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“Anything Rather Than a Deliberate and Well-Considered Opinion”—Henry Lord Brougham, Written by Himself

FRED C. ZACHARIAS* AND BRUCE A. GREEN**

In *Reconceptualizing Advocacy Ethics*, we compared two standard conceptions of advocacy ethics and offered a third alternative.¹ The first standard conception is commonly traced to Henry Lord Brougham’s statement in Parliament in 1820 about *Queen Caroline’s Case*:

[A]n 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 . . . 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.²

The other stems from David Hoffman’s contemporaneous *Resolutions in Regard to Professional Deportment* and places a higher premium on lawyers’ personal consciences as determinants of lawyers’ conduct.³ We suggested a middle-ground that helps explain anomalous decisions by courts to impose duties that appear inconsistent with the modern professional codes.⁴

Monroe Freedman has written an essay first criticizing our reliance on an 1845 opinion by Justice John Gibson of the Pennsylvania Supreme Court and then challenging one half of one sentence in our article which notes, in passing, that

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1. Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1 (2005).

2. 2 TRIAL OF QUEEN CAROLINE 3 (1821). Brougham made this statement while defending Queen Caroline against charges of treason in political proceedings in the House of Lords. As Brougham later acknowledged, his speech was not meant as a learned disquisition on the trial advocate’s role, but as a veiled threat to reveal embarrassing information about the King should the proceeding go forward.

3. 2 DAVID HOFFMAN, *Resolutions in Regard to Professional Deportment*, in A COURSE OF LEGAL STUDY 752-75 (William S. Hein & Co. 1968) (1846).

4. Zacharias & Green, *supra* note 1, at 4-6. Professor Freedman suggests that the conception we propose simply reflects a truism that lawyers should act zealously within the bounds of the ethics rules and other law. Monroe H. Freedman, *Henry Lord Brougham, Written by Himself*, 19 GEO. J. LEGAL ETHICS 1213, 1213 & n.6 (2006). As our article discusses at length, the alternative conception that we identify with Justice Gibson’s 1845 reference to “professional conscience” presupposes restrictions on advocacy that go well beyond those explicitly set forth in the law. See Zacharias & Green, *supra* note 1, at 21-36.

Lord Brougham repudiated his statement about advocacy later in his career.⁵ We respond briefly simply to suggest that the first criticism is misguided and that the second is unpersuasive.

We did indeed rely on Justice Gibson's opinion in *Rush v. Cavanaugh*,⁶ which suggested that professional regulation of lawyers is based on lawyers' "professional conscience"—as distinct from personal conscience. The opinion was deemed important at the time, and Gibson's opinions in other fields have been highly influential. Professor Freedman, however, intimates that we have encouraged our readers to honor Gibson and dishonor Brougham and that this is unwarranted because Gibson once wrote a decision forecasting the United States Supreme Court's infamous *Dred Scott* decision, while Brougham was an abolitionist.⁷ Our article did not hold Gibson up as a moral authority, as Freedman maintains, but only as an influential jurist whose opinion on professional regulation is worth revisiting. The question of slavery—and for that matter, the question of Gibson's and Brougham's relative distinction—had nothing to do with our thesis.

The rest of Professor Freedman's essay is directed at the passing reference in our article to Brougham's subsequent repudiation of his pronouncement about legal advocacy, which Freedman characterizes as "an error."⁸ Our observation derived from an introspective letter Brougham wrote in 1859 that stated, "I wish to mention to you, in reference to . . . my statement in the Queen's case . . . *that the statement was anything rather than a deliberate and well-considered opinion.*"⁹ John R. Dos Passos, a well-respected nineteenth century scholar,¹⁰ characterized Brougham's letter as a repudiation, and we cited Dos Passos's book.¹¹

5. Freedman, *supra* note 4.

6. 2 Pa. 187 (1845).

7. Freedman, *supra* note 4, at 1214.

8. *Id.* at 1213.

9. WILLIAM FORSYTH, THE HISTORY OF LAWYERS ANCIENT AND MODERN 380 n.1 (Lawbook Exchange, Ltd. 1998) (1875) (quoting an 1859 letter from Henry Lord Brougham) (emphasis added).

10. Dos Passos was a practicing lawyer who "took time to study the legal profession and to write about the responsibilities of lawyers." Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 GEO. J. LEGAL ETHICS 155, 159 (2006). His book on the American legal profession continues to be cited as authority today. See, e.g., Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 32 n.91, 50 n.172 (1988); Erik M. Jensen, *A Law Unto Itself: The Untold Story of the Law Firm Sullivan and Cromwell*, 1990 COLUM. BUS. L. REV. 133, 160 n.139 (book review).

11. JOHN R. DOS PASSOS, THE AMERICAN LAWYER: AS HE WAS—AS HE IS—AS HE CAN BE 142-43 (Fred B. Rothman & Co. 1986) (1907); Zacharias & Green, *supra* note 1, at 2 n.3. Other scholars have expressed similar doubts about whether Brougham's pronouncement reflected his personal belief in the extreme conception of advocacy. See, e.g., James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2443 & n.272 (2003) ("Lord Brougham commented later that the absolute loyalty to the client articulated in his speech was 'not so much a statement of [a lawyer's] duty as it was a political threat.'") (quoting L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909 (1980)); Michael I. Krauss, *The Lawyer as Limo: A Brief History of the Hired Gun*, 8 U. CHI. L. SCH. ROUNDTABLE 325, 332 (2001) ("Lord

In truth, Brougham's state of mind late in life had little significance for us. Our article starts from the proposition that Brougham's original position reflects a conception of advocacy on which many lawyers continue to rely, so it does not matter whether Brougham believed what he said and for how long. Brougham's repudiation is, at most, a tangential issue.

But even taking Professor Freedman's argument on its own terms, the evidence is not nearly as persuasive as Freedman believes. Most obviously, there seems to be little reason not to accept the 1859 letter at face value. Brougham's concession that his 1820 statement "was anything rather than a deliberate and well-considered opinion" surely sounds like a repudiation, not an endorsement, of the earlier pronouncement.

In arguing on Queen Caroline's behalf, Brougham advanced her cause by threatening to disclose information embarrassing to the crown.¹² Professor Freedman reasons that because Brougham's 1859 letter did not express regret for making this political threat and because making the threat was consistent with the extreme view of an advocate's role that Brougham used to justify the threat in his speech, the letter must be a reaffirmation of Brougham's original view of advocacy. This, however, ignores the possibility that Brougham stood by his actions without attempting to endorse, more generally, the separate statement about advocacy that accompanied them. Brougham may have come to believe that his threat was justified under different, or more moderate, conceptions of the advocate's role (or without regard to one's view of an advocate's role).¹³

Professor Freedman looks for support in Brougham's 1871 autobiography—that is, to Brougham's own words—as evidence that he did not repudiate his original view.¹⁴ Professor Freedman's argument appears to be that because Brougham repeats language from his speech in a footnote in the autobiography, he must have meant every word of it in 1820, in 1871, and at every point between. But the footnote is not a reaffirmation of the original speech. It includes no reflection upon, much less a normative endorsement of, Brougham's earlier

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.”).

12. See *supra* note 2.

13. Arguably, advocacy ethics had no bearing on Brougham's conduct since he was speaking in a political, not a judicial, forum. A lawyer-politician acting on a political stage may not be bound by an advocate's duties to the judicial process.

Moreover, even if the proceedings were judicial in nature, Brougham's concession that his legal argument had the client-centered aim of posing a political threat militates against the conclusion that the speech reflected Brougham's personal views. Adversary ethics have always included the core proposition that arguments made in the course of advocacy should not be taken as expressions of the lawyer's personal opinion—indeed, that advocates ordinarily should *avoid* expressing their personal opinion in the course of argument. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2004) [hereinafter MODEL RULES] (“A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities.”); MODEL RULES R. 3.4(e) (forbidding trial lawyers to “state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused . . .”).

14. Freedman, *supra* note 4, at 1217-18.

beliefs about the role of lawyers. The footnote purports to be no more than a direct quote of Brougham's words in the House of Lords—just a recollection of what Brougham previously had said.¹⁵

Finally, there may be more significance than Professor Freedman acknowledges to the fact that Brougham's autobiography recounts the *Queen Caroline* speech differently from the way it traditionally has been reported. Most historical accounts quote the speech as proclaiming that the advocate's obligation to the client is "his first and only duty." The autobiography states that the advocate's obligation to the client "is the highest and most unquestioned of his duties"¹⁶—implying that the advocate also owes duties to others. If Brougham meant exactly what he wrote in his autobiography, as Professor Freedman maintains, this difference would be significant. One would have to conclude that Brougham recognized the existence of secondary duties that the speech, as reported, did not acknowledge. Interestingly, this modified position on the lawyer's role would neatly fit the thesis of our article that lawyers' duties to their clients are limited by other obligations not codified in the law and professional rules.¹⁷

In the end, however, the accuracy of the reporting of Brougham's speech, whether John Dos Passos or Monroe Freedman is right about Brougham's so-called "repudiation," and how "deliberate and well-considered" Brougham ultimately believed his pronouncement concerning advocacy to be all are minor issues. We share Professor Freedman's recognition of Brougham's speech (as traditionally reported) as an influential encapsulation of one conception of the advocate's role. Brougham's pronouncement found a receptive audience in this country and continues to have life almost two centuries later. Its normative validity, rather than Brougham's regret or lack thereof, is what we addressed in our article and is what should engage the professional responsibility community today.

15. 2 HENRY LORD BROUGHAM, *THE LIFE AND TIMES OF HENRY LORD BROUGHAM, WRITTEN BY HIMSELF* 308-09 n. (1871).

16. *Id.* (emphasis added).

17. There is a second difference that may be significant, but less so. Brougham's speech said that a lawyer "knows but one person in all the world, and that person is his client." 2 *TRIAL OF QUEEN CAROLINE*, *supra* note 2, at 8. The autobiography emphasizes that the lawyer knows but one person: "THAT CLIENT AND NONE OTHER." BROUGHAM, *supra* note 14, at 309 n. This sentence precedes the sentence referring to the lawyer's "duties."

In the original version, the reference to one client and one duty suggested that the lawyer's role is simple and unambiguous. The more nuanced modified version, however, suggests that Brougham may have meant to confine his first observation to duties among clients and his second to other duties that may exist—for example to the public or the legal system. This interpretation is supported by the historical fact that, before pleading Queen Caroline's case on the floor of the House of Lords, Brougham vacillated in his representation of Caroline. He at times appeared to curry the favor of government officials and at times appeared to serve his own interests. ROBERT STEWART, *HENRY BROUGHAM 1778-1868: HIS PUBLIC CAREER* 145-46 (1986). There thus may have been some question as to which client he truly served, which the first sentence resolved—a resolution that did not eliminate the possibility that Brougham recognized other, potentially supervening duties.