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## THE LAWYER AS LIMO: A BRIEF HISTORY OF THE HIRED GUN

MICHAEL I. KRAUSS<sup>†</sup>

[T]he defense lawyer has to be a maverick; he has to be able to buck the system to make it work. “A trial lawyer in a contentious case is a paid professional fighter,” I once told a reporter. “The one word that comes closest to what he ought to be is ‘renegade.’ That’s why most good criminal lawyers are loners. A hundred years ago you saw them walking down some dusty street, shooting people.”<sup>1</sup>

Sitting down to write a paper tracing the history of the “hired gun” notion of lawyering, the first image to pop into my head was, of course, “Paladin.” Aside from the practical matter that a reference to Richard Boone in the 1960s Western television series *Have Gun Will Travel* would leave a numerous population of younger readers scratching their heads in bewilderment, the Paladin metaphor would be substantively inappropriate. For the gunfighter knows that he is accountable for taking up his client’s goals—and Paladin, for those young readers in my audience, was a gunfighter. The gunfighter is never seen as morally independent of his client. Richard Boone in fact typically chose good guys as his clients, and was thus distinguishable from more dastardly gunslingers that were less discriminating in their selections.

An article by Stephen Pepper prompts a second image: the “lawyer as common carrier,” or maybe the “lawyer as bus.”<sup>2</sup> The idea is that, like a bus, the modern lawyer cares not at all about the client’s “destination.” If the customer has the fare, he must be accepted on board; the bus will take him where he wants to go and will thereby “further his autonomy.” But that analogy also fails for two reasons. First, the bus has a fixed itinerary, which it will not alter even if

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1. F. Lee Bailey, *The Defense Never Rests* 11 (Stein and Day 1971).

2. Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 Am B Found Res J 613 (1986).

pressed to do so by the customer. Second, bus passengers are typically too impecunious to afford to get where they want to go all by themselves. Many (though not all) “hired gun” lawyers are lawyers for the rich.

The notion of “lawyer as limo” then came to mind. In addition to its fine aliterative qualities, “lawyer as limo” denotes both greater service for greater pay and a relatively amoral form of commodification. Limo passengers often ostentatiously display their limo. When my teenagers were younger children they would exclaim, “Look, a *limo!*” when they saw one drive by. (Much the same reaction, perhaps, as some 1L’s have to certain law firms’ letterhead.) Limo drivers are also known to tolerate just about anything their clients want to do in and with the limo; regulations and laws have been bent, stretched and broken by many a passenger. For a big enough tip, many limo drivers will do almost anything for their clients, or more precisely allow almost anything to be done by their clients, and will shield them while they are doing it. And if they are found out, it is the client, not the limo driver, who tends to assume the blame for misdeeds. The limo driver is just a vehicle for the satisfaction of the client’s wants.

The lawyer as limousine is therefore my own image of the “hired gun.” By that term I am referring to a double notion borrowed from the helpful methodology of Tom Shaffer and Bob Cochran: (1) that it is the client, and not the lawyer, who primarily determines what might be called the “shape” taken by the legal representation; and (2) that the lawyer has no obligation to anyone or anything other than the client.<sup>3</sup> A two-by-two grid summarizes Shaffer and Cochran’s four “ideal types” of lawyering:

Figure 1 Lawyerly “Ideal Types”

|   | <b>Lawyer directs representation</b> | <b>Client directs representation</b> |
|---|--------------------------------------|--------------------------------------|
| <b>Interests other than the client’s “count”</b>    | Guru                                 | Friend <sup>4</sup>                  |
| <b>No interests other than the client’s “count”</b> | Godfather                            | Hired Gun                            |

This paper sketches the history of the vision of lawyering wherein the client runs the show, and where the lawyer need not be concerned by his representation’s effects on others. Professional ethics rules have existed as long as the profession itself. These codes reveal that the notion of the “hired gun” lawyer, who allows his client to dictate both ends and means while feeling no moral duties to

3. Thomas L. Shaffer and Robert F. Cochran, Jr., *Lawyers, Clients and Moral Responsibility* 3 (West 1994).

4. This is *not* the “friend” as understood by Charles Fried. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 Yale L J 1060 (1976). Fried’s “friend” is a “hired gun.”

anyone other than the client, has not always been the reigning paradigm it is today. The “hired gun” lawyer, like the stretch Lincoln limo, is a twentieth-century invention. A review of the evolution (devolution?) to the current paradigm follows.

### HISTORIC CONCEPTIONS OF LEGAL PROFESSIONALISM

This historical sketch has a lot of ground to cover, so to persist with the automotive analogy let us imagine ourselves as time travelers in Michael J. Fox’s hot rod,<sup>5</sup> rocketing back to Rome at the height of the Empire. We find at our feet a freshly transcribed copy of Justinian’s *Codex*. Opening the code we read that a lawyer must not uphold a cause that is villainous or supported by falsehood, and that if in the progress of a trial he discovers that a case of that kind has been given to him he must abandon it.<sup>6</sup> This sense of moral responsibility was a product of a firm view of legal agency. Lawyers at Roman law were agents morally and legally distinct from their principals. “What the agent did was not thought of as done by his principal. As the law saw it, what the agent did he did himself.”<sup>7</sup> Thus, a lawyer who zealously represented the interests of his client at all costs would not be justified in doing so *because he was a lawyer*.

We step back in the car and flash forward to medieval France. Professional legal advocates played an important role in the evolution of French law. One former French Chancellor, D’Augeseau, described professional advocacy “as ancient as the magistracy, and as necessary as justice.”<sup>8</sup> In France, as virtually everywhere in the Western world until the twentieth century, lawyers’ ethics rules existed in largely unwritten form, enforceable by social sanction and historically ascertainable mainly through exegesis of court decisions and occasional discussions in learned texts. Occasionally, though, we find evidence that is more direct. *Avocats* in France in the thirteenth century swore the following:

That they would discharge their duties with care, diligence and fidelity; and would support causes only so long as they believed them to be just, but abandon them when they discovered they were not.<sup>9</sup>

A century or so later, a French lawyer’s code was derived explicitly from this oath. The code had only eight articles, six of which are directly relevant to this overview. These articles epitomize the sober, moral and somewhat ascetic life of the jurist. Here they are:

1. [The attorney] was *not* to undertake just and unjust causes alike without dis-

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5. *Back to the Future* (Universal Pictures 1985).

6. See Orrin N. Carter, *Ethics of the Legal Profession* 45 (Northwestern 1915).

7. Roscoe Pound, *The Lawyer from Antiquity to Modern Times* 38 (West 1953).

8. Orrin N. Carter, *Ethics of the Legal Profession*, 9 U Ill L Rev 297, 298 (1914).

9. See Carter, *Ethics of the Legal Profession* at 26 (cited in note 6).

inction . . . .

2. He was *not* in his pleadings to indulge in abuse of the opposite party or his counsel.
3. He was *not* to violate the respect due to the court, by either improper expressions or unbecoming gestures.
4. He was *not* to exhibit a sordid avidity of gain, by putting too high a price upon his services.
5. He was *not* to make any bargain with his client for a share in the fruits of the judgment he might recover.
6. He was *not* to lead a dissipated life, or one contrary to the modesty and gravity of his calling.<sup>10</sup>

Jumping back into the car and zipping across the Channel to England, we find a system of advocacy that aligned the client's wishes somewhat more closely with the duties of the lawyer. This seemed naturally suited for the Anglo-Saxon method of settling disputes, a method that often involved physical conflict or duels. As a result, early Anglo-Saxon courts originally required the accused and the parties to civil actions to represent themselves so long as they were male and able bodied.<sup>11</sup> Thus, women, children and the elderly could choose family members as representatives. Over time, the limitations on selecting representatives disappeared and a class of professional advocates arose that would literally fight one's battles for one. As England moved away from pugilistic settlements, these professionals evolved into what we would today recognize as England's first lawyers.

Despite this history of close alliance between client and lawyer, English law did not encourage unreserved advocacy of the client's wishes. Professional lawyers were selected directly by the King, ensuring in part that they would not be drawn from the ranks of the unscrupulous. To further restrain them, Edward I's *Statute of Westminster* (1275) prohibited lawyers from "beguiling" the court and third parties, and punished "antagonizing judges by unconvincing arguments" and other acts of *excès de zèle* by one year and one day in prison.<sup>12</sup> The old English lawyer was a Shaffer/Cochran "friend," supportive of client autonomy but protective of the collective morality. This lawyer was *not* a "hired gun."

The medieval practice of advocacy on both sides of the Channel offers a sketch of the lawyer's favorite personality type: grave, prestigious, learned, and more than a bit humble. He is a servant to justice and a dedicated but *non-servile* assistant to those striving to obtain justice. Note that this lawyer is a *professional* in the sense used by Dean Roscoe Pound in his masterful work *The Lawyer from Antiquity to Modern Times*: "a member of a group . . . pursuing a learned art . . . in

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10. *Id.*

11. *Id.* at 299.

12. Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 *Syracuse L Rev* 1, 49-50 (1998).

the spirit of public service.”<sup>13</sup> This lawyer is not a merchant or a salesman. Perhaps he is closer to the Levites of biblical tradition: a participant in a profession consisting of a small, highly selective group, which values its members’ reputation for honesty and dedication to the truth of matters. In these days before multimillion dollar punitive damage awards, no one client’s result is more important than maintaining a reputation for honest dealing before the court. In such circumstances, a “hired gun” would be a dysfunctional lawyer.

It is worthy of note that the “lawyer as professional” is only conceivable, is indeed only *intelligible*, in a universe in which terms such as the following have meaning: “public service,” “just cause,” “abuse,” *et j’en passe*. The professional lawyer’s universe is not the sophisticated one where there are no right answers to any questions—it is, rather, the world of that adversary of the sophists, Socrates.<sup>14</sup> It is a world where learned questioning exists in order to find correct answers, and not in order to wage combat for its own sake. This is not to imply that lawyers of the past always behaved in accordance with their professional obligations. Indeed, the fact that past societies had sanctions for unprofessional lawyers indicates that specimens of the latter could be found. The point is not that the norm was never breached, but rather that the norm was one of devotion both to the client *and* to overriding moral truths.

Our time traveling turbocharger now tools away from medieval Europe and pulls up in late twentieth-century America. We must make three stops before going back a bit further in time again.

Our first modern stop is New York City on November 4, 1991. We pick up a copy of *Newsweek* at a local stand. A mysterious force compels us to flip to page ten. We there find an essay by a Colorado attorney by the name of Sam Benson entitled *Why I Quit Practicing Law*. Benson describes what he believes to be the norm in 1991 for legal practice in the U.S. This norm was unacceptable to Benson, so he quit. Benson summarizes his reasons in this excerpt:

The code of ethics states that an attorney must zealously represent his or her client. . . . In practice, this creates a warlike atmosphere for attorneys in which they are pressured by clients to win at any cost and by any means available. . . . In this warlike setting, cooperation is often seen as a sign of weakness. Many attorneys believe that “zealously representing their clients” means pushing all rules of ethics and decency to the limit. The sad thing is, they may be right. A nice guy does not usually make a good attorney in the adversarial system.<sup>15</sup>

The essay goes on to describe discovery tactics that delay, intimidate and harass.<sup>16</sup> It notes that clients who pay their attorneys \$250 an hour “want their

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13. Pound, *The Lawyer from Antiquity to Modern Times* at 5 (cited in note 7).

14. Alan Hirsch, *The Moral Failure of Law Schools*, *Troika* 31 (Nov-Dec 1996).

15. Sam Benson, *Why I Quit Practicing Law*, *Newsweek* 10 (Nov 4, 1991).

16. For a striking illustration of Benson’s complaint, see Stuart Taylor, *Sleazy in Seattle*, *American Lawyer* 5 (Apr 1994).

attorney to do battle with all guns blazing.”<sup>17</sup> (Attorney readers other than law professors may think \$250 an hour is a paltry sum—but remember that this is back in 1991.) Benson does not cite academic opinion corroborating his claim that American legal practice actually encourages unethical behavior, though such support would not have been hard to find.<sup>18</sup> Benson concludes:

For years, we have winked, blinked and nodded at blatant if not outrageous lying and deception in pleading, negotiating, investigating, testifying and bargaining. . . . The reality is that the side that strikes hardest and fastest is often likely to prevail regardless of the relative merits of their cases.

Still in 1991, we travel south to Baltimore, where a path breaking study of the “professions” in America has just been published at Johns Hopkins University.<sup>19</sup> Over 100 professions are studied, from physician to clergyman to real estate broker to accountant. Out of a total of 104 kinds of professionals, lawyers are the *least* likely to want their children to take up their line of work. They are the *most* likely to contemplate suicide. They are the *most* likely to regret their own career choices.<sup>20</sup> Oh, and by the way, the public hates them, too.<sup>21</sup> The public has extreme contempt for the “hired gun” rationale. Sam Benson is not alone.

Our third and final stop comes at century’s close. In a 1999 book, *The Moral Compass of the American Lawyer*, we learn that not all “modern” lawyers share Sam Benson’s angst about the practice of law. The Introduction to this book provides the following example:

When her kids reached school age, Sabrina Jones went back to work as a nurse’s aide at a health care facility run by Just Like Home, Inc. She soon became concerned by what she saw. . . . [S]he was given ordinary household cleansers instead of the industrial-strength products that she knew were necessary to meet strict state [health] standards. And she sometimes saw medical instruments that appeared unsterilized lying about the exam rooms. [A]fter . . . she had developed a good relationship with her boss, she went to him with her concerns. Three days later she was fired, allowed back into the facility only to clean out her locker in the company of a security guard. Jones was shocked and upset. She hired a lawyer, who sued Just Like Home for wrongful discharge.

Across town, Laura Bernardi, a senior associate at a large urban law firm, has been working seventy hours a week trying to impress her partners so she can make partner herself. Just Like Home is one of Laura’s biggest clients, and she is assigned to defend the company in the Jones case. Laura knows that the Jones suit

17. Benson, *Why I Quit Practicing Law* at 10 (cited in note 15).

18. See, for example, Richard Abel, *American Lawyers* 247 (Oxford 1989) (“Lawyers are hired guns: they know they are, their clients demand that they be, and the public sees them that way . . . . Lawyers must stop denying the identification and embrace it.”).

19. Andrew Herrman, *Depressing News for Lawyers*, Chicago Sun Times 1 (Sept 13, 1991).

20. See Amy Stevens, *Why Lawyers are Depressed, Anxious, Bored Insomniacs*, Wall Street J B1 (June 12, 1995) (discussing manifestations of and reasons for depression among lawyers).

21. Randall Samborn, *Anti-Lawyer Attitudes Up*, Natl L J 1 (Aug 9, 1993).

could mean big trouble for her client: Just Like Home has a pattern of cutting corners on more than just cleaning products. And Laura has seen an internal memo stating that Jones was fired because of what she suspected about the company's sloppy attitude about cleanliness.

But Laura has been taught that her primary ethical duty is to represent her client zealously. . . . Sabrina's lawyer has taken a job in another state, leaving her without counsel. Still unemployed, Sabrina has little money to prosecute the lawsuit herself, and almost no knowledge about how to do it.

Knowing that Sabrina has moved in with her sister eighty miles south of the city, Laura sets the Jones deposition at a branch of her law firm that will require Sabrina to travel by train to the city center, then by bus out of the city, and then change buses. It's a time-consuming and costly trip for an unemployed mother of two. When Sabrina calls to plead with Laura to set the deposition at the firm's main city office, Laura politely but firmly refuses.

Knowing Sabrina is not likely to show up at the deposition, Laura has a certified shorthand reporter ready and waiting. When Sabrina is not there on time, Laura waits ten more minutes, notes it on the reporter's official transcribed record, and heads back to her office to sign an already-prepared motion to dismiss the case based on Sabrina's failure to appear. Overwhelmed and daunted by the legal system, Sabrina again calls Laura, pleading for more time to reply to the motion and to find a new lawyer. Again Laura refuses. Her motion is heard and granted by the court, and Sabrina has lost her case almost before it's begun.

The story of Sabrina Jones and Laura Bernardi is true, though the names have been changed. . . . [M]ost [lawyers] would say [Laura] acted properly—doing it by the book, using legal procedure to gain an advantage for her client. Few, if any, would call it unethical. Yet most non-lawyers would say that something wrong has taken place—that justice has been not served but denied.<sup>22</sup>

Laura Bernardi's actions seem familiar to our twenty-first century sense of the profession. When, how and why did the dominant paradigm of lawyering shift from Justinian's "guru"<sup>23</sup> to the "hired gun" defending Just Like Home, Inc.?

### **BACK TO THE FUTURE: WHEN AND HOW LEGAL ETHICS SHIFTED TO THE MODERN HIRED GUN**

The "when" and "how" are in fact easy questions. In brief, the answers are "very recently" and "by increment only." Some quick evidence:

#### **1. DAVID HOFFMAN'S FIFTY RESOLUTIONS IN REGARD TO PROFESSIONAL DEPARTMENT (1836)<sup>24</sup>**

David Hoffman in 1836 knew he had adversaries, but he also knew that he

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22. Richard Zitrin and Carol M. Langford, *The Moral Compass of the American Lawyer: Truth, Justice, Power and Greed* 1-2 (Ballantine Books 1999).

23. See Figure 1 Lawyerly "Ideal Types" above.

24. David Hoffman, 2 *A Course of Legal Study* 752-75 (Joseph Neal 1836).

was not writing “outside the lines” when he penned his *Fifty Resolutions in Regard to Professional Deportment* for the new law school he was establishing in Maryland. *Fifty Resolutions* is remarkable for its unrelenting contention that representation of clients in no way absolves lawyers from the dictates of conscience. *Resolution 11*, for example, admonishes: “If, after duly examining a case, I am persuaded that my client’s claim or defence (as the case may be,) cannot, *or rather ought not*, to be sustained, I will promptly advise him to abandon it.”<sup>25</sup> Similarly, if a defendant acknowledged a plaintiff’s civil claim, Hoffman maintains in *Resolution 12* that it is unethical for the defendant’s lawyer to invoke a statute of limitations on the client’s behalf.<sup>26</sup> Another resolution forbids lawyers to abuse their intellectual prowess by misleading jurors into accepting unsound arguments.<sup>27</sup>

Compliance with several of Hoffman’s resolutions might be grounds for disbarment in 2001. This is the best evidence that Hoffman is indeed “outside the lines” today. Hoffman’s resolutions surely seem incompatible with Lord Brougham’s famous declaration in 1820 that “an advocate knows but one person,” his client.<sup>28</sup> But it turns out that, like Shakespeare’s well known declaration, “let’s kill all the lawyers,”<sup>29</sup> Lord Brougham’s dictum is routinely taken out of context. Brougham never advocated “hired gunship”—he simply said he would stand up to *political power* when his client was in the right.<sup>30</sup>

## 2. GEORGE SHARSWOOD’S *ESSAY ON PROFESSIONAL ETHICS* (1854)

Crossing the Mason-and-Dixon Line,<sup>31</sup> the *Essay on Professional Ethics* written by George Sharswood of the University of Pennsylvania in 1854 is, in my opinion, a cautious application of the vision expressed by Hoffman one generation earlier.<sup>32</sup> To be sure, Sharswood does appear to give more weight to the client’s

25. *Id.* at 754 (emphasis added).

26. *Id.*

27. *Resolution XLI.* *Id.* at 769-70.

28. *2 Trial of Queen Caroline* 8 (1821) (James Cockroft & Co. 1874 reprint) (“an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.”).

29. William Shakespeare, *The Second Part of King Henry the Sixth* act 4, sc 2. This passage is actually praiseworthy of lawyers. It merely alludes to the disappearance of lawyers as the first act of tyrants, but is commonly quoted to illustrate public hostility to lawyers.

30. See Thomas L. Shaffer, *American Legal Ethics* 204-05 (1985). Lord Brougham was defending an innocent adversary of King George IV. His statement was simply that he would not refrain from producing true evidence that might harm his sovereign. Brougham in no way meant his statement to justify “take no prisoners” tactics in an unjust cause or against an innocent victim.

31. See Michael Hoeflich, *Legal Ethics in the Nineteenth Century: The ‘Other’ Tradition*, 47 U Kan L Rev 793 (1999). Hoeflich claims that southern lawyers (like Hoffman) were more likely to be “gurus,” and northern lawyers (like Sharswood) more likely to be “hired guns.” *Id.* at 812. Evidence for this claim is scant. Again, I believe the difference between Sharswood and Hoffman is often overplayed.

32. George Sharswood, *An Essay on Professional Ethics* (T. & J.W. Johnson & Co 1854).

wishes than would Hoffman; Sharswood is perhaps closer to Shaffer and Cochran's "friend" than to Hoffman's "guru."<sup>33</sup> Sharswood speaks of the lawyer's duty to his client with high—at times seemingly unconditional—praise. For example, he writes, "Entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability, these are the higher points, which can only satisfy the truly conscientious practitioner."<sup>34</sup>

An out-of-context reading of passages like these might sustain a conclusion that Sharswood is a precursor to today's believer in the text (as opposed to the meaning) of Lord Brougham's idiom.<sup>35</sup> But Sharswood is surely not a defender of the "hired gun." For Sharswood, the duties of the lawyer to the client and to moral value exist in harmony: "Fidelity to the court, fidelity to the client, fidelity to the claims of truth and honor: these are the matters comprised in the oath of office."<sup>36</sup> In accordance with this imperative, he believes the limits of the lawyer's duty to the client are as follows:

Now the lawyer is not merely the agent of the party; he is an officer of the court. The party has a right to have his case decided upon the law and the evidence, and to have every view presented to the minds of the judges, which can *legitimately* bear upon the question.<sup>37</sup>

Following the logic of this duty, Sharswood departs from Hoffman's prescriptions by rejecting the idea that a lawyer may refuse to represent a client solely because the lawyer *disagrees* with the client's goals. Sharswood believes this is insufficient grounds for refusal, *not* because the lawyer owes his duty solely to his client but because of the lawyer's duty to allow a court to hear justly presented arguments: "The lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both *judge and jury*."<sup>38</sup> Sharswood does appear to disagree with Hoffman as to who directs the *goals* of the representation, but Sharswood does *not* claim that the lawyer should be unconcerned with truth in the *manner* in which he represents his client. Indeed, when he does dwell on modes of lawyering, Sharswood constantly emphasizes collegiality and honesty. It is interesting that he invokes a line from Shakespeare which is much less often quoted than the *Henry VI* quip: "And do as adversaries in the law, Strive mightily, but eat and drink as friends."<sup>39</sup> Sharswood also reproduces with glowing approval the following poetic ode to the lawyer's credo by Sir William Blackstone:

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33. See Figure 1 Lawyerly "Ideal Types" above.

34. Sharswood, *An Essay on Professional Ethics* at 78-80 (cited in note 32).

35. See Shaffer, *American Legal Ethics* (cited in note 30).

36. Sharswood, *An Essay on Professional Ethics* at 75-76 (cited in note 32).

37. *Id.* at 83-84 (emphasis added).

38. *Id.* at 84 (emphasis added).

39. William Shakespeare, *The Taming of the Shrew* act 1, sc 2.

To Virtue and her friends a friend  
 Still may my voice the weak defend  
 Ne'er may my prostituted tongue  
 Protect the oppressor in his wrong;  
 Nor wrest the spirit of the laws,<sup>40</sup>  
 To sanctify the villain's cause.

Since truth and goodness are important to Sharswood, from the perspective of Figure 1 above, he constitutes the “friend” type and avoids the “hired gun” label.<sup>41</sup> Nothing in Sharswood’s essay fundamentally contradicts the view of lawyering found in the writings of Blackstone, or in Timothy Walker’s claim in his contemporaneous *Introduction to American Law* (1837): “Law is a science which distinguishes the criterions of right and wrong, which employs in its theory the noble faculties of the soul, and exerts in its practice the cardinal virtues of the heart.”<sup>42</sup>

### 3. TIMOTHY WALKER’S *INTRODUCTION TO AMERICAN LAW* (1837)

Like Hoffman, Timothy Walker despises those who advance claims merely to make money. “The rewards of the profession,” writes Walker, “are commensurate with its toils. . . . I speak not now of the successful pettifogger, ‘who prowls in the courts of law for human prey.’ Such men are among the most detestable of the species. Their very knowledge is knavery.”<sup>43</sup> For Walker, the law offers loftier goals:

The lawyer’s reward . . . is the enjoyment of being a good lawyer and being admired by young lawyers who are unable to untie the knots and solve the enigmas of the law. To be a great and good lawyer is glory enough. You need desire no monument more illustrious or enduring than such men erect for themselves. The luminous expositions of jurisprudence, which they leave behind them, form a radiant and ever-enduring track of light, by which their successors may trace their footsteps through the courts below, while they are rendering sublimer services in the high court above.<sup>44</sup>

Truth and justice are central to Walker’s understanding of the profession. The idea that a lawyer’s legacy endures for the ages means that the lawyer is

40. Sharswood, *An Essay on Professional Ethics* at 97-98 (cited in note 32).

41. Sharswood also writes that the lawyer “is not morally responsible for the act of the party in maintaining an unjust cause, nor for the error of the court, if they fall into error, in deciding it in his favor.” *Id.* at 27. This should properly be read not that the lawyer may willfully mislead the court, a view Sharswood clearly shuns, but that the lawyer has a duty to honestly bring the client’s case, if the client insists, to the judge and jury for them to sort out.

42. Timothy Walker, *Introduction to American Law* 14 (P.H. Nicklin & T. Johnson 1837) (original edition).

43. *Id.* at 17.

44. *Id.* at 18.

never truly morally independent from his work—or from his client. Walker's vision of the professional service ethic is thus inimical to the modern view that law is only a business. "The province of a lawyer is to vindicate rights and redress wrongs; and it is a high and holy function. Men come to him in their hours of trouble; not such trouble as religion can solace, or medicines cure."<sup>45</sup> Lawyers serve in the heavenly crew advancing the rule of law and are accountable to that end.

#### 4. POST-CIVIL WAR EXPANSION OF THE BAR

The industrialization of the post-Civil War years brought about an opening up of all professional fields, and people thus came to lawyering who were unfamiliar with its historical professional bounds. A study of the Massachusetts bar reveals that between 1840 and 1890 the percentage of lawyers who were themselves children of professionals dropped from 70 percent to 40 percent.<sup>46</sup> Dean Pound decried these newcomers as ignorant of the requirements of the profession; these new lawyers viewed their work "as a mere private, money-making occupation."<sup>47</sup> Pound and others in the academy fought back against the moral leveling of lawyering. Dean Langdell, for example, introduced the Socratic method at Harvard precisely to carry out the mission of Socrates, which was to arrive at the objective truths that Langdell thought were discoverable through discussion and which underlay both the law and the profession.<sup>48</sup>

#### 5. FIRST PROFESSIONAL ETHICS CODE: ALABAMA CODE OF 1887

The early ethics codes, which were seen as urgent responses to an invasion of the profession by the great unwashed,<sup>49</sup> were fundamentally *not* "hired gun" codes. For example, the Alabama Code of 1887—America's first legally sanctioned legal ethics code—was clearly influenced by the perspective of lawyering that appeared in Hoffman and Sharswood's writings. The first substantive provision of this Code contains a verbatim quotation from Sharswood about the character of a lawyer, stating that "[h]igh moral principle' provides . . . 'the only torch to light his way amidst darkness and obstruction.'"<sup>50</sup> Apropos the duty a lawyer owes his client, the Code again quotes from Sharswood that it is "entire devotion to [the client's] interest," but the Code adds the important caveat that this duty "does not destroy the man's accountability to the Creator . . . and the

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45. Timothy Walker, *Introduction to American Law* 16-17 (Little, Brown rev 10th ed 1895).

46. Gerard W. Gawalt, ed, *The New High Priests: Lawyers in Post-Civil War America* 102 (Greenwood 1984).

47. Pound, *The Lawyer from Antiquity to Modern Times* at 232 (cited in note 7).

48. See Hirsch, *The Moral Failure of Law Schools* (cited in note 14).

49. George P. Costigan, Jr., *The Proposed American Code of Legal Ethics*, 20 *The Green Bag* 57 (1908).

50. Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 *Ala L Rev* 471, 498 (1998) (citing the Code of Ethics of the Alabama State Bar Association (1887)).

obligation to his neighbor.”<sup>51</sup> The first ethics Code made it clear that the “hired gun” was not the paradigmatic lawyer.

## 6. THE INHERENT ETHICAL TENSION UNDERLYING THE ABA’S ETHICAL CANONS OF 1908

The ABA’s 1908 Canons have recently been analyzed in a sparkling article by Susan Carle.<sup>52</sup> As alluded to earlier and as Jerold Auerbach has described, part of the impetus for the Canons was the bar’s concern that ethnic newcomers—often Catholics and Jews—had commercialized the profession by extending services to “undesirable” elements.<sup>53</sup> Retaining control of the bar by previously established ethnic groups was an indirect goal of the new Canons, to be sure. But it was not the explicit or the only goal at that. What I have above termed a Socratic belief in objective justice, right and wrong—Professor Carle calls this “religious jurisprudence”—spurred many of the Canons’ promoters.<sup>54</sup> The 1908 Canons were unambiguous on this count: the lawyer “must obey his own conscience, and not that of his client.”

Professor Carle points out that, perhaps for the first time, the religious lawyers who dominated the bar had to compose ethics rules meant to govern a critical mass of attorneys who did not feel that lawyers were beholden to any knowable transcendent values. Some lawyers at this time were influenced by the subjective theories of value derived from Smith<sup>55</sup> and Pareto,<sup>56</sup> combined with the evolutionist thinking of Darwin. Such influences lead to the conclusion that legal ethics could consist only of those positive rules imposed by force—beyond such rules all else was allegedly mere aesthetic preference. Justice Oliver Wendell Holmes was, of course, the most renowned exponent of this view that legal ethics was nothing but rules enacted by politically triumphant forces.<sup>57</sup> Holmes’s view that morality and ethics were merely ground rules making the triumph of the powerful more orderly, rather than protecting the weak or achieving any transcendent justice, is anticipated in this passage from a commentator on the 1908 Canons:

It was in acting for clients in pursuit of the most fundamental “law of nature”—namely, the struggle for self—that lawyers could be expected to engage in free and

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51. Alabama State Bar Association, Code of Ethics § 10 (1887), reprinted in Henry S. Drinker, *Legal Ethics* 355 (Columbia 1953).

52. Susan D. Carle, *Lawyers’ Duty to Do Justice: A New Look at the 1908 Canons*, 24 *Law & Soc Inquiry* 1 (1999).

53. Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in America* 40-73 (Oxford 1974).

54. See, for example, Charles Wolverton, *The Ethics of Advocacy*, 8 *American Lawyer* 62 (1900).

55. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Ward, Lock 1838).

56. Vilfredo Pareto, *Manual of Political Economy* 51 (Augustus M. Velley 1971) (advocating that values were not intercomparable between individuals).

57. See Albert Alschuler, *Law Without Values* (Chicago 2001).

independent thinking, and the discovery and assertion of moral rights that would lead to the development of moral law as the law of the law.<sup>58</sup>

Thus, in the drafting of the first national ethics codes, two visions of legal ethics stood opposed to one another: one asserting the united metaphysical and epistemological necessity of ethical obligation, and the other denying the existence of any normative system not enacted by someone backed by force. This opposition has continued apace, of course, though the relative importance of the combatants has changed considerably since 1908.

In representing one side, Atticus Finch famously declares to his daughter Scout that if he did not behave with honor and integrity as a lawyer he could not ask his children to respect him as a father.<sup>59</sup> In other words, *one* (objective) set of moral standards must govern Atticus's personal *and* professional life.

For other attorneys of Atticus's time, however, the foundations for this ethical unity are less clear. Particularly fascinating is the portrait of attorney Henry Knox in Louis Auchincloss's *The Great World and Timothy Colt*.<sup>60</sup> Knox is a big city attorney in the early twentieth century who is torn, in a way the small town Atticus Finch is not, between transcendent "guru" values and spanking new commercial success. His protégé Timothy Colt, one generation removed from Knox's values, joyfully and tirelessly plugs away at his job, but never really knows why he works so hard. Colt's own wife pities her mate. Colt reminds one of some modern parents who are non-believers but do not quite admit to their atheism, and thus raise their children by going through religious motions without any conviction. The children of these parents are more likely to be coherent atheists because their parents failed to provide the proper *meaning* behind their ritual words and acts. The loss of moral meaning is thus attributable to a failure to identify explicitly with moral values as such. The young attorney Colt, who lacks any support from his own conflicted boss in finding moral value, will likely find solace in positivism—values are what some authority wielding force declares them to be.

This conclusion is reflected in the words of logical positivists like Samuel Johnson, who pulled no punches in this famous exchange with James Boswell:

Boswell: "But what do you think of supporting a cause which you know to be bad?"

Johnson: "Sir, you do not know it to be good or bad till the Judge determines it."<sup>61</sup>

This is a far cry from the staunch moral absolutism of Atticus Finch. A positivist

58. Everett V. Abbot, *Justice and the Modern Law* 81-83 (Houghton Mifflin 1913).

59. Harper Lee, *To Kill A Mockingbird* 80 (Warner Books 1960).

60. Louis Auchincloss, *The Great World and Timothy Colt* (Houghton Mifflin 1956).

61. James Boswell, *The Life of Samuel Johnson*, in Ephraim London, ed, 2 *The World of Law* 763 (Simon and Schuster 1960).

in law will also be a positivist in legal ethics. The lack of commitment to objective moral value underlies both positions.

## 7. BACK TO THE FUTURE: THE END OF OUR HISTORICAL SURVEY

Our time traveling hot rod has run out of gas. As is well known, our Model Code<sup>62</sup> (with ethical “considerations” coupled to zeal-promoting rules) and Model Rules<sup>63</sup> (*sans* “considerations” but with rules somewhat tempered in their zeal) do tilt in favor of the “hired gun,” though lip service is paid to other conceptions of lawyering. Even the recent *Restatement of the Law Governing Lawyers*, which basically sanctions the “hired gun” model,<sup>64</sup> throws more than a few crumbs in the direction of those who agree with Atticus Finch.<sup>65</sup> Mostly, however, these efforts permit a lawyer to hide behind his client (“Don’t blame me. My client made me do it.”), and a client to hide behind his lawyer (“Don’t blame me. My lawyer advised me to do it.”). The modern ambivalence between two conflicting moral theories has led to a *mélange* of legal ethics rules, which results in moral scapegoating by lawyers *and* clients. No one acknowledges, accepts, or aspires to any sense of objective right or justice. The client and the lawyer are both free to act and to blame others in case anyone disapproves. The consequence, of course, is that the “hired gun” conception of lawyering is reinforced in both the profession and the public’s view of it.

Throughout this modern period, prominent legal voices from Columbia University’s esteemed Professor Harry Jones<sup>66</sup> to Chief Justice William H. Rehnquist<sup>67</sup> have railed against the denial of professionalism implicit in the “lawyer as limo” model. At the same time, other prominent voices from Justice Holmes<sup>68</sup> to Judge Richard Posner<sup>69</sup> advance the belief that obligation cannot derive from anything other than the will of the dominant forces of the community (which is then expressed in the force of the legal rules enacted by the *polis*).

62. The Model Code or some variant thereof is in effect in nine jurisdictions. See Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics* 5 (Aspen 5th ed 1998) (listing ten states that had, at that time, adopted the Model Code).

63. The Model Rules or some variant thereof is in effect in forty-one jurisdictions. *Id.*

64. See *Restatement of the Law Governing Lawyers*, Proposed Final Draft, § 16(1) (1996) (“a lawyer *must*, in matters within the scope of the representation, proceed in a manner reasonably calculated to advance a client’s lawful objectives, as defined by the client after consultation”).

65. *Id.* See, for example, § 66 (lawyer *may*, but need not, disclose confidential information if necessary to prevent death or serious injury); § 67 (lawyer *may* disclose confidential information to prevent the lawyer’s services being used to commit a substantial fraud on a third party); §94 (lawyer *may* address moral aspects of the client’s proposed course of conduct when counseling client); §110 (lawyer *must* diligently comply with “proper” discovery request, though presumably if the request is declared “improper” by the lawyer the obligation ceases).

66. Harry W. Jones, *Lawyers and Justice: The Uneasy Ethics of Partnership*, 23 Vill L Rev 957 (1978).

67. William H. Rehnquist, *The Lawyer-Statesman in American History*, 9 Harv J L & Pub Pol 537 (1986).

68. See *Gitlow v New York*, 268 US 652 (1925) (Holmes dissenting).

69. Richard Posner, *The Problematics of Moral and Legal Theory* (Belknap 1999).

For Judge Posner, for example, the ethics, *mores* and professionalism that we attribute to lawyers are based only on the *public's belief* that the legal profession possesses some socially valuable knowledge or purpose. Posner tells us that "the key to an occupation being classified as a profession . . . is not that actual possession of specialized, socially valuable knowledge; it is the *belief* that some group has such knowledge."<sup>70</sup> Posner further describes how a profession might cultivate such a professional mystique through what can only be called Machievelian deception.<sup>71</sup> For "modern" scholars like these—in stark contrast to their nineteenth-century counterparts—professional ethics are imposed not only from inside the professional, but from outside the profession as well.

### CONCLUSION: WHY THE HIRED GUN?

So much for the *when* and *how* of the paradigm shift. Some closing comments on the *why*. *Why* did we move from David Hoffman's "guru" lawyering to Sam Benson's "hired gun"?

Since approximately the Vietnam War era, our country has witnessed the ascendancy of an ethos that Allan Bloom described as a "distinctly American style of nihilism."<sup>72</sup> The universal "self evident truths" of the Declaration of Independence have become truths for *you*, or for *your ethnic group*, or for *your sex* or *your race*; not truths for all, let alone truths for all time. According to this modern understanding, there are *no* truths for all time. In common parlance, tell me I'm misbehaving and I'll respond, "Sez who?"<sup>73</sup> There is under this ethos no right and wrong, but only power. If what a lawyer does is not illegal, i.e., not prohibited by some "controlling legal authority," then it cannot by definition be unprofessional. By the same token, the lawyer's act cannot be wrong.<sup>74</sup>

There are many tags for this phenomenon. It is, in the words of Mary Ann Glendon, the triumph of the "individual-state-market grid."<sup>75</sup> It is, in Michael Sandel's terminology, the rise of "free and independent selves, unclaimed by moral ties antecedent to choice."<sup>76</sup> In both of these ideas, we find that morals

70. Richard A. Posner, *Professionalisms*, 40 *Ariz L Rev* 1, 2 (1998).

71. *Id.*

72. Allan Bloom, *The Closing of the American Mind* 155 (Simon and Schuster 1987). See also Kenneth L. Grasso, *The Decline of Liberalism and the Rise of the Victorious Lawyer*, 40 *S Tex L Rev* 233 (1999).

73. See Arthur Allen Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 *Va L Rev* 451 (1974).

74. It bears noting that the Socratic method, when used to teach law under such an ethos, ends up promoting the Sophists against whose relativism Socrates railed. The law schools are thus affirming this mindset in their law students by teaching them skepticism and sophistries. The objective truths Socrates and Langdell believed in are now obscured and destroyed through the very method they used to discover these truths.

75. See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press 1991). As Glendon points out, under this "grid" the individual has "sovereign" rights, the market alone determines what is "good," and religious institutions have given way to the State as the sole *locus* of binding power.

76. Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?*, in James D. Hunter and Os Guin-

are not immanent but exist “outside” of us to be imposed by an external agent. As Justice Holmes and Judge Posner make clear, this external agent means public opinion and the force of government this opinion can bring to bear in the form of explicit legal rules. Without opinion or coercively backed legal rules, modernists see no moral obligation.

This is the triumph of both pragmatics and reason of which Kurtz spoke on his deathbed in *Heart of Darkness*.<sup>77</sup> As Robert Green has written:

[I]f rational individuals engage in religious reflection in the first place, and if they seek to ground the dictates of their own consciences in a source beyond the human, it is because they recognize that practical reason cannot fully justify its own authority before the corrosive testimony of ordinary experience. Belief in God is a way of protecting conscience from reason’s own assaults.<sup>78</sup>

The Alabama Code of 1887 relied on the attorney’s “obligation to the Creator” as a check on zealous representation of the client.<sup>79</sup> If the Creator has departed the scene, however, the attorney’s ethical obligations are uprooted. There is no ethical obligation until some people get around to choosing to create this obligation. The “lawyer as limo” may thus be the crowning achievement of reason and individualism—and the death of legal ethics.

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ness, eds, *Articles of Faith, Articles of Peace: The Religious Liberty Clauses and the American Public Philosophy* 76 (Brookings Institution 1990).

77. Joseph Conrad, *Heart of Darkness* 58 (Wadsworth 1960).

78. R. Green, *Abraham, Isaac and the Jewish Tradition: An Ethical Appraisal*, 10 *J of Religious Ethics* 1, 18 (1982).

79. See note 51 and accompanying text.