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ZEALOUS ADVOCATES: THE HISTORICAL FOUNDATIONS OF THE ADVERSARIAL CRIMINAL DEFENCE LAWYER

Tom Smith¹

Abstract

The place of the criminal defence lawyer in the modern criminal justice system is a given; every suspect and defendant expects full representation as a right. However, the defence lawyer appeared surprisingly late in the long and venerable history of the English and Welsh legal system. Notwithstanding the defence lawyer's role as advocate for the accused, this unique professional role involves a variety of duties and obligations. This article will focus on the historical development of these core 'principles' of criminal defence as well as the expansion of the role in the general context of adversarialism.

Keywords: Criminal defence lawyer and history of, legal ethics, adversarial legal system, advocate

Introduction

The criminal defence lawyer is a familiar figure in the modern criminal justice system, considered an essential component in any fair trial.² Equally, the adversarial system of justice – based on the ideology of 'battle' between two opposing versions of the facts – is archetypically represented by the English and Welsh legal system. Both are, in essence, a 'given' in the modern landscape of criminal justice in this jurisdiction. It might therefore surprise many to discover that both developed, by and large, simultaneously, at a late stage in the history of the English legal system. The evolution of the adversarial system has been covered widely and in depth, most notably by John Langbein;³ however, a specific and overarching examination of the historical development of the criminal defence lawyer is lacking from the body of literature on this subject. Although this article cannot hope to comprehensively tackle such a substantial topic, it will endeavour to contribute in a more focused way.

As a unique legal professional, the work of the criminal defence lawyer requires him or her to wear a number of 'hats'. Primarily, the defence lawyer is the advocate and representative of the

¹ Dr Tom Smith, Research Assistant, Plymouth University, thomas.smith@plymouth.ac.uk.

² See Article 6 European Convention on Human Rights, incorporated into English and Welsh Law through the Human Rights Act 1998.

³ John Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2003) p.2.

client, protector of his or her interests, keeper of his confidences and non-judgmental legal 'friend'. Alongside the 'client hat', the defence lawyer must don the 'court hat'; he or she is an officer of the court and required to cooperate with and aid in the administration of justice. Third – and perhaps more tenuously – the criminal defence lawyer (who is almost always paid using publicly funded, legal aid money through the Legal Services Commission in England and Wales) can be considered a public servant. The ultimate goal of the criminal justice system is to serve society, and as a professional engaged in the determination of criminal justice, the defence lawyer must arguably wear a 'public hat'. All of these major functions are underpinned by a variety of specific duties and obligations, which have been debated and discussed by academics, lawyers, politicians and philosophers for centuries. In my doctoral thesis,⁴ I argued that these could be summarised in a conceptual framework entitled the 'zealous advocate' model. The model outlines and describes the normative duties which define the role of the adversarial criminal role. These are summarised below.

1 The 'Zealous Advocate' Model

The duties which fall under the 'client hat' are the principles of partisanship, detachment and confidentiality. Partisanship is arguably the cornerstone of adversarial justice, exemplifying the combative philosophy that underscores accusatorial systems. The defence lawyer must act as a loyal partisan for the accused; the lawyer's 'raison d'être' is to serve client interests.⁵ This loyalty requires that the advocate present 'as persuasively as he can, the facts and the law of the case as seen from the standpoint of his client's interest'⁶ and 'say all that the client would say for himself (were he able to do so).'⁷ Partisanship is commonly associated with a fearless approach to the defence of the accused in hostile circumstances; as such, the defence lawyer is required to act 'with courage and devotion' in representing the client;⁸ the lawyer will frequently be required to be 'brave, strong and unflinchingly confrontational.'⁹ The principle of detachment requires a lawyer to provide a service regardless of their personal opinions about the character of a client or the 'moral status of his objectives'.¹⁰ A fine example of this is the 'cab-rank rule'; in

⁴ Tom Smith, 'The Zealous Advocate in the 21st Century: Concepts and Conflicts for the Criminal Defence Lawyer', unpublished PhD thesis, University of the West of England, 2010.

⁵ David Nicolson, et al., *Professional Legal Ethics* (Oxford University Press, 1999) p.123.

⁶ Richard O'Dair, *Legal Ethics: Text and Materials* (Butterworths, 2001) p.152.

⁷ David Pannick, *Advocates* (Oxford University Press, 1992) p.92.

⁸ Gerald Lefcourt, 'Responsibilities of a Criminal Defense Attorney,' *Loyola of Los Angeles Law Review*, 30 (1996-1997), 59-68, p.61.

⁹ Cristina Arguedas, 'Duties of a Criminal Defence Lawyer,' *Loyola of Los Angeles Law Review*, 30 (1996-1997), 7-12, p.11.

¹⁰ Ted Schneyer, 'Moral Philosophy's Standard Misconception of Legal Ethics,' *Wisconsin Law Review*,

England and Wales, barristers, who represent criminal clients in the most serious cases, must accept any client (regardless of their character or the alleged offence) who requires their services and conduct a full defence notwithstanding that it may upset, offend or annoy.¹¹ The defence lawyer is required to separate the professional and personal, and must ‘momentarily “suspend”... personal morality and make a firm commitment to the system of justice.’¹² As such, detachment creates a moral non-accountability which ‘insulates lawyers from considerations of morality, justice or politics in relation to [client] ends or the best means to them.’¹³ Confidentiality is self-explanatory – the defence lawyer must ‘hold in strictest confidence the disclosures made by the client in the course of the professional relationship.’¹⁴ The ‘duty of loyalty demand[s] confidentiality and the duty of confidentiality demand[s] loyalty’;¹⁵ it is a fundamental part of the lawyer-client relationship, but is not absolute, for example in the case of iniquity.

The ‘court hat’ which must also be worn by the defence lawyer is underpinned by the principles of procedural justice and truth-seeking as espoused by Lord Morris in *Rondel v Worsley*.¹⁶

The advocate has a duty to assist in ensuring that the administration of justice is not distorted or thwarted by dishonest or disreputable practices. To a certain extent every advocate is an ‘amicus curiae’.¹⁷

The defence lawyer is indeed an *amicus curiae*, or ‘friend of the court’; to what extent that friendship stretches is debatable. At its root though, procedural justice requires that every criminal defence lawyer facilitate the ‘administration of justice... [and] represent clients by fair and proper means.’¹⁸ The defence lawyer should respect the procedural requirements of the system, and refrain from tactics that deliberately and unfairly obfuscate or frustrate the pursuit of justice. The meaning of truth-seeking is, again, plain; the defence lawyer ‘must never suppress or distort the truth’,¹⁹ which of course prohibits lying for the client or knowingly allowing the client

(1984), 1529-1572, p.1534.

¹¹ Solicitors, who defend clients in the police station and in the magistrates’ court (where most criminal trials take place), are not traditionally bound by the ‘cab-rank rule’. However, having evolved in the same adversarial system as barristers, the shared value of professional detachment means that solicitors often, in practice, exercise a *de facto* ‘cab-rank rule’, accepting any client requiring their services.

¹² Greta Van Susteren, ‘Responsibility of a Criminal Defence Attorney,’ *Loyola of Los Angeles Law Review*, 30 (1996-1997), 125-130, p.128.

¹³ Nicolson, *Professional Legal Ethics* p.163.

¹⁴ Monroe Freedman, *Lawyers’ Ethics in an Adversary System* (Bobbs-Merrill, 1975) p.27.

¹⁵ Ray Patterson, ‘Legal Ethics and the Lawyer’s Duty of Loyalty,’ *Emory Law Journal*, 29 (1980), 909-969, p.954.

¹⁶ [1969] 1 AC 191.

¹⁷ *Rondel v Worsley* [1969] 1 AC 191, p.247 *per* Lord Morris.

¹⁸ Nicolson, *Professional Legal Ethics* p.164.

¹⁹ Claude Savage, ‘The Duties and Conduct of Crown and Defence Counsel in a Criminal Trial,’ *Criminal*

to lie to the court. The defence advocate therefore has 'a primary duty to preserve the integrity of the adversarial system by preventing the court or jury from being misled by the presentation of false or perjured testimony.'²⁰

The 'public hat', arguably the least robust aspect of the defence lawyer's role, infers an obligation which can be termed the principle of morality. The principle suggests that the defence lawyer must act 'with concern for his own standards as a human person, as well as with regard for the requirements of the society which the system serves.'²¹ Morality is justified by the criminal defence lawyer's position as a servant of the public through the legal system and that one of the aims of that system is to protect the public and its values. As such, 'lawyers should try to act in all of their professional dealings as a good person should act',²² and avoid "degrad[ing]" themselves personally for the purpose of winning their client's case'.²³ As mentioned above, the place of morality in the role of the criminal defence lawyer is questionable; however, it is for this reason that it has generated so much debate over the last 200 years (as will be examined below). As such, it deserves at least a speculative place in any conceptual consideration of the role.

The duties and obligations outlined in the 'zealous advocate' model can be traced back beyond modern practice, current regulation and academic commentary. They have long-standing, historic roots which emerged hundreds of years ago, and have been developed not only in key statutes and case law, but in a body of literature created by academics, philosophers and legal practitioners. Examining all of the sources which first established the principles that are today regarded as vital to the effectiveness of criminal defence is a valuable exercise. Such understanding helps us to appreciate the influence the emergence of the criminal defence lawyer has had on core elements of fair trial and also enables us to identify the significance of modern changes to the nature of the role. This article will explore some of the key examples of the development of these central duties and obligations, highlighting their importance and continued relevance today.

Law Quarterly, 1 (1958-1959), 164-169, p.167.

²⁰ William Erickson, 'The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to his Client,' *Denver Law Journal*, 59 (1981-1982) 75-91, p.91.

²¹ John Noonan, 'The Purposes of Advocacy and the Limits of Confidentiality,' *Michigan Law Review*, 64 (1965-1966), 1485-1492, p.1492.

²² Robert Lawry, 'The Central Moral Tradition of Lawyering,' *Hofstra Law Review*, 19 (1990-1991), 311-363, p.337.

²³ *In re G. Mayor Cooke* (1889) 5 TLR 407, p.408 *per* Lord Esher MR.

2 The Entrenchment of Adversarialism

The English and Welsh legal system represents the oldest archetypal adversarial model; as such, one tends to think of adversarialism first and the defence lawyer second, assuming that the latter was a necessary development resulting from the former. However, it is undoubtedly the case that the emergence of both adversarialism and the defence lawyer in English and Welsh criminal justice were, effectively, simultaneous and inextricably linked. The birth and eventual entrenchment of adversarial culture and the criminal defence lawyer can arguably be explained by two broad factors – the professionalization of criminal justice, and the seismic shift in political and social ideology that occurred during the Enlightenment. In the seventeenth and eighteenth centuries wholesale change swept through the Western world; the French and American Revolutions and the Glorious Revolution in Britain resulted from the unquenchable desire of the educated and the down-trodden to see the values of democracy and individual liberty realised. The English and Welsh criminal justice system could not remain unaffected by the sea-change surrounding it. The seeds of principles such as equality of arms and due process were sewn in the late 1600s and early 1700s – rooted in the Enlightenment ideals of individual rights and the accountability of the powers that be.

The abuse of power by authorities at the expense of fairness and justice was typified by the Treason Trials of the late seventeenth century. Prior to this, the criminal trial was regarded as an ‘altercation’ between citizens, as famously described by Sir Thomas Smith.²⁴ Equality and fairness were assumed because it was simply a case of one member of the public versus another, with the Bench providing protection for both. At this point representation by defence counsel ‘was still forbidden...[and] prosecution counsel was virtually never employed.’²⁵ However, the Treason Trials clearly demonstrated that the fairness of the ‘altercation’ model could no longer be taken for granted. Not only were prosecution counsel routinely employed by the Crown, judges abandoned their supposed impartiality, favouring the accusers, ignoring blatant perjury and barring the defendant from any sort of legal representation.²⁶ The series of miscarriages of justice that inevitably resulted highlighted the flaws in the system. This was partially remedied by the Treason Trials Act 1696, which allowed the accused, under s1, ‘to make his full Defense, by Counsel learned in the law’ – but in treason trials only. This was a

²⁴ John Langbein, ‘The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors,’ *Faculty Scholarship Series*, Paper 529 (Yale Law School, 1999) 314-265, p.315:http://digitalcommons.law.yale.edu/fss_papers/529 Accessed 11 Jan 2012.

²⁵ Langbein, *Origins* p.2.

²⁶ Langbein, *Prosecutorial* p.340.

significant rejection of the rationale that defence counsel 'would interfere with the court's ability to have the accused serve as an informational resource',²⁷ but more importantly symbolised the dawn of an adversarial system built around equality and due process, which could protect the individual from the almighty power of the state. The desire to secure these values only gained momentum over the next two centuries, helping to entrench adversarial culture in the English and Welsh criminal justice system.

Alongside the philosophical revolution embracing criminal justice was an equally significant change in its participants. As Langbein states, 'the lawyer-conducted criminal trial appeared late in English legal history, and quite rapidly'.²⁸ until the Treason Trials Act, lawyers rarely had a place in the criminal process. Indeed, the whole system lacked a professional structure, with no specified, formal body (such as the contemporary Crown Prosecution Service (CPS)) taking responsibility for leading prosecutions and no official state police force. In the early eighteenth century, this began to change. Barristers appeared more frequently in criminal trials from the 1720s onwards,²⁹ whilst solicitors – who formally had little or no place in the sphere of criminal law – began to act as evidence gatherers and investigation managers in the pre-trial phase. In both cases, the prosecution were the primary beneficiaries; this led to a reaction by judges, recognising the inequality and unfairness of denying the defence a representative in court whilst the prosecution's clout grew. By the 1730s, judges had begun to abandon the long-standing prohibition on defence counsel for those charged with felonies, despite there being no formal allowance for this in legislation.³⁰ As a result, the balance of power in the criminal process gradually transferred from the Bench – as investigator and counsel for citizens – to an adversarial battle between counsel for the prosecution and defence, reinforced by the influence of solicitors who 'instructed' counsel on behalf of the parties.

'Lawyerization' was accompanied by other professional developments which underline the increasingly adversarial nature of the criminal justice process in the eighteenth century, and in fact accelerated the rise of the lawyer as lead actor. The dwindling role of the individual citizen in pursuing criminal prosecutions in the 1800s can generally be attributed to cost, time-consumption and lack of skill; in contrast, the emergence of the criminal solicitor was arguably

²⁷ Langbein, *Origins* p.2.

²⁸ *Ibid.*

²⁹ However, it should be noted that this was still very infrequent until later in the century.

³⁰ Langbein, *Origins* p.168.

driven by these factors.³¹ As such, various authorities and bodies began to fund and promote prosecutions. Most notable was the King, who sporadically paid for and sent lawyers to conduct prosecutions during the eighteenth century.³² However, more significant were Associations for the Prosecution of Felons and the prosecution 'reward' scheme. The former involved groups of citizens (often led by a solicitor) banding together to pool resources to pay for prosecutions; this sort of embryonic, community-led version of the CPS was eventually displaced by the formal police force formed in the nineteenth century.³³

The 'reward' system offered members of the public financial compensation for bringing offenders to justice, leading to the emergence of professional 'thief-takers'. These disreputable characters would often target the vulnerable, fabricate offences, bring a prosecution and reap the rewards of a wrongful conviction. Both the Associations and the 'reward' scheme indicate an increasingly adversarial process, with semi-formal systems of prosecution that would evolve into the structures we recognise today. The dangers of an unchecked and corrupt system of prosecution did not go unrecognised by the courts. The introduction of defence lawyers in the 1730s was a policy designed to 'correct the imbalance that had opened between the unaided accused and a criminal prosecution that increasingly reflected the hand of lawyers and quasi-professional thief-takers.'³⁴ Described by Langbein as 'epochal', the introduction of defence counsel and the subsequent growth in their use 'perpetuated and entrenched the principle that the trial court would shoulder no responsibility to investigate on its own'.³⁵ The judges had effectively abdicated their role as the chief criminal investigator and defender; the era of lawyer-led criminal process had arrived and adversarialism was established as the primary mode of criminal justice.

Early Years and Pioneers

Despite the fact defence lawyers did not begin to regularly appear in criminal proceedings until the mid-1800s, some of the founding duties of defence lawyers – embodied in the 'zealous advocate' model outlined above – were openly discussed prior to this. In 1648, Law Commissioner Whitelock stated that the duties of an advocate 'consist in three things; secrecy, diligence and fidelity.' He further elaborated, describing 'secrecy' as a duty to act as someone to

³¹ Langbein, *Prosecutorial* p.335.

³² *Ibid*, pp.332-333.

³³ See Clive Emsley, *Crime and Society in England, 1750-1900*, (Longman, 1996, 2nd ed.) ch.8; pp187-200.

³⁴ Langbein, *Origins* p.168.

³⁵ Langbein, *Prosecutorial* p.364.

whom a client could 'lay open his evidences, and the naked truth of his case', 'diligence' as the requirement to give 'a constant and careful attendance and endeavour in his clients' causes', and 'fidelity' as a duty to act as someone 'the client trusts with his livelihood'.³⁶ This early, definitive statement laid the foundations for the normative conceptions of the role of defence counsel which would blossom over the next 200 years. The decision to allow those charged with treason to have 'partisan helpers' in 1696 was a turning point,³⁷ but nearly another century passed before the true extent of this change became clear. By the late eighteenth century, the approach of defence lawyers had become aggressively partisan and '[this] growing intensity of counsel's activity bespoke a changed ethos of defensive representation.'³⁸

Such shifts saw the emergence of conflict between the duty of fidelity to the client and the 'view of advocacy in which fidelity to the truth should have placed bounds upon counsel's service to the client.'³⁹ The rise of the partisan defender was best exemplified by William Garrow, described as 'one of the finest criminal lawyers of the day'⁴⁰ and admirably portrayed in the BBC TV series *Garrow's Law*. Garrow spent 10 years at the Old Bailey in the 1780s, establishing a notorious reputation, 'especially as a defense counsel.'⁴¹ Garrow was 'the archetype of the contentious advocate, zealous on his client's behalf and merciless to his opponents',⁴² adopting an approach to criminal defence which 'helped to establish a new tone, a new intention, in the defense of prisoners in the criminal courts in this period.'⁴³ Garrow would defend a prisoner 'with impressive zeal and vigor',⁴⁴ and rarely hesitated in using 'brutal and nasty tactics to advance a client's cause.'⁴⁵ On occasion Garrow would recognise that he owed duties not only to the client but to the court, accepting in one case that 'he had acted "with improper zeal on the part of my client" but he had intended no disrespect to the "great and brave and venerable and learned judges of the law of England"'.⁴⁶ Garrow's legacy was his single-minded and unyielding defence of those accused of criminal offences, which represented 'the clearest demonstration that

³⁶ Cited in Ross Cranston, *Legal Ethics and Professional Responsibility* (Clarendon Press, 1995) p.6.

³⁷ Langbein, *Origins* p.3.

³⁸ *Ibid*, p.306.

³⁹ *Ibid*, p.307.

⁴⁰ Stephan Landsman, 'The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England,' *Cornell Law Review*, 75 (1989-1990), 496-609,p.532.

⁴¹ John Beattie, 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries,' *Law and History Review*, 9 (1991), 221-267,p.239.

⁴² Landsman, 'The Rise' p.565.

⁴³ Beattie, 'Scales' p.239.

⁴⁴ Landsman, 'The Rise' p.562.

⁴⁵ *Ibid*, p.553.

⁴⁶ Beattie, 'Scales' p.246.

adversarial attitudes and methods had come to dominate the courtroom.¹⁴⁷

Within 30 years, the burgeoning criminal defence profession had perhaps its most definitive, if controversial, philosophy espoused by one of its leading lights, Henry Brougham:

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. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.⁴⁸

Brougham's now renowned words are widely regarded as the 'classic articulation'⁴⁹ of defence advocacy, and permeate all modern descriptions of the classic role of the criminal defence lawyer. Brougham was entrusted with the defence of Queen Caroline, the estranged wife of George IV. On ascending to the throne in 1820, the King sought to have Caroline stripped of her title by introducing the Bill of Pains and Penalties in the House of Lords; the ensuing debate in the House is popularly referred to as 'the Trial of Queen Caroline'.⁵⁰ Brougham, acting as counsel for the Queen, conducted her defence against accusations of adultery.

The Brougham Debate

The above statement 'has stood as the ideal of zealous representation for English and American lawyers for almost two centuries since then' and has undoubtedly coloured all subsequent academic discourse, case law, legislation and regulation relating to criminal defence.⁵¹ For example, in *Queen v O'Connell*,⁵² defence counsel were described as being obliged to exercise zeal as 'warm as [their] heart's blood',⁵³ whilst in *Kennedy v Broun*,⁵⁴ they were described as being bound to 'exert every faculty and privilege and power in order that [they] may maintain [their] client's right.'⁵⁵

⁴⁷ Landsman, 'The Rise' p.565.

⁴⁸ 2 The Trial of Queen Caroline 3 (1821).

⁴⁹ Geoffrey Hazard, 'The Future of Legal Ethics,' *Yale Law Journal*, 100 (1990-1991), 1239-1280, p.1244.

⁵⁰ For further discussion, see Thomas Lacquer, 'The Queen Caroline Affair: Politics as Art in the Reign of George IV' *The Journal of Modern History*, 54 (1982), 417-466.

⁵¹ Monroe Freedman, 'Henry Lord Brougham, Written By Himself,' *Georgetown Journal of Legal Ethics*, 19 (2006) 1213-1219, p.1215.

⁵² (1844) 7 Ir. LR 261.

⁵³ *Queen v O'Connell* (1844) 7 Ir. LR 261, p.312.

⁵⁴ (1863) 13 CB(NS) 677.

⁵⁵ *Kennedy v Broun* (1863) 13 CB(NS) 677, p.737.

The philosophy has attracted criticism as well as praise. Patterson described it as having done 'more to corrupt the concept of the lawyer's duty to the client than any other single comment',⁵⁶ while Dos Passos believed that 'the great name of Lord Brougham is still used... to sustain many ridiculous and false positions of advocates.'⁵⁷ Field described it as 'unsound in theory and pernicious in practice' and concluded that 'a more revolting doctrine scarcely ever fell from any man's lips.'⁵⁸ Savage questioned the single-minded nature of Brougham's philosophy in less dramatic fashion, claiming that '[the] viewpoint, with the greatest respect, cannot be accepted in its entirety without any reservation or delimitation' – an important reference to the competing (and thus limiting) obligations owed by defence lawyers.⁵⁹ Gold suggested that Brougham's philosophy was 'not in the mainstream of English thinking even in 1846.'⁶⁰ Interestingly, around that time, the *Courvoisier* case generated much controversy. Although the 'mainstream' – perhaps meaning the public – reacted negatively to the single-minded and uncompromising nature of the defence in that case, it was in fact the trial judge who required such conduct. As such, Gold's conclusion is questionable if one interprets the 'mainstream' as being the 'legal mainstream' rather than society in general; one would think the 'legal mainstream' was perhaps a more important barometer in this context. The *Courvoisier* case will be discussed later in this article.

In 1859, Brougham himself described his famous speech as 'anything rather than a deliberate and well-considered opinion' and as 'a menace, addressed chiefly to George IV.'⁶¹ Some theorists have interpreted this as a retraction of the ethic of partisanship, arguing that it 'surely sounds like a repudiation, not an endorsement.'⁶²

⁵⁶ Patterson, 'Legal Ethics' p.910.

⁵⁷ John Dos Passos, *The American Lawyer: As He Was, As He Is, As He Could Be (1907)* (Beard Books, 2000), p.134. It should be noted that Dos Passos was a commercial lawyer. Although much of the general discourse on lawyer ethics is also applicable to criminal defence, in this instance (and others) the discussion is not focused on whether Brougham's ethic was appropriate for criminal defence lawyers, but for lawyers more generally. Thus, such criticism should perhaps be regarded as less valuable as a commentary on the criminal defence lawyer's role.

⁵⁸ David Field, 'The Study and Practice of the Law' (originally published in the *Democratic Review* (1844)) in Charles Haar (ed.) *The Golden Age of American Law* (G. Braziller, 1965) p.33.

⁵⁹ Savage, 'The Duties and Conduct,' p.166.

⁶⁰ Gerald Gold, 'Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer,' *Cleveland-Marshall Law Review*, 14 (1965), 65-78,p.65.

⁶¹ William Forsyth, *The History of Lawyers Ancient and Modern (1875)* (The Lawbook Exchange 1998) p.380.

⁶² Fred Zacharias, et al., 'Reconsidering Brougham,' *Georgetown Journal of Legal Ethics*, 74 (2006),1221-1224, p.1223.

In contrast, Freedman argued:

The fact that Brougham's statement had been delivered as a "menace" was precisely what made it so powerful and, at the same time, demonstrated just how far a lawyer should be prepared to go on behalf of the client.⁶³

Brougham later restated his philosophy in his autobiography with slightly different, but highly significant, wording. He seemingly retracted the claim that protection of the client was 'his first and *only* duty (emphasis added)', replacing it with the phrase, 'the highest and most unquestioned of his duties.'⁶⁴ This telling departure seemed to be a fairly unambiguous signal that Brougham regarded the role of the criminal defence lawyer as comprising several duties – not, as has been suggested many times, singular fealty to the client.

The Prisoners' Counsel Act 1836

Despite the appearance of criminal defence lawyers in felony trials from the 1730s onwards and the development of a discernible doctrine surrounding the role, it took Parliament a century to formalise the full representation of felony suspects in legislation – the Prisoners' Counsel Act 1836. Substantial discussions of the history of this statute have been undertaken in the past, most notably by Cairns and Beattie,⁶⁵ but a brief overview helps underline its significance. The 'irksome and unfair'⁶⁶ restrictions placed on defence lawyers in the eighteenth century became the subject of substantial criticism in the early 1800s. By the 1820s, Parliamentarians had weighed in; between 1821 and 1836, a staggering ten attempts were made to pass legislation granting suspected felons full representation by a defence lawyer.⁶⁷ Stifled by a conservative parliamentary make-up, proposed Bills (introduced primarily by reformer John Martin) were consistently rejected in the 1820s.

However, by the next decade the balance of power in the House of Commons had shifted and the Bills, introduced by William Ewart, gained approval. After being delayed in the House of Lords, the inevitable victory for the reformers came with the passing of the final statute in 1836. It granted all felony suspects the right to 'make full Answer and Defence thereto, by Counsel

⁶³ Monroe Freedman, 'Henry Lord Brougham and Zeal,' *Hofstra Law Review*, 34 (2005-2006), 1319-1324, p.1321.

⁶⁴ Henry Brougham, *The Life and Times of Henry Lord Brougham* (W. Blackwood, 1871), p.309.

⁶⁵ David Cairns, *Advocacy and the Making of the Adversarial Criminal Trial* (Clarendon Press, 1998); Beattie, 'Scales of Justice' p.222.

⁶⁶ *Ibid*, p.251.

⁶⁷ *Ibid*, p.250.

learned in the Law', including the right of the defence lawyer to directly address the jury and to inspect depositions. The statute represented the first, formal recognition of the right of the majority to not only a defence counsel but an *effective* defence counsel. The expansion of the defence lawyer's remit from the cross-examination of witnesses to addressing the jury transformed the role, allowing defence lawyers to present and direct a case, offer observations and opinions, and actively 'sway' the jury. The Prisoners' Counsel Act unshackled defence lawyers, enabling them to become true 'zealous advocates' for the defendant.

3 A Wider Debate

Alongside this landmark statutory recognition of the cruciality of criminal defence, normative conceptions of the role of 'zealous advocate' were becoming well developed. The criminal trial had become much more than 'an opportunity for defense counsel to test the prosecution case';⁶⁸ it was an arena for vigorous and steadfast defence advocacy on behalf of the accused. However, it is arguable that the concept of the 'zealous advocate' had only partly evolved. As the criticisms of Brougham's philosophy indicate, obligations to justice and morality were emerging alongside those owed to the client. The American case of *Rush v Cavanaugh*⁶⁹ is helpful in understanding early developments in the professional responsibility of defence lawyers.⁷⁰ In this case, the attorney, Rush, prosecuted a third party for forgery on behalf of Cavanaugh; however, at an early point, Rush concluded that Cavanaugh's accusations were false and consequently withdrew the forgery charge. Cavanaugh branded his lawyer a 'cheat' and Rush commenced slander proceedings against his former client.

At the crux of *Rush v Cavanaugh* was the issue of whether the latter was justified in calling the former a 'cheat', a matter which hinged upon how well Rush had fulfilled his role as a prosecutor. Although the case applies most directly to prosecutors, Pennsylvanian Chief Justice John Gibson's words have application to the legal profession generally. He suggested that 'it is a popular, but gross mistake, to suppose that a lawyer owes no fidelity to anyone except his client; and that the latter is the keeper of his professional conscience.' Gibson described the lawyer as being 'expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client', suggesting an equal, if not paramount, duty. He went further, implying that lawyers must discharge their duties in accordance with acceptable

⁶⁸ Langbein, *Origins* p.310.

⁶⁹ *Rush v Cavanaugh* (1845) 2 Pa. 187.

⁷⁰ Zacharias, *Reconceptualizing* p.21.

standards of morality and empathy, explaining: The high and honourable office of a counsel would be degraded to that of a mercenary, were he compelled to do the biddings of his client against the dictates of his conscience.⁷¹

The introduction of such language into descriptions of the lawyer's role was influential, particularly in application to criminal defence lawyers. George Sharswood borrowed the above quotations from *Rush v Cavanaugh* in discussing the importance of morality in the advocate's role. In his 1860 work, *An Essay on Professional Ethics*, Sharswood suggested that it was:⁷²

An immoral act to afford... assistance, when [the lawyer's] conscience told him that the client was aiming to perpetrate a wrong through the means of some advantage the law may have afforded him.⁷³

Instead, a lawyer should 'throw up the cause, and retire from all connection with it, rather than thus be a participator in other men's sins.'⁷⁴ In referring specifically to 'the mode of conducting defence', he stated:

Counsel... may and even ought to refuse to act under instructions from a client to defeat what he believes to be an honest and just claim, by insisting upon the slips of the opposite party, by sharp practice, or special pleading – in short, by any other means than a fair trial on the merits in open court.⁷⁵

Although respectful of Brougham's defence of Queen Caroline, Sharswood believed that he was 'led by the excitement of so great an occasion to say what cool reflection and sober reason certainly never can approve.'⁷⁶ That being said, Sharswood recognised the importance of the defence lawyer's role as a partisan for the defendant. He stated that 'the great duty which the counsel owes to his client, is an immovable fidelity',⁷⁷ and criticised the suggestion that vigorously defending the guilty was immoral:

It is not to be termed screening the guilty from punishment, for the advocate to exert all his ability, learning, and ingenuity, in such a defence, even if he should be perfectly assured in his own mind of the actual guilt of the prisoner.⁷⁸

The publication of David Hoffman's 'Fifty Resolutions in Regard to Professional Deportment

⁷¹ *Rush v Cavanaugh* (1845) 2 Pa. 187, p.189.

⁷² George Sharswood, *An Essay on Professional Ethics* (T & JW Johnson & Co., 1860).

⁷³ *Ibid*, p.40.

⁷⁴ *Ibid*, p.43.

⁷⁵ *Ibid*, pp.41-42.

⁷⁶ *Ibid*, p.30.

⁷⁷ *Ibid*, p.61.

⁷⁸ *Ibid*, p.35.

'represented a landmark in the development of legal ethics generally.⁷⁹ It described a collection of ideal principles that should guide the conduct of practitioners, several having particular relevance to criminal defence. Resolution I supported criticism of Brougham's philosophy, stating, 'I will never permit zeal to carry me beyond the limits of sobriety and decorum'. From the outset, Hoffman suggested that limits should apply to partisanship. Resolution II indicated that lawyers should remain emotionally detached in conducting their work, saying, 'I will espouse no man's cause out of envy, hatred or malice, towards his antagonist.' Hoffman also asserted that a defence lawyer should refrain from exploiting the mistakes of opponents, stating, 'no man's ignorance or folly shall induce me to take any advantage of him' (Resolution V). Significantly, other rules suggested duties of honesty, truthfulness and justice which seemingly outranked the obligation to defend a client 'at all hazards and costs', as Brougham termed it:

Should my client be disposed to insist on captious requisitions, or frivolous and vexatious defences, they shall be neither enforced nor countenanced by me. (Resolution X)

If, after duly examining a case, I am persuaded that my client's claim or defence... cannot, or rather ought not, to be sustained, I will promptly advise him to abandon it. To press it further in such a case... would be lending myself to a dishonourable use of legal means. (Resolution XI)

More compelling still was Resolution XV, addressing the morality of defending 'persons of atrocious character, who have violated the laws of God and man':

When employed to defend those charged with crimes of the deepest dye, and the evidence against them, whether legal or moral, be such as to leave no just doubt of their guilt, I shall not hold myself privileged, much less obliged, to use my endeavours to arrest or to impede the course of justice, by special resorts to ingenuity – the artifices of eloquence – to appeals to the morbid and fleeting sympathies of weak juries.⁸⁰

This arguably stands in contrast to that of single-minded partisanship, even suggesting that testing a prosecution is unacceptable where the client is undeserving of 'special exertions from any member of our pure and honourable profession'.⁸¹

Indeed, Hoffman fairly explicitly undermined the concept of detachment, claiming:

Counsel, in giving opinions, whether they perceive this weakness in their clients or not, should act as judges, responsible to God and to man, as also especially to their employers, to advise them soberly, discreetly, and honestly, to the best of their ability –

⁷⁹David Hoffman, 'Fifty Resolutions in Regard to Professional Deportment,' in David Hoffman (ed.) *A Course of Legal Study* (J. Neal, 1836) p.752.

⁸⁰ Hoffman, 'Fifty Resolutions' p.755.

⁸¹ *Ibid*, p.756.

though the certain consequence be the loss of large prospective gains.(Resolution XXXI)

However, Hoffman also affirms the ethic of Brougham to some extent, stating, ‘to my clients I will be faithful; and in their causes, zealous and industrious’ (Resolution XVIII). Although an important theoretical milestone, these resolutions were not ‘didactic rules’ binding practitioners;⁸² caution should be exercised in relying on Hoffman’s sometimes self-contradictory and, occasionally, extreme conceptualisation of the advocate’s role.

4 The Moral Advocate

Hoffman and Sharswood started a debate that continues to divide academic opinion today: ‘the question as to the duties of an advocate *in foro conscientiae* – his ethical as distinguished from his forensic duty, and whether the two are reconcilable or mutually exclusive.’⁸³ The criminal defender’s duties *in foro conscientiae* (‘before the tribunal of conscience’) potentially conflict with his or her obligations not only to zealously defend a client but to even represent them; which of these obligations prevails was subject to vociferous academic argument throughout the nineteenth century. Both sides of the conflict were well-documented in Showell Rogers’ 1899 article, *The Ethics of Advocacy*. Several commentators quoted in his article argued that it was not the place of the defence lawyer to engage in moral judgment of a client or cause. For example, Sir Harry Bodkin Poland QC stated that a defence lawyer should endeavour ‘to get an acquittal if he can, whatever the merits of the case may be’, while Sydney Smith claimed: ‘that, the decided duty of an advocate [is] to use all the arguments in his power to defend the cause he has adopted, and to leave the effects of those arguments to the judgment of others.’⁸⁴

Others contended that detachment and partisanship could not be allowed to rule defence advocacy unchallenged by moral standards of righteousness, fairness, truth and justice. In a direct response to a speech by Brougham at a banquet for the English Bar, Sir Alexander Cockburn (the Lord Chief Justice in 1864) described that the role of the advocate was to ‘seek to reconcile the interests he is bound to maintain... with the eternal and immutable interests of truth and justice.’⁸⁵

Rogers himself also identified moral limitations on defence advocacy. He claimed that ‘every

⁸² Hoffman, ‘Fifty Resolutions’ p.751.

⁸³ Showell Rogers, ‘The Ethics of Advocacy,’ *Law Quarterly Review*, 15 (1899), 259-280, p.260.

⁸⁴ *Ibid*, p.263.

⁸⁵ *Ibid*, p.274.

advocate is bound by an unwritten but stringent bond of ethical obligation to take no undue advantage of his tribunal' and that 'courts... are not to be misled nor inveigled into wrong judgments by the misplaced ingenuity of advocates in order to gain victories for their clients in particular cases.'⁸⁶ Rogers believed that were such advocacy to prevail, then 'truth would be dishonoured and justice dethroned'.⁸⁷ He urged defenders to remember that 'the stream of his forensic eloquence should flow from him as through a purifying filter', adding that 'it behoves him to guard against opening the sluices of words regardless of evil consequences to others than his client'.⁸⁸ However, Rogers also accepted that sometimes 'the *suppressio veri* (concealment of the truth) may not only be well within the legal and moral rights of an advocate, it may even constitute his actual duty' and that a defence lawyer 'has no monopoly in truth-seeking and no certainty that he will arrive unaided at a just conclusion as to the law'.⁸⁹ Even renowned philosophers weighed in on the debate. When asked whether one should defend a bad cause, Samuel Johnson famously argued that 'you do not know it to be bad or good until the judge determines it';⁹⁰ in contrast, Jeremy Bentham described the defence lawyer who protects a client who has confessed guilt as 'an accessory after the fact'.⁹¹

Notwithstanding the spirited debate about its place in adversarial advocacy, morality has been notably absent as a formal duty incumbent on criminal defence lawyers. The last century has been dominated by arguments about the extent of the lawyer's obligation to provide the accused with a 'full defence': for example, what questions and tactics can he or she employ, and what secrets can he or she hide. These debates have primarily taken place in the context of balancing due process and equality of arms with procedural integrity and truth-seeking functions. Questions addressing whether the defence lawyer behaves in a morally commendable manner in undertaking his or her duties have been side-lined to some extent. One could argue quite confidently that the philosophy of Brougham – which encouraged an advocate to go so far as to plunge his nation into political and social turmoil to succeed – did much to push the debate in a due process-oriented direction, and anointed the 'full defence' principle as the most important strand of criminal defence ethics up for discussion. As is made clear earlier in this article, the importance of the 'full defence' principle clearly emerged in reaction to the substantial flaws evident in the criminal justice system: the systematic abuse and

⁸⁶ Ibid, p.272

⁸⁷ Rogers, 'The Ethics'.

⁸⁸ Ibid, p.275.

⁸⁹ Ibid, pp.276 and 264.

⁹⁰ Ibid, p.263.

⁹¹ Mark Orkin, 'Defence of One Known to be Guilty,' *Criminal Law Quarterly*, 1 (1958), 170-177, p.170.

repression of the rights of prisoners, the one-sided nature of criminal trials in the seventeenth and eighteenth centuries; the exploitation of prosecution for profit by thief-takers and solicitors; and the myth popularised by Serjeant William Hawkins that 'it requires no manner of skill to make a plain and honest defence'.⁹² All were questioned, and it appeared that a 'full defence' was required to remedy these issues.

In the twentieth century, the notions of pluralism and equality have further undermined the desirability of 'moral advocacy' in the criminal justice system. In any society, there will be people considered to be outcasts or undesirables, those who do not conform to the political, religious or moral expectations of their communities. However, in a pluralist society, deviation from the norm is tolerated; where this deviation strays beyond reasonable boundaries, most notably when a law is broken, it is regulated via the mechanism of the legal system. Adversarial culture recognises that 'we do not order our communities by direct appeal to any particular view of the good'. As a result, the determination of legal issues is based on 'decision procedures structured to take all reasonable views seriously'.⁹³

All citizens, accused of any offence, should be able to defend themselves before an independent and objective tribunal. Of course, anyone can do this in theory (as Serjeant Hawkins suggested), but the practical complexity of the legal system means that the vast majority of people require the help of a skilled professional to do so; as such, criminal defence lawyers are effectively the 'key' to accessing legal rights, granting them 'tremendous power'⁹⁴ in deciding who to represent and how much effort to expend on their behalf. The fact is that the majority of suspects and defendants would probably be considered 'deviant', usually because of a past criminal record, poverty, social habits, ethnicity, and other factors. Equally, many offences, particularly the most serious like rape and murder, are considered heinous by most people.

The argument against a 'moral advocate' suggests that if a criminal defence lawyer was permitted to refuse to represent someone or provide a less vigorous service for a defendant on the basis of personal morality, then not only would many people be denied access to the law, but the designated system for determining criminal justice issues would be circumvented.

⁹² William Hawkins, *A Treatise of the Pleas of the Crown*, Vol. 2 (J. Walthoe, 1716) p.400.

⁹³ Dare, *The Counsel* p.74.

⁹⁴ *Ibid*, p.74

Furthermore, it is argued that individual lawyers simply cannot be trusted to impose their own personal morality on others for fear of creating an 'oligarchy'.⁹⁵ Even if defence lawyers were willing to become moral crusaders, one might argue that concepts such as 'common morality' or 'the greater good' are nebulous, vague and subjective – all words antipathetic to legal culture. However, the direction of debate appears to have shifted in recent years; as Alice Woolley pointed out in 1996, 'the dominant tone of current scholarship... [is] highly critical of lawyers' seeming ability to remove their 'professional' actions from the scrutiny of basic precepts of ordinary morality'. Additionally, there has been a significant push by successive governments since the election of New Labour to put victims of crime at the 'centre' of the criminal justice system, on the grounds that many are treated in an unethical and immoral manner during criminal trials. Various limitations (or obstacles dependent on one's view) have been imposed on the defence lawyer and his or her ability to question victims in a manner advantageous to the defendant. This article does not provide significant detail about these victim-oriented changes, but it would be fair to say that the nineteenth century debate about defence lawyers and morality is likely to have increased relevance in the years to come.

Defending the Guilty

The balancing act required of defence lawyers was, and still is, embodied in ethical conflict. This is well exemplified by the situation where a defendant confesses guilt to the defence lawyer, but insists on a defence anyway; this pits the duty to be a zealous advocate for a client against the obligation of *amicus curiae* and truth-seeker, and has been described as the 'supreme test problem' in legal ethics.⁹⁶ In an arguable milestone in the historical development of the role, the 'supreme test problem' was addressed in court in the middle of the nineteenth century in the infamous *Courvoisier Case*. In 1840, François Courvoisier – a Swiss valet – was tried for the murder of his master, Lord William Russell. Courvoisier pleaded not guilty and his lawyer, the venerable barrister Charles Phillips, pursued a vigorous defence. The prosecution's case was undermined by a poor police investigation and Phillips took full advantage of this; however, part way through the trial, the defendant confessed his guilt to Phillips – in the light of newly discovered and fairly conclusive evidence – but insisted that Phillips continue to defend him. The defence lawyer was faced with the 'supreme test problem', and approached the Bench for advice. Phillips was asked by the bench whether Courvoisier still wanted his advocacy; Phillips

⁹⁵ Richard Wasserstrom, 'Lawyers As Professionals: Some Moral Issues,' *Human Rights*, 5 (1975), 1-24, p.6.

⁹⁶ Orkin, 'Defence' p.170.

confirmed that the defendant did, and was advised by the Bench that he was 'bound to do so' and was 'to use all fair arguments arising out of the evidence' to further Courvoisier's defence.⁹⁷

Phillips proceeded to present a robust and aggressive defence for Courvoisier, who was eventually convicted and executed. On discovering the truth about Phillips' defence of Courvoisier, there was substantial public outcry, unprecedented media coverage, and extensive debate and commentary about legal ethics amongst politicians, academics and even writers like Charles Dickens. Despite the criticism levelled at Phillips, the case set out a very clear principle – the defendant is entitled to a full and fair defence, on the evidence, regardless of a confession of guilt to the advocate. The 'Courvoisier Principle' is followed to this day in the courts of England and Wales, and beyond. As such, the case substantially supports the principles of zealous advocacy, detachment and confidentiality whilst simultaneously casting doubt on the practical importance of morality and truth-seeking in the criminal defence profession.

The nineteenth century was revolutionary in terms of the rights granted to suspects and defendants, and the freedoms afforded to defence lawyers to protect them. To cap off a remarkable 100 years, the Criminal Evidence Act 1898 entitled the defendant to be a witness in his or her own trial. Section 1 of the statute established that 'every person charged with an offence... shall be a competent witness for the defence at every stage of the proceedings'. Furthermore, this right was only exercisable 'upon his own application'; no defendant could be compelled to appear as a witness, protecting the class of accused with a tendency to unwittingly incriminate themselves through poor testimony. This right expanded the role of the defence lawyer significantly. It finally allowed the lawyer to conduct a defence on an equal basis with the prosecution, using the accused's own words as evidence and enabling the advocate to carefully shepherd his or her client through testimony. The statute fully enfranchised the defence lawyer defined by partisanship and client-oriented obligations.

Conclusion

The core duties and obligations which continue to delineate the role of the criminal defence lawyer in the twenty-first century were forged through a fascinating evolutionary process. This involved the lobbying for and passage of statutes, the determination of outstanding practitioners, the gradual re-shaping of the common law, and extensive debate and discussion amongst

⁹⁷ Ibid, p.173.

academics, philosophers, professionals and politicians. The principles outlined in the 'zealous advocate' model – partisanship, detachment, confidentiality, procedural justice, truth-seeking and morality – were undoubtedly the product of a long and difficult self-examination of how justice should be conducted in this jurisdiction by the people involved in administering it and those observing it. Moreover, the development of the criminal defence lawyer as a crucial entity within the criminal justice system arguably spearheaded the birth of a raft of rights we now consider central to any liberal democracy. As the defence lawyer emerged as a powerful force, the foundations of a core Human Right were laid – the right to a fair trial and its corollaries of equality of arms, the right to legal representation, the presumption of innocence and the right to silence at trial.

Furthermore, the development of the defence lawyer's role gradually helped ensure that the prosecution burden of proof was properly discharged, that the laws of evidence (still in their infancy in the eighteenth and nineteenth centuries) were upheld, and that the judge – for so long merely a symbol of neutrality – finally adopted the role of impartial arbiter, rather than principal investigator. Above all, the rise of the defence lawyer occurred alongside some of the most important developments in English and Welsh criminal justice – the emergence and entrenchment of adversarial culture and the professionalization of the criminal justice system. Therefore, the historical development of the defence lawyer is also a story about the birth of the modern criminal justice system in this jurisdiction and those it is influenced by. This article has only scratched the surface – it is my intention to conduct much more research into this extraordinary figurehead of adversarialism and my hope that others will also seek to do so.