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ESSAYS

Henry Lord Brougham, Written by Himself*

MONROE H. FREEDMAN**

In a recent article,¹ Professors Fred C. Zacharias and Bruce A. Green have made an error in discussing Henry Lord Brougham's famous declaration about the duty of zealous representation that lawyers owe to their clients.² The purpose of this essay is to correct that error, which first appeared in a 1907 book by John Dos Passos.³

As part of their article, Zacharias and Green argue that lawyers should adopt the ethic of "professional conscience" expressed by a nineteenth century Pennsylvania judge, John Bannister Gibson, rather than the client-centered ethic of Brougham.⁴ As the authors explain it, Gibson's ethic of professional conscience means that "lawyers' duties of zealous advocacy are limited by duties to the court that are implicit in the lawyer's professional role, capable of being articulated, and, in some cases, judicially enforced."⁵ This appears to be simply a truism⁶ and not a basis for "reconceptualizing advocacy ethics." The focus of this essay, however, is to suggest that Zacharias and Green's reliance on Gibson as a

* This title is taken from the title of Brougham's three-volume autobiography, *The Life and Times of Henry Lord Brougham, Written by Himself*.

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

2. For the text of Brougham's quote, see *infra* text accompanying note 21.

3. 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).

4. Zacharias & Green, *supra* note 1, at 2.

5. *Id.* at 6.

6. The view that a lawyer's duty of zealous advocacy must be tempered by the lawyer's duties to the court has already been adopted by the American Bar Association and state codes of professional ethics. See, e.g., MODEL RULES OF PROF'L CONDUCT (2004) [hereinafter MODEL RULES]; N.Y. CODE OF PROF'L RESPONSIBILITY Canon 7 (2002) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."). DR 7-101(a) says that a lawyer "shall not intentionally (1) [f]ail to seek the lawful objectives of the client through reasonably available means" But that language (which itself is restricted to what is lawful) is immediately subjected to the limitation: "permitted by law and the Disciplinary Rules" The entire remainder of Canon 7, from DR 7-101(b) through DR 7-110, deals with *restrictions* on zealous representation, that is, with actions that a lawyer may forgo, or that the lawyer is forbidden to take, on behalf of the client. These restrictions are, of course, both

moral authority is misplaced, and, more importantly, to correct the erroneous assertion that Brougham repudiated his classic statement regarding zealous representation.

Zacharias and Green hold up Judge Gibson as “an intellectual giant”⁷ whose moral pronouncements are entitled to our respect. It is therefore worth taking note of Gibson’s moral authority, or lack of it, as revealed in his opinion in *Hobbs v. Fogg*.⁸ Although Zacharias and Green certainly do not share Gibson’s racism, Gibson himself is impeachable on that ground.

William Fogg was an African American who had been emancipated by a state statute.⁹ He sued because he had been denied the right to vote.¹⁰ On the basis of undisputed facts establishing that Fogg was a freeman and otherwise qualified to vote, the trial judge directed a verdict for Fogg.¹¹

Gibson reversed.¹² “[O]ur ancestors settled the province as a community of white men,” he declared, “and the blacks were introduced into it as a race of slaves.”¹³ Accordingly, they are not capable, because of their “caste,”¹⁴ of being “party to our social compact.”¹⁵ Expressing his notion of professional judicial conscience, Gibson concluded that “[c]onsiderations of mere humanity . . . belong to a class with which, as judges, we have nothing to do; and interpreting the [federal] constitution in the spirit of our institutions, we are bound to pronounce that men of colour are destitute of title to the elective franchise.”¹⁶ Thus, Gibson distinguished himself by anticipating *Dred Scott v. Sandford*¹⁷ by twenty years.

By contrast, during the same period, Henry Lord Brougham was an ardent and eloquent abolitionist.¹⁸ He insisted that the slave was his brother and “as fit for his freedom as any English peasant, ay, or any Lord whom I now address.”¹⁹ Moreover, Brougham demanded that the emancipated slave have his liberty and his rights “without stint.”²⁰ That speech was delivered by Brougham to the House of Lords in 1838, just one year after Gibson wrote his opinion in *Hobbs v. Fogg*.

articulated and capable of being judicially enforced. Moreover, none of them is inconsistent with Brougham’s declaration.

7. Zacharias & Green, *supra* note 1, at 4.

8. 6 Watts 553 (Pa. 1837).

9. *See id.* at 556.

10. *See id.* at 557-58.

11. *Id.* at 560.

12. *Id.*

13. *Id.* at 558.

14. *Id.*

15. *Id.*

16. *Id.* at 560.

17. 60 U.S. 393 (1857).

18. *See generally* 10 WORKS OF HENRY LORD BROUGHAM (Adam & Charles Black eds., 1873).

19. *Id.* at 279.

20. *Id.* at 243, 279 (“Emancipation of Negro Apprentices”).

Turning now to Zacharias and Green's error regarding Brougham, here is his famous statement, which was made in defense of the Queen in Queen Caroline's Case in 1820:

[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, 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.²¹

That statement has stood as the ideal of zealous representation for English and American lawyers for almost two centuries since then.²²

In their article, Zacharias and Green incorrectly assert that Brougham later repudiated his statement.²³ Their only documentation for this assertion is a questionable secondary source, a 1907 book by a lawyer named Dos Passos.²⁴ According to Dos Passos, "as far back as 1859, the author of those destructive and unfounded views [that is, Brougham], in a letter to Mr. Forsyth, publicly repudiated them by saying that they were used as a sort of political menace."²⁵

That sentence is the entire basis for the conclusion, first by Dos Passos and then by Zacharias and Green, that Brougham repudiated his statement. However, as discussed below, Mr. Forsyth did not understand Brougham's letter to have been a repudiation.²⁶ More importantly, the fact that the statement had been delivered as a "political menace" was precisely what made it so powerful and that, at the same time, demonstrated just how far a lawyer should be prepared to go on behalf of a client.

The Queen had been charged with adultery (of which she was almost certainly

21. 2 THE TRIAL OF QUEEN CAROLINE 3 (1821).

22. The view expressed in Brougham's declaration was recognized in drafting the 1908 *Canons of Professional Ethics*. Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 961 (1991); see also CANONS OF PROF'L ETHICS Canon 15 (1908). Brougham's view was reaffirmed in the *Model Code of Professional Responsibility* and continues to play a role under the current *Model Rules of Professional Conduct*. Lanctot, *supra*, at 962; MODEL CODE OF PROF'L RESPONSIBILITY EC 5-1, 5-21 (1983); MODEL RULES pmb1. 2, 9; MODEL RULES R. 1.3 cmt. 1. See generally MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 71 (3d ed. 2004).

23. Zacharias & Green, *supra* note 1, at 2. But see *infra* text accompanying notes 40-46.

24. Zacharias & Green, *supra* note 1, at 2 n.3 (citing DOS PASSOS, *supra* note 3).

25. DOS PASSOS, *supra* note 3, at 142-43 (citing WILLIAM FORSYTH, THE HISTORY OF LAWYERS ANCIENT AND MODERN 380 n. (Lawbook Exchange, Ltd. 1998) (1875)).

26. See *infra* text accompanying notes 52-55. In addition, Dos Passos even misquoted Brougham. He reports the quotation as including the phrase, "separating even the duties of a parent from those of an advocate . . ." DOS PASSOS, *supra* note 3, at 142 (substituting "parent" for "patriot"); see *supra* text accompanying note 21.

guilty).²⁷ Conviction would have resulted in her divorce from the King and the loss of her title. In his opening statement at the Queen's trial, Brougham delivered a fearsome threat—or, as he called it in his letter to Forsyth, a “menace.” As Brougham explained in his autobiography, this threat was “neither more nor less than impeaching the King's own title, by proving that he had forfeited the crown.”²⁸ The ground for the King's expulsion from the throne was that “[h]e had married a Roman Catholic (Mrs. Fitzherbert) while heir-apparent,” and such a marriage is “declared by the Act of Settlement to be a forfeiture of the crown, ‘as if he were naturally dead.’”²⁹ Therefore, to drive his threat home, Brougham had prefaced it by saying that, if the case should reach a point at which an attack on the King were justified to protect the Queen, then he would not “hesitate one moment in the fearless discharge of [that] paramount duty.”³⁰

Brougham's threat was particularly potent because of the dangerous social and political unrest at the time of the trial.³¹ As Brougham reported, members of the army, like the people of England generally, held their allegiance to the Queen as well as the King.³² Indeed, many enthusiastically favored the Queen, and the members of one cavalry regiment vowed that they would “fight up to their knees in blood for their queen.”³³ Other troops mutinied, and in daily demonstrations by mobs of people, “the soldiers showed plain signs of being with the multitude.”³⁴ Because of these demonstrations, a “great barrier” had to be erected to “[break] the force of the crowd”³⁵ and to allow the peers, who “actually feared for their personal safety,”³⁶ to enter and leave the House.³⁷ There were also nights of mob violence against the residences of the King's ministers and intimates.³⁸ In Brougham's own view, if he had been forced to carry out his threat, it could have meant that “civil war was inevitable.”³⁹

Nevertheless, Brougham's opening statement, including his threat to undo the

27. FLORA FRASER, *THE UNRULY QUEEN: THE LIFE OF QUEEN CAROLINE* 264 (1996) (Regarding a principal charge in the Bill against the Queen: “There can be no doubt that [Bartolomeo Pergami], now her servant, became her lover . . .”). However, Brougham himself wrote: “Of the utter groundlessness of those charges [I] had the most complete and unhesitating belief.” 2 HENRY LORD BROUGHAM, *THE LIFE AND TIMES OF HENRY LORD BROUGHAM, WRITTEN BY HIMSELF* 291 (1871). He added, though, that he was acquainted with “great indiscretions” on the Queen's part that were unrelated to the charges against her. *Id.*

28. 2 BROUGHAM, *supra* note 27, at 309.

29. *Id.* at 309-10.

30. *Id.* at 308-09 n.

31. *See id.* at 307-08; FRASER, *supra* note 27, at 382-83.

32. 2 BROUGHAM, *supra* note 27, at 307-08.

33. *Id.* at 307.

34. *Id.* at 308.

35. *Id.*

36. E.A. SMITH, *A QUEEN ON TRIAL: THE AFFAIR OF QUEEN CAROLINE* 67 (1993) (quoting Lady Anne Hamilton, the Queen's closest attendant during the trial).

37. 2 BROUGHAM, *supra* note 27, at 308.

38. FRASER, *supra* note 27, at 382.

39. 2 BROUGHAM, *supra* note 27, at 311.

King, was “acclaimed as brilliant”⁴⁰ and has been recognized as “a masterly performance.”⁴¹ As Brougham finished, “the aged Lord Erskine, former Lord Chancellor, [was so moved that he] rushed from the chamber in tears.”⁴² Another barrister declared that Lord Brougham’s opening statement was “one of the most powerful orations that ever proceeded from human lips.”⁴³ Dissenting from those views, Lord Chancellor Eldon (an enemy of the Queen) later “rebuked Brougham most weightily for his threats to the House”⁴⁴—that is, for what Eldon saw as Brougham’s overzealousness on behalf of his client. Nevertheless, Brougham was “the hero of the hour,”⁴⁵ and he subsequently succeeded Eldon as Lord Chancellor of England.⁴⁶

Thus, Brougham successfully engaged in a classic case, and perhaps our earliest example, of what we now call graymail. The term refers to a threat by a criminal defendant to reveal, in the course of the defense, classified information that is harmful or embarrassing to the government to induce the government to drop the charges.⁴⁷

Brougham’s autobiography makes clear that he never repudiated his famous declaration. In a preface addressed “To the Reader,” Brougham wrote: “[T]he Narrative is to be printed AS I HAVE WRITTEN IT . . . I will have no Editor employed to alter, or rewrite, what I desire shall be published as EXCLUSIVELY MY OWN.”⁴⁸ With that introduction, half a century after having delivered his graymail threat, Brougham proudly reiterated and defended that threat with modifications that did not diminish its substance or force.⁴⁹ Indeed, Brougham’s

40. SMITH, *supra* note 36, at 110.

41. FRASER, *supra* note 27, at 433.

42. *Id.*

43. *Id.*

44. *Id.* at 438.

45. *Id.* at 443.

46. *Id.* at 465.

47. A modern practitioner of graymail was the renowned criminal defense lawyer, Edward Bennett Williams. His most famous of several such cases was his defense in 1976 of Richard Helms, the former director of the CIA. Helms had been charged with lying to a Senate committee by denying the CIA’s role in attempting to defeat the election of Salvador Allende in Chile. Emulating Brougham’s “menace,” Williams gave an early leak to Bob Woodward of the *Washington Post*: “If Helms tells what he knows, the government won’t be able to function. We won’t be able to have an embassy in any South American capital. It’ll raze the presidency, the judiciary, and the intelligence establishment if this comes out!” EVAN THOMAS, EDWARD BENNETT WILLIAMS: ULTIMATE INSIDER; LEGENDARY TRIAL LAWYER 341 (1991). The Justice Department backed down, and Helms was allowed to plead *nolite contendere* to reduced charges of “misleading” the committee. He served no jail time, and Williams announced on the courthouse steps that Helms would “wear this conviction like a badge of honor.” *Id.* at 344.

The effectiveness of graymail has been reduced since 1980 by the Classified Information Procedures Act, 18 U.S.C.A. app. 3 (2006). *See, e.g.*, United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005); *see also* Neil A. Lewis, *Prosecutor Says Libby Seeks To Thwart Criminal Case*, N.Y. TIMES, Feb. 18, 2006, at A11 (reporting the charge by Patrick J. Fitzgerald that I. Lewis (“Scooter”) Libby has demanded “extraordinarily sensitive” government documents in a “transparent effort at ‘graymail’”).

48. 1 BROUGHAM, *supra* note 27, at 12 (Preface with Brougham’s instructions to the executor of his estate).

49. The quotation in the autobiography (1871) is not identical to the original at the trial (1820). Here is the version from the autobiography:

final modification of the statement characterized it as the advocate's "sacred duty."⁵⁰ As his final assessment of his role in the matter, Brougham wrote: "On looking back to that time of anxiety because of serious hazards . . . I feel that I had nothing wherewith to reproach myself . . ."⁵¹

Return now to William Forsyth, to whom Brougham wrote the letter that was quoted and then corrupted into a repudiation by Dos Passos, whose book *Zacharias and Green* relied on in their recent article. Forsyth also published a book discussing Brougham's letter in 1875, four years after the publication of Brougham's autobiography. In this book, Forsyth quoted not the original threat, but the modified version that appeared in Brougham's autobiography.⁵² It appears, therefore, that Forsyth was familiar with the autobiography and, as a consequence, with Brougham's support of his statement in it. Also, Brougham's letter to Forsyth, written twelve years prior to the publication of Brougham's autobiography, says nothing about repudiation. On the contrary, in the letter Brougham wrote:

I was prepared, *in case of necessity*, that is, in case the Bill [against the Queen] passed the Lords, to do two things—first, to resist it in the Commons *with the country at my back*; but next, if need be, to dispute the King's title, to show he had forfeited the crown by marrying a Catholic, in the words of the Act "as if he were naturally dead." What I said was fully understood by Geo. IV [and others], and I am confident it would have prevented them from pressing the Bill beyond a certain point.⁵³

Thus, Forsyth could not have thought—and did not say—that Brougham had repudiated his statement.

[A]n advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, THAT CLIENT AND NONE OTHER. To save that client by all expedient means – to protect that client at all hazards and costs to all others, and among others to himself – is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on reckless of the consequences, if his fate it should unhappily be, to involve his country in confusion for his client's protection!

2 BROUGHAM, *supra* note 27, at 308-09 n.

The most significant differences between the versions are that "the discharge of his duty" has become "the sacred duty that he owes his client" and "his first and only duty" has become "the highest and most unquestioned of his duties."

The change appears to have been deliberate. In 1838 Brougham published *Speeches of Henry Lord Brougham* (in four volumes). In that publication, the version of his declaration of the advocate's duty is the same as that in the autobiography, with the exception that the 1838 version uses dashes rather than commas in one passage: "and he must not regard the alarm—the suffering—the torment—the destruction—which he may bring upon any other." 1 SPEECHES OF HENRY LORD BROUGHAM 105 (1838); see 2 BROUGHAM, *supra* note 27, at 309 n.

50. See 2 BROUGHAM, *supra* note 27, at 309 n.

51. *Id.* at 315-16.

52. WILLIAM FORSYTH, *THE HISTORY OF LAWYERS ANCIENT AND MODERN* 380 (Lawbook Exchange, Ltd. 1998) (1875). For the modified version, see *supra* note 49.

53. FORSYTH, *supra* note 52, at 380-81 n.1 (quoting a letter the author received from Brougham in 1859).

What Forsyth did was to contend that Brougham's statement was not to be taken literally as a model for the lawyer's role. Rather, he argued, it was an advocate's defense of his client, and therefore should be given more latitude and not be "tested by the same canons according to which we criticise [sic] the opinions expressed in an essay or a sermon."⁵⁴ In his letter to Forsyth, Brougham did write that his statement had been "a menace," not "a deliberate and well-considered opinion."⁵⁵ However, what Brougham meant by this, and what Forsyth understood it to mean from the full context of the letter, was that Brougham had leveled a threat of what we now call "graymail," not made a dispassionate legal argument. And, as both his letter to Forsyth and his autobiography make clear, far from repudiating the statement, Brougham maintained the rightness of his "menace."

The short of it is, therefore, that Brougham was indeed ready to "go on reckless of the consequences" and to "involve his country in confusion," a course that he later characterized in his autobiography as having been his "sacred duty."⁵⁶ In that sense, Brougham's conduct was an even more powerful declaration of the advocate's duty than was the statement itself (and more powerful, surely, than any "sermon or essay").

Professors Zacharias and Green relied on the questionable secondary authority of Dos Passos and accordingly published the incorrect assertion that Henry Lord Brougham eventually repudiated the famous statement about the advocate's duty to his client that he had made in Queen Caroline's Case. However, the truth is quite contrary to what Dos Passos said. In fact, in an autobiography written half a century after the Queen's trial, Brougham reiterated his statement and stood behind it.⁵⁷ Moreover, he characterized his declaration on zealous advocacy as the "sacred duty that [the advocate] owes his client."⁵⁸

Those are Brougham's final words on the subject, "Written by Himself."

54. *Id.* at 382.

55. *Id.* at 380 n.1.

56. 2 BROUGHAM, *supra* note 27, at 309 n.

57. *Id.*

58. *Id.*; *see also supra* text accompanying note 50.

