seduces.<sup>94</sup> Watterston’s lawyer’s character is, of course, a total perversion of what his professional brethren like Hoffman and Sharswood believed lawyers should be.<sup>95</sup> It was the image of the lawyer portrayed by Watterston that not only helped to fuel anti-lawyer sentiment but, led men like Hoffman, Sharswood, and Butler to write their own works to counter this negative image.<sup>96</sup>

An even more detailed and negative portrait of a lawyer is found in John

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92. *Id.* at 11.

93. *Id.* at 13–14.

94. *See id.* at 23–24 (admiring a woman named Matilda but owning up to having the “inhumanity [and] deliberate villainy to destroy [her]”).

95. *Compare id.* at 58–9 (“The love of wealth . . . [is] the ruling passion. To that I willingly sacrificed the few virtues I possessed and became . . . the greatest scoundrel at the bar.”), *with* CAROL RICE ANDREWS ET AL., *GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES’ 1887 CODE AND THE REGULATION OF THE PROFESSION* 12–13 (2003) (articulating David Hoffman’s and George Sharswood’s principles of good lawyering as “matters of etiquette, good business practice . . . social discourse . . . business relations with clients, and proper litigation conduct”).

96. *See* Ariens, *supra* note 8, at 572 (“Hoffman has been regularly and favorably cited as a guide to overcoming ethical woes in the American legal profession.”) The author later tells how Sharswood taught his students about ethics but advised them to steer away from focusing on virtues like wealth, because they are only of “factitious importance.” *Id.* at 606; *see also* BUTLER, *supra* note 44, at 67 (recognizing “literature . . . reflecting the current opinions of each succeeding generation, is full of instances of course abuse or sharp satire directed against lawyers, by authors, wits, pamphleteers, and penny-a-liners”).



Treat Irving's, *The Attorney, or the Correspondence of John Quod*,<sup>97</sup> first published as a series in the magazine, *The Knickerbocker*,<sup>98</sup> and in 1842, as a book in New York by Robert DeWitt.<sup>99</sup> Irving was a lawyer and the nephew of the novelist Washington Irving, as well as the son of the lawyer and judge John T. Irving.<sup>100</sup> His portrayal of the main character, John Quod, shows lawyers at their very worst. The novel is written in the first person and Quod relates his personal history in a blunt and depressing way. He began his career by taking "an office in a dark, gloomy building in the neighborhood of Wall Street" where he "kept like a spider in [his nest,] on the look-out for the unwary."<sup>101</sup> He was poor and his office was furnished with only a desk and a few dusty law books.<sup>102</sup> As his career progressed, Quod did whatever he could to earn his living and took any case he found, regardless of its merits.<sup>103</sup> In a number of cases, his exertions on behalf of his client not only did not pay dividends for them, but, in fact, brought about their ruin.<sup>104</sup> But this was not enough. The main plot of the book concerns Quod's machinations by which he forged the will of a dead acquaintance, hired thugs to intimidate any witnesses to the real will, and had former clients, whom he had ruined financially in earlier cases, put their signatures as witnesses on the forged will.<sup>105</sup> All of this he accomplished to deprive the decedent's only daughter, a poor, innocent woman of her legacy, consisting primarily of the only home that she had ever known.<sup>106</sup> The plot, of course, is a perfect example of nineteenth century melodrama and the villain is the greedy, grasping lawyer Quod.<sup>107</sup> Happily, for the innocent daughter, Quod's plot failed and she

97. JOHN T. IRVING, *THE ATTORNEY, OR THE CORRESPONDENCE OF JOHN QUOD* (Research Publications, Inc. 1842).

98. John Mark Ockerbloom, *The Knickerbocker*, ONLINE BOOKS PAGE (last visited Feb. 18, 2017), <http://onlinebooks.library.upenn.edu/webbin/serial?id=knickerbockerymm>

99. IRVING, *supra* note 97.

100. CHARLES ELLIOT FITCH, *ENCYCLOPEDIA OF BIOGRAPHY OF NEW YORK: A LIFE RECORD OF MEN AND WOMEN OF THE PAST* 49 (1916)

101. IRVING, *supra* note 97, at 12–13.

102. *Id.* at 13.

103. *See id.* at 14 (explaining efforts to elbow among the crowds in the courts but concluding that the profession did not come natural).

104. *See generally id.* at 19–21 (summarizing a series of sad facts which are recounted throughout the rest of the book).

105. *See id.* at 307 ("[H]e had left a Will in favor of his daughter . . . [T]his Will would be a mere dead-letter . . . on that ground [because] the present Will [is] forged."); *see also id.* at 47–48 (discussing the payment of one thousand dollars to help with a crime of forgery).

106. *See id.* at 157 ("A few days ago a gentleman in this city died, leaving a large property, and an only daughter, who would by law have inherited it . . . Perhaps you understand now . . . I want [it].").

107. *See generally id.*

eventually received her rightful estate.<sup>108</sup>

Irving’s book, with its negative portrayal of a lawyer achieved a large audience. The *Knickerbocker* was one of the most popular magazines of its period with a large readership. The book form of Irving’s tale was highly touted by the editors of *The Knickerbocker*.

[I]t was entitled to the appellation “thrilling.” . . . Dickens himself does not better understand, than does the author of ‘The Quod Correspondence,’ the art of stimulating without satisfying curiosity, until the whole of his story is before his readers. The wiles of his ‘head-devil, the “infernal Attorney” and the retribution at last visited upon him, are in the way of graphic description, and stirring incident, wholly unsurpassed by any kindred work with which we are acquainted.<sup>109</sup>

Of course, while the fame of *The Attorney* may have benefited Irving’s finances and career as a novelist, it did little good for the reputation of the legal profession.

One might ask a question at this point: Why did two successful lawyers, Watterston and Irving, write novels that portrayed lawyers as avaricious, unprincipled predators upon the public? I can suggest one possible answer. Both Watterston and Irving were members of the legal elite.<sup>110</sup> Both came from prosperous families and both had successful careers.<sup>111</sup> The villains in both novels, while lawyers, however, were not lawyers like them. These were not successful members of the legal elite. Instead, both Morcel and Quod came from poor backgrounds and their practices would undoubtedly have qualified them in the eyes of men like Watterston and Irving as worthy of the title “pettifogger.”<sup>112</sup> Whether the general public who read these novels were able to make such a distinction, however, is

108. See *id.* at 368 (explaining how the daughter received the good news of getting her valid will).

109. John A. Gray, Announcement for 1860, 54 *Knickerbocker Magazine* 428, 430 (October, 1859)

110. See e.g., LIBRARY OF CONGRESS, <https://www.loc.gov/about/about-the-librarian/previous-librarians-of-congress/george-watterston/> (last visited Apr. 10, 2017) (listing a laundry list of accomplishments by George Watterston, including serving as the third librarian of congress); see also FITCH, *supra* note 100, at 49 (stating John Irving was the son of a judge and born in a family mansion on Wall Street in New York City).

111. See FITCH, *supra* note 100, at 49 (highlighting some of John Irving’s accomplishments, as well as his family’s, including Irving graduating from Columbia College and earning distinction of republication for his published work in England); LIBRARY OF CONGRESS, *supra* note 110 (showcasing several feats accomplished throughout Watterston’s career).

112. A pettifogger is a “sneaky, underhanded” lawyer. VOCABULARY.COM, *Dictionary*, <https://www.vocabulary.com/dictionary/pettifogger> (last visited Apr. 10, 2016).

unclear.

The final nineteenth century legal work that I want to discuss is not a novel, but rather a series of essays. The authors, Henry and Charles Francis Adams, descendants of two American Presidents and distinguished writers and diplomats, wrote several essays on the stock manipulations used by a group of infamous stock “operators,” Jim Fisk, Cornelius Vanderbilt, Daniel Drew, and Jim Gould, to take over several American railroad lines after the Civil War.<sup>113</sup> These essays were first published in major magazines of the era and then, in 1871, gathered into a book, *Chapters of Erie and Other Essays*,<sup>114</sup> published in Boston by James R. Osgood.<sup>115</sup> In addition to these essays, a number of other essays as well as correspondence about the affair were published both in magazines and newspapers.<sup>116</sup>

The battles for the takeover of the Erie Railroad and other railroads were the first major corporate stock battle in United States history.<sup>117</sup> It was a battle fought in the market and in the courts.<sup>118</sup> In addition to the aforementioned main players, it involved President Grant’s family, the New York City political machine, a number of judges associated with that machine—including the father of Benjamin Cardozo—as well as some of the most prominent lawyers in the United States, including David Dudley Field.<sup>119</sup> In scope and importance, the Erie scandal approached our own Enron scandal. In carrying out their battle for acquisition of the stock they sought, Fisk and Gould and their confederates engaged in stock fraud, extortion and serious abuse of the judicial process.<sup>120</sup> At the center

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113. See CHARLES F. ADAMS, JR. & HENRY ADAMS, CHAPTERS OF ERIE, AND OTHER ESSAYS 5, 27 (Bedford, Mass., James R. Osgood & Co. 1871) (discussing a “series of events in the Erie history” involving Daniel Drew and Cornelius Vanderbilt, and later introducing Jim Fisk and Jim Gould).

114. CHARLES F. ADAMS JR. & HENRY ADAMS, CHAPTERS OF ERIE, AND OTHER ESSAYS (Bedford, Mass., James R. Osgood & Co. 1871).

115. *Id.*

116. See e.g., CHARLES FRANCIS ADAMS, JR. ET AL., HIGH FINANCE IN THE SIXTIES, CHAPTERS FROM THE EARLY HISTORY OF THE ERIE RAILWAY (1929).

117. See PATRICK A. GAUGAN, MERGERS, ACQUISITIONS, AND CORPORATE RESTRUCTURINGS 41 (5th ed. 2011) (stating the first great takeover battle began in 1868, which involved “an attempt to take control” of the Erie Railroad and “large quantities of stock”).

118. See *id.* (explaining how a defense to the takeover attempt was to self-issue stock and recognizing legal remedies were weak due to bribery).

119. See e.g., ADAMS, JR. & ADAMS, *supra* note 113, at 124–25 (discussing a letter addressed to President Grant); see also *id.* at 86–87 (highlighting some of Judge Albert Cardozo’s roles in the lawsuits); *id.* at 36–37 (listing a question and answer conversation concerning David Dudley Field).

120. *Cf. id.* at 84 (describing the story as “ridiculous” and illustrative of how “utterly demoralized the public mind ha[s] become, and how prepared for any act of high-fraud or outrage [the public should be]”).

of all of this were the lawyers. In this scandal, the modern conception of the “corporate lawyer” was born and the traditional ethical values of the American Bar were put to the ultimate challenge.

David Dudley Field was one of the most eminent members of the American and New York City Bars at the time of the Erie scandal.<sup>121</sup> His brother, Stephen Field, was a noted jurist who became a justice of the U.S. Supreme Court.<sup>122</sup> His father was a noted clergyman.<sup>123</sup> He was one of the leading proponents of procedural reform in the United States and principal author of the New York Code of Procedure that was named after him, the Field Code.<sup>124</sup> He was a leading member of the legal elite. Thus, his deep involvement in the machinations of the Erie operators was itself a source of great controversy.<sup>125</sup>

In a series of letters between Field and Samuel Bowles, a Springfield, Massachusetts newspaper editor, the two men debated whether Field had, in fact, acted unethically and dishonorably.<sup>126</sup> Field maintained that he had done nothing either legally or morally offensive. Bowles, on the other hand, condemned Field for representing the Erie operators when he knew what they were doing was fraudulent and, in some cases, illegal.<sup>127</sup> Other essays were published both attacking Field and supporting him.<sup>128</sup> The essence of Field’s argument was that he had not violated any established rules nor had he known of, or participated in, any illegal acts in his representation of his clients.<sup>129</sup> His critics argued that he should not have represented such “bad” characters in the first place and that once he had taken on the representation he should have exercised independence of

121. See Irving Browne, *David Dudley Field*, 3 GREEN BAG 49, 50 (1981) (noting Field’s reputation during the Erie Litigation, including how he “availed himself, for the benefit of his clients . . . with unshrinking boldness”).

122. *Id.* at 49.

123. See *id.* (“The father of this eminent [family] was the Rev. David Dudley Field, of Haddam, Conn., and Stockbridge, Mass.,—a clergyman of acknowledged learning, piety and strength of character.”).

124. See ADAMS, JR. & ADAMS, *supra* note 113, at 109 (“Mr. Field . . . was an eminent law reformer [and] author of the New York Code . . .”).

125. See Browne, *supra* note 121, at 50 (explaining how Field “made many enemies among lawyers, and encountered bitter blame from the public” because of the Erie Litigation).

126. ADAMS, JR. & ADAMS, *supra* note 113, at 92–93.

127. Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, AM. J. LEGAL HIST., July 1977, at 191, 199.

128. See, e.g., ADAMS, JR. & ADAMS, *supra* note 113, at 3 (describing the implications of the Erie wars and how “[the Erie wars] touch very nearly the foundation of common truth and honesty without which that healthy public opinion cannot exist which is the life’s breath of our whole political system”).

129. See Schudson, *supra* note 127, at 199 (discussing the correspondence between Field and Bowles where Field defends his professionalism).

action and refused to do what was asked of him when to do so was dishonorable.<sup>130</sup>

To some degree, the debate between Field's supporters and critics was a debate over Lord Brougham's famous statement that a lawyer must do everything possible to represent his client regardless of the consequences to the public or to himself—a debate that had been going on among lawyers for half a century.<sup>131</sup> Interestingly, Field explicitly rejected Brougham's theory and simply defended his actions by saying that they were neither dishonorable nor illegal.<sup>132</sup> But beneath the rhetoric of the debates over Field's actions was something more fundamental. In essence, what so upset Field's critics was that one of the leading lawyers of the day was using his considerable legal talents to assist his clients in activities that were harmful to the public.<sup>133</sup> The message that Field's critics were conveying was that Field, in pursuit of the vast fortune in fees that his clients were paying, was willing to compromise his civic responsibilities and his conscience.<sup>134</sup>

In my opinion, the Erie scandal and Field's role in it marked a turning point in American legal ethics. Field was, as I suggested, the first true corporate lawyer in American history.<sup>135</sup> His work for the Erie operators

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130. See *id.* at 196–197 (claiming a lawyer is not bound to choose every case).

131. See Hoeflich, *Other Tradition*, *supra* note 11, at 793 (describing the debate over zealous client representation by lawyers). “Just as the adversarial system and the concept of overwhelming loyalty to, and advocacy for, a client in that system has its proponents, so, too, does it have its detractors.” *Id.*

132. See *id.* at 815 (describing Field's claim of the moral high ground in his representation of Erie). “What was important to Field was that, in his opinion, he was bound to represent his clients regardless of their actions or character and, furthermore, that he was bound to use all means possible—within the law—to further his clients' cause as part of his representation.” *Id.*

133. See Schudson, *supra* note 127, at 196–97 (discussing the distaste of high powered lawyers by the press). “For a lawyer, the *Times* wrote in an editorial, Fisk should have turned to the ‘Tombs bar’ but instead went to ‘a leading jurist and law-reformer of the State, a man of wide reputation and large fortune, and, instead of being shown the door, found no difficulty in employing him in his worst cases.’” *Id.*

134. See *id.* at 196–197 (asserting the lawyer's primary value is money). “Everything is taken as a matter of course. A lawyer, therefore, thinks first of making money; and as there is a fortune in the law business of the Erie Road . . .” *Id.* But see Browne, *supra* note 121, at 55 (“Mr. Field has in a sense lived to an age which ‘knows not Joseph.’ But legal history will do justice to his potent, useful, and noble career.”).

135. See Maxwell Bloomfield, *Lawyers and Public Criticism: Challenge and Response in Nineteenth-Century America*, AM. J. LEGAL HIST., Oct. 1971, at 269, 814 [hereinafter Bloomfield, *Lawyers and Public Criticism*] (“The context was the rise of a new type of law in the United States, what we now call corporate law, and the lawyer most responsible for popularizing the view was David Dudley Field.”); see also Schudson, *supra* note 127, at 208 (describing Field as a corporate lawyer); Hoeflich, *Other Tradition*, *supra* note 11, at 816 (“The idea of the lawyer as moral arbiter of his client's case and the notion that a lawyer should act within severely defined limits in his representation of clients gave way

occupied virtually all of his time.<sup>136</sup> They were his principal client to the exclusion of all others.<sup>137</sup> Also, this client was willing to pay massive amounts of money to their lawyer to achieve their goals.<sup>138</sup> This was a far cry from the traditional model of law practice in the United States where no one client could monopolize a lawyer's time nor pay so much in fees as to make the lawyer fabulously wealthy.<sup>139</sup> In effect, Field became a captive of his clients and his reward was great wealth. He sacrificed his independence, and—in the eyes of his critics—his honor in the pursuit of money.

In fact, the dangers great railroad corporations posed to the independence of lawyers may well have been one of the principal motivations for the drafting of the first formal code of legal ethics adopted by an American jurisdiction. In 1887, Alabama adopted a code of legal ethics.<sup>140</sup> The primary author of this code was Thomas Goode Jones.<sup>141</sup> Jones was a wealthy farmer and lawyer in Alabama who served in the Confederate army during the Civil War; and afterwards became a prominent Alabama lawyer and politician.<sup>142</sup> He was also retained by a number of railroad corporations; and it was this work that made him realize that when a lawyer served such corporations he inevitably faced the temptation to give up his independence of professional judgment and become a servant of his client to reap the monetary rewards such service would provide.<sup>143</sup> He was so concerned about this temptation that he championed the adoption of a formal ethics code by the state, one that

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to the demands of corporate and individual clients who wanted zealous advocacy not moral criticism from their attorneys.”)

136. *Cf.* Browne, *supra* note 121, at 52 (“Mr. Field had able associates and assistants in this work, but he himself wrought and produced more upon it than all of them together . . .”).

137. *See id.* at 50 (“[Field] simply availed himself, for the benefit of his clients [in the ‘Erie Litigations’], of the existing remedies, with unshrinking boldness, and not to a greater extent than had been before and has since been done in some important instances.”).

138. *See* Schudson, *supra* note 127, at 195 (“Field and the forty other lawyers who assisted him received \$333,416 for their efforts, Field’s own four-man firm taking in \$48,289.”).

139. *See* Hoeflich, *Other Tradition*, *supra* note 11, at 817 (explaining moral objectives were placed higher than financial goals in the nineteenth century).

140. ALABAMA CODE OF ETHICS (ALA. BAR ASS’N 1887).

141. *See* ANDREWS ET AL., *supra* note 95, at 2 (“[Jones] was the natural choice to author the Association’s code, and at the fourth annual meeting of the Bar in 1882 he was nominated as chairman of a three-member committee to draft the code.”).

142. *See id.* at 65 (“Students of history are more likely to know Jones as a Confederate veteran and New South Lawyer who achieved high office as Alabama’s governor (1890-1894) and as a federal judge (1901-1914).”).

143. *See id.* at 77–80 (explaining Jones’ impasse with the railroad corporations). “Railroads in particular were jealous mistresses, as Jones found in the late 1870s, when he paid a price for separating his professional and political personae.” *Id.*

would make surrendering to such temptation more difficult.<sup>144</sup> As many know, the Alabama Code of 1887 became the model for the first American Bar Association Code of 1908.<sup>145</sup>

From a jurisprudential perspective, I think it is fair to posit that when a profession finds it necessary to adopt formal rules that carry sanctions for breaches, this signals the breakdown of informal professional ethics. In the antebellum United States, there was a consensus among the elite of the American Bar about how lawyers should behave, the dangers of avarice in practice, and the loss of professional judgment and independence when the acquisition of wealth becomes the primary purpose for being a lawyer.<sup>146</sup> In the thoughts of the elite, such actions converted the lawyer from a professional into a tradesman.<sup>147</sup> During this period, the elite became the custodians of the profession's honor, and advocated for a level of professional ethics they believed necessary to maintain the prestige of the Bar.<sup>148</sup> Unethical behavior, greed, and dishonesty were, in the elite's minds, characteristics of pettifoggers, the "bottom feeders" of the Bar.<sup>149</sup> After the Civil War, the rise of great corporations, railroads, steel companies, and oil trusts created a new type of client who could offer the elite members of the profession monetary temptations they had hitherto not experienced.<sup>150</sup> David Dudley Field's representation of the Erie

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144. *See id.* at 1 (describing Jones' motivation for developing a formal ethics code because he "perceived a strong need for a guide that would establish a standard of honor and integrity for the Alabama Bar").

145. CANONS OF PROFESSIONAL ETHICS (AM. BAR ASS'N. 1908).

146. *See* Bloomfield, *Lawyers and Public Criticism*, *supra* note 135, at 270 ("[P]ractitioners in Jacksonian America . . . were more apt than their predecessors to cherish a narrow vocational outlook toward their work and to insist upon a technical competence that set them apart from their fellow men, as it enabled them to justify their elite status in American society . . .").

147. *See id.* (providing there was a thought that antebellum era practitioners who considered themselves elite were more likely than their predecessors to "cherish a narrow vocational outlook toward their work and to insist upon a technical competence that set them apart from their fellow men" since it more firmly planted their elite status).

148. *See id.* at 269 (describing the elite leadership in reforming the morality of the bar, and stating: "Finally, after several decades of disorder and demoralization, an elite leadership arises to purge the profession of its populist standards of recruitment and achievement, through the creation of the first modern bar associations in the eighteen-seventies").

149. For an example of the type of behavior considered to be that of a pettifogger see the case of George W. Niven. WILLIAM SAMPSON, *THE CASE OF GEORGE W. NIVEN* 92 (New York, Van Pelt & Spear 1822) (addressing the disbarment of George Niven, and proclaiming "the honour of a liberal profession is tarnished, when its members stoop to the shifts, and the expedients we have been considering, as the means of procuring a recompense for professional employment").

150. *See* Hoeflich, *Other Tradition*, *supra* note 11, at 815 (detailing the new type of clients for the elite bar members). It states:

Not surprisingly, given the large amounts of money at stake, these robber barons were easily

operators and the consequent scandal to which it gave birth, forced the American Bar to recognize that even the elite were at risk of succumbing to avarice.<sup>151</sup> Thus, men like Thomas Goode Jones recognized that, for the first time, formal codes of ethics applying to all members of the Bar were necessary to protect the honor of the profession and to fight the root of all evil.<sup>152</sup>

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able to find legal talent to serve their purposes. What is significant, however, is that many of the lawyers who served men like Gould and Fisk were not the dregs of the profession, or the back-room pettifoggers despised by men like Sharswood or Hoffman. Instead, they were often individuals of the highest professional standing.

*Id.*

151. *See id.* ("Field's dissertations on the lawyer-client relationship and the ethical obligations of lawyers within it is, to a large extent, the harbinger of the modern idea of zealous advocacy.").

152. *See* ANDREWS ET AL., *supra* note 95, at 91–2 ("With such a guide, pointing out in advance the sentiment of the Bar against practices which it condemns, we would find them gradually disappearing; and should any be bold enough to engage in evil practices, the Code would be ready witness for his condemnation, and carry with it the whole moral power of the profession.").