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# THE MORE THINGS CHANGE THE MORE THEY STAY THE SAME: MR. TUTT AND THE DISTRUST OF LAWYERS IN THE EARLY TWENTIETH CENTURY

*Molly A. Guptill\**

## INTRODUCTION

“Does the lawyer of today hold as high a place and exercise as commanding influence in this country as did the lawyer of fifty years ago?”<sup>1</sup> Over the course of the last century, the legal profession has grappled with this question and its distressing answer. At the center of the profession’s concern over the image of lawyers in the twentieth century was the growing expression of public dissatisfaction with lawyers.<sup>2</sup> Newspapers, magazines, and popular literature were the main sources for discussion about the negative image of lawyers. One of the most popular authors of legal literature during the first half of the twentieth century was Arthur Cheney Train. This article explores how Train attempted to use his writing to improve the public’s perception of lawyers,

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\* B.A. History, University at Albany, May 2001; M.A. History, University at Albany, December 2002; J.D. candidate Benjamin Cardozo School of Law (June 2005). Executive Editor, Cardozo Public Law, Policy, and Ethics Journal. I want to express my gratitude to Professor Richard Hamm for introducing me to Mr. Train and Mr. Tutt and for his constant guidance and encouragement with my work on this topic. I would also like to thank Linda Harrison, who first taught me the value of learning history and has been a role model and inspiration to me since our first American History class. I also want to thank Daniel Crane and E. Nathaniel Gates for reviewing drafts of my note.

<sup>1</sup> William L. Marbury, *The Lawyer of Fifty Years Ago and the Lawyer of To-day*, 24 GREEN BAG 64, 64 (1912). As a result of the public’s dissatisfaction with the legal profession, those within the profession have attempted to answer: “what is the reason, and how can [lawyers] best be restored to [their] former position?” *Id.* One way in which the legal profession dealt with public dissatisfaction with lawyers was to pass ethical rules that would at least create the image that the profession was upright and operated ethically.

<sup>2</sup> The public’s perception of the law was shaped largely by “reports of trials, both civil and criminal, of legislative proceedings . . . and on the reading of newspapers, magazines, and books.” Charles W. Eliot, L.L.D., *The Popular Dissatisfaction with the Administration of Justice in the United States*, 25 GREEN BAG 65, 65-66 (1913) (discussing the portrayal of the legal profession by the popular media in the early twentieth century and the impression it had on the American public).

and how his writing ultimately created greater dissatisfaction with modern lawyers.

From the beginning of his literary career, Arthur Train wrote stories that revealed the problems that prevented lawyers from attaining the public's respect. Over the years, Train began to shape an image of an ideal version of the legal profession and spent the latter portion of his writing career elaborating and reinforcing this image.<sup>3</sup> Although Train initially anticipated his books to be read exclusively by lawyers, his writing was widely embraced by the public as it nourished the public's desire for higher moral and ethical standards for lawyers. The public became especially endeared to Train's most famous character, Ephraim Tutt, who resembled the mythical nineteenth-century country lawyer.<sup>4</sup> The popularity of this nostalgic character created a dilemma for twentieth-century lawyers, who were trying to modernize their legal practices to adjust to recent change, yet were plagued by Tutt and his representation of an idealized past.<sup>5</sup> One way in which the legal profession responded to this dilemma was through the implementation and revision of ethical regulations, which were supposed to bridge the gap between the esteem for the mythical legal past and the growing disrepute of lawyers in the twentieth century.<sup>6</sup> Arthur Train's writing acted as an intermediary be-

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<sup>3</sup> Train's dedication to the image of the country lawyer is not surprising considering his father, a Harvard Law School graduate, was a country lawyer. Even as the cities began to industrialize and urbanize, the country was much slower to change. Train noted that in the country "save for the twice daily toot of the locomotive and the greater prevalence of the newspaper, existence retained its former tranquillity in the country towns of New England, [while] enormous changes had taken place in the cities throughout the United States." ARTHUR TRAIN, *PURITAN'S PROGRESS* 164 (Charles Scribner's Sons 1930) (Train's autobiography) [hereinafter, TRAIN, *PURITAN*].

<sup>4</sup> See Arthur Train, *Should I Apologize?*, SAT. EVENING POST, Feb. 26, 1944, at 55 [hereinafter, Train, *Apologize*].

<sup>5</sup> The image of the nineteenth-century country lawyer embraced by Train was truly a mythical figure, and even lawyers in the nineteenth century did not resemble the country lawyer image. See, e.g., JOSEPH G. BALDWIN, *THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI* (La. State Univ. Press 1987) (1853) (showing the reckless manner in which lawyers practiced prior to the Civil War). In fact, the corrupt practices of some lawyers necessitated quick escape from the towns in which they practiced in order to avoid punishment. *Id.* As *The Flush Times of Alabama and Mississippi* suggests, the nineteenth century was not devoid of unethical legal practices, and not all lawyers practiced in an honest and principled manner. *Id.*

<sup>6</sup> The importance of maintaining the public's esteem for lawyers was a recurring theme in discussions on legal ethics. By the time the Canons of Ethics were promulgated in 1908, the public's confidence in lawyers had been "greatly sapped." Charles F. Chamberlayne, *Legal Idealism*, 21 GREEN BAG 436, 441 (1909) [hereinafter Chamberlayne, *Idealism*].

tween the public and the legal profession, and was integral in fostering discussion on the improvement of the legal profession.

From approximately 1870 through the 1920s, America experienced tremendous change that both transformed the country and what was required of the legal profession. Stalemate seemed inevitable as the legal profession felt pressure to modernize, yet the popularity of the image of an idealized legal past rallied against change. While the “serpents of industrialization, urbanization and immigration” transformed America, the legal profession tended to “drink[ ] so deeply from the cup of nostalgia” that it “impaired [its] ability to cope with social change.”<sup>7</sup> Tutt existed in a nostalgic landscape and was very popular for doing so. However, his popularity<sup>8</sup> was problematic as Tutt fortified the growing tension between the allure of an ideal, romanticized past, and the need for the profession to modernize to remain functional.

Despite the appeal of the past, the legal profession slowly yielded to change. One of the most glaring examples of such change was the development of urban law firms that began to specialize in a relatively new area—corporate law. Although the number of corporate firms originally remained small, “their power—economically and professionally—was considerable.”<sup>9</sup> The corporate bar posed a new and tempting option for law school graduates at the turn of the twentieth century, and many “[y]oung lawyers responded with alacrity to the challenge and income that awaited them in metropolitan corporate practice.”<sup>10</sup> Corporate law firms soon became the public’s scapegoat for their discontent with lawyers and the growing problem of the maldistribution of justice; for corporate firms directed their attention to the rising commercial power of big business and corporations, not to the needs of the under-

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<sup>7</sup> JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 17 (1976).

<sup>8</sup> Auerbach noted that the legal profession was not the only sector of society that desired to grasp onto the past rather than brace itself for contemporary change:

Others shared [lawyers’] myopia; indeed the American experience itself seemed to confirm man’s ability to leap backward from a sinful present and land with both feet in paradise. The American Adam haunts our national consciousness, reappearing whenever change is too swift, or its shock too sudden, for men to comprehend or tolerate.

*Id.* at 17.

<sup>9</sup> *Id.* at 30.

<sup>10</sup> *Id.* at 25.

privileged or the public.<sup>11</sup> On the whole, the public became frustrated as many people viewed lawyers as catering to the interests of big business and money-making, while casting aside their general responsibility to the public.<sup>12</sup> In the face of these changes, the public took comfort in images that reinforced and reminded them of the stability, homogeneity, and tranquility associated with the dissipating rural past.<sup>13</sup> In this respect, the image of the nineteenth-century country lawyer was enormously appealing to the public, but was an impractical standard to which the legal profession was held in the twentieth century. The public distrusted and loathed corporate lawyers who "[we]re not looked upon as were the lawyers of fifty years ago, as men whose eminent talents are at the service of any or every citizen who may desire to employ them in the protection or enforcement of his rights."<sup>14</sup>

This note analyzes the works of Arthur Train and how his writing created dissatisfaction with contemporary lawyers and applied pressure for the profession to react to this dissatisfaction. Part I discusses who Arthur Train was, and outlines the nature of his writing career. Part II examines the reality of early twentieth-century shyster firms by analyzing the Howe and Hummel law firm. Part III discusses the attributes associated with the mythical country lawyer in twentieth-century literature. Part IV analyzes Train's use of the Tutt character and explores the "life" of Tutt. Part V explores the public's belief in Tutt's existence and the ethical dilemma this belief created for the legal profession. Part VI

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<sup>11</sup> *Id.* at 12, 21. The maldistribution of justice was felt even stronger among minorities, since ethnic and racial prejudices created an environment in which justice was "distributed according to race, ethnicity, and wealth, rather than need." *Id.* at 12.

<sup>12</sup> Considering the allure of, and attention given to, the interests of corporations and big business by lawyers and firms, it is not surprising that the corporate bar became a scapegoat for the lack of esteem in the legal profession. See, e.g., Chamberlayne, *Idealism*, *supra* note 6, at 438-42. As dissatisfaction with the legal profession grew, one response by bar associations was to attempt to impress upon young lawyers and law students the ethical obligations expected of them. *Id.*

<sup>13</sup> AUERBACH, *supra* note 7, at 17.

<sup>14</sup> Marbury, *supra* note 1, at 72. Marbury disfavored corporate lawyers because he believed they were unlikely to use the law to serve the public interest, unlike nineteenth-century country lawyers. He noted that

great numbers of the very men who by reason of their talents and character would be best qualified to preserve and maintain in the minds of the people the ancient credit and prestige of the profession in the country at large—are to all intents and purposes withdrawn from that great service into the shadow of the great private interests of which, in the public view at any rate, they have become a part.

*Id.*

examines Tutt's legacy and the legal profession's response to the public's dissatisfaction with lawyers.

### I. ARTHUR CHENEY TRAIN AND HIS LITERARY PROGENY

Arthur Train was born in 1875 in Boston, Massachusetts. He graduated from Harvard University in 1896, and Harvard Law School in 1899.<sup>15</sup> Upon graduation, he took a job in the New York District Attorney's Office. Despite his enthusiasm for the criminal bar, Train soon found writing about the law more enjoyable than practicing it.<sup>16</sup> Thus, beginning in 1903, Train increasingly devoted his time to writing short stories and books, with his first published story appearing in *Leslie's Magazine* in 1904.<sup>17</sup> Thereafter, Train gained publicity and popularity with each short story, book, or article he published, especially those that focused on law or lawyers.<sup>18</sup> Before he died, Train published over 250 short stories and novels.<sup>19</sup> Train's most popular and beloved works were those describing the life of a fictitious lawyer, Ephraim Tutt, who began to appear in Train's stories in 1919.<sup>20</sup>

Train adopted two strategies to create momentum for reform of the legal profession. The first was to expose the corrupt nature of the practices of shyster lawyers and incite moral indignation amongst his readers

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<sup>15</sup> David Schmid, *Arthur Train*, in 21 AM. NAT'L BIOGRAPHY 799-800 (John A. Garraty & Mark C. Carnes, eds., 1999); see also TRAIN, PURITAN, *supra* note 3, at 321.

<sup>16</sup> See, e.g., ARTHUR TRAIN, MY DAY IN COURT 355-69 (Charles Scribner's Sons 1939) [hereinafter TRAIN, DAY].

<sup>17</sup> Schmid, *supra* note 15, at 799. Train's first published article was "The Maximilian Diamond." *Id.*

<sup>18</sup> Train went from being unknown in the literary world to becoming a regularly published author in the *Saturday Evening Post*, among other magazines. Train became a household name, and many of his books received a great deal of publicity. For instance, Train was featured on the front page of *The Saturday Review of Literature*, in which Stephen Vincent Benét reviewed one of Train's books. Stephen Vincent Benét, *Mr. Train and Mr. Tutt*, 19 SAT. REV. OF LITERATURE, Feb. 18, 1939, at 5 (book review). Train also had book reviews published in periodicals including *Time*, *Newsweek*, the *Harvard Law Review*, the *Yale Law Review*, and in the *New York Times*. See *infra* note 155.

<sup>19</sup> *Arthur Train Dead; Created 'Mr. Tutt,'* N.Y. TIMES, Dec. 23, 1945, at 18 [hereinafter *Arthur Train Dead*].

<sup>20</sup> Schmid, *supra* note 15, at 799. As Schmid noted, "Ephraim Tutt made Train famous." *Id.* at 800. Train also occasionally wrote short pieces based on real lawyers whom he admired. For instance, Train wrote an adulatory piece on William Travers Jerome, a district attorney of New York County, for a popular law magazine. See Arthur Train, *Jerome the Lawyer*, 17 GREEN BAG 617-22 (1905).

against such practices.<sup>21</sup> The second strategy was to create a paradigmatic "good lawyer"<sup>22</sup> that would serve as an example to twentieth-century lawyers. During the early portion of his literary career, Train wrote articles and novels that explored the unruly practices of shysters, pettifoggers, and other lawyers who personally profited from the abuse of law.<sup>23</sup> Train despised the underhanded and corrupt practices of such lawyers, and it seems that his writing was intended to reproach the actions of dishonest lawyers and discourage such behavior. In this regard, Train wrote several short stories and an entire book exposing the practices of the most disreputable, dishonest, and loathsome lawyers of his age, Abraham Howe and William Hummel.<sup>24</sup> Then, beginning in 1919, Train turned his efforts to creating Tutt, his paradigmatic country lawyer.

## II. UNDERMINING THE SHYSTER BAR: THE ATTACK ON HOWE & HUMMEL

Early in his literary career, Train attacked the practices of the two most notorious lawyers in nineteenth-century New York City: Abraham Howe and William Hummel.<sup>25</sup> Howe and Hummel stooped to the lowest levels in order to win clients, cases, and large fees. Train found this duo so abominable that he included accounts of the shocking downfall of Hummel's legal career in several books and in articles published in popular periodicals.<sup>26</sup> The biographer of Howe and Hummel suggested that they "owned reporters," and probably newspaper publishers as well, for even their smallest cases received wide publicity in nota-

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<sup>21</sup> Perhaps the quintessential example of a shyster law firm was that of Howe and Hummel. *See infra* Part II.

<sup>22</sup> Train's paradigmatic "good lawyer" was his character, Ephraim Tutt. *See infra* Part IV.

<sup>23</sup> Many of Train's earlier works exposed the corrupt legal practices of some lawyers. *See, e.g.* ARTHUR TRAIN, *THE CONFESSIONS OF ARTEMAS QUIBBLE* (1911) [hereinafter TRAIN, *CONFESSIONS*]; ARTHUR TRAIN, *COURTS AND CRIMINALS* (1912) [hereinafter TRAIN, *COURTS*]; and ARTHUR TRAIN, *TRUE STORIES OF CRIME* (1908) [hereinafter TRAIN, *STORIES*]. In *True Stories of Crime*, Train discussed the exploits of the Howe and Hummel law firm, the most infamous firm of the late nineteenth century. *See* TRAIN, *STORIES*, *supra*.

<sup>24</sup> *See infra* note 26.

<sup>25</sup> *See* TRAIN, *CONFESSIONS*, *supra* note 23; *see also* RICHARD H. ROVERE, *HOWE AND HUMMEL* (Farrar, Straus & Giroux, Inc. 1985) (tracing the careers of Howe and Hummel).

<sup>26</sup> The story of the downfall of Hummel, as written by Train, appears in several different volumes. *See* TRAIN, *STORIES*, *supra* note 23, at 283-313; TRAIN, *DAY*, *supra* note 16, at 140-49; ARTHUR TRAIN, *FROM THE DISTRICT ATTORNEY'S OFFICE* 251-69 (1939) [hereinafter TRAIN, *OFFICE*].

ble newspapers such as the *Herald*.<sup>27</sup> Howe and Hummel wrote articles on racy cases and legal issues, which provided entertaining, and sometimes raunchy, reading. The message these articles impressed upon the public was that lawyers were exploiting the law to serve their own ends.<sup>28</sup> It was this sort of message that caused the public to lose respect for lawyers and the profession. These stories confirmed the public's concern about the decline in the morals of lawyers, who no longer seemed "to be officers of a court seeking for truth and justice, but players of an unethical, intellectual game."<sup>29</sup> Howe and Hummel had a mastery of playing such a game.

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<sup>27</sup> ROVERE, *supra* note 25, at 14-16. The articles written by Howe and Hummel include "Is Love Avoidable?," "Jack the Ripper Explained," "Should the Anti-Tights Law Be Repealed?," "Is Marriage a Failure," and "Can Lawyers Be Honest?," (they thought that lawyers certainly could be honest.)" *Id.* at 16. Rovere also suggests that Howe and Hummel's publicity in the *Herald* may have been the result of services provided by the lawyers to the *Herald's* editor and publisher. *Id.* Howe and Hummel "were never above encouraging new crime as a means of creating future business for themselves." *Id.* at 115. They even wrote a book for this purpose entitled, *In Danger, or Life in New York. A True History of a Great City's Wiles and Temptations*. *Id.* at 115-16. The book was instructive on how to commit various crimes. *Id.* at 116-18.

<sup>28</sup> See, e.g., Eliot, *supra* note 2, at 67. Eliot notes:

Some considerable portion of the public from time to time gets much interested, through the newspapers, in this game of counsels umpired by the judge. They admire and applaud the ingenuity and spirit with which counsel take technical points for their clients, and the public press often sympathizes with and encourages this misdirected admiration.

*Id.*

<sup>29</sup> *Id.* The search for legal loopholes was one of the most common ways for Howe and Hummel to avoid justice being done. For instance, in 1888, Howe took the case of a "cop-killer" known as Handsome Harry Carlton, who had been convicted of first-degree murder. ROVERE, *supra* note 25, at 53. Prior to sentencing, Howe discovered that the New York Legislature, in trying to amend the "Electrical Death Penalty Law," had made a grave error. *Id.* at 54. The intent of the legislature was "to abolish hanging as of June 4 of [1888] and to institute electrocution on January 1, 1889; murderers convicted after June 4 were to be kept alive and in prison until the electric chair was ready." *Id.* However, the careless wording of the Act resulted in the state depriving itself "of the legal power to execute anyone who killed with malice aforethought during a period of almost seven months," for from June 4, 1888 to January 1, 1889, the Act did not prescribe a punishment for murder. *Id.* If Howe's argument—that Handsome Harry could not be punished—was persuasive on the court, the sentences of dozens of murderers in New York prisons would have to be voided. The trial judge agreed that "by the wording of the law, he had no power to sentence Carlton or any other first-degree murderer." *Id.* at 55. When the newspapers got wind of this technicality, they had a field day publicizing the incredible blunder. Some people feared the possible repercussions of the faulty law: people could kill with impunity for the remainder of 1888. *Id.* However, "the higher courts took the position that no mere slip in syntax could be allowed to jeopardize human life and that the intent of the Legislature, no matter how awkwardly expressed, had not been to declare a Borgian holiday." *Id.* at 56. Handsome Harry was the last person hung in the Tombs' courtyard. *Id.*



According to Howe and Hummel's biographer, the two men first met in 1863, when thirteen year-old Abraham Hummel sought employment with William Howe, and was given a job as an office boy.<sup>30</sup> By the time Hummel turned twenty, he had become the law partner of forty-one-year-old Howe.<sup>31</sup> "Between 1869, when the partnership was formed, and 1907, by which time Howe was dead and Hummel disbarred, they defended more than a thousand persons charged with murder or manslaughter."<sup>32</sup> The clients of Howe and Hummel included "every free-lance safecracker, forger, arsonist, confidence man, bucket-shop proprietor, and panel thief whose business was worth having."<sup>33</sup> Essentially, the Howe and Hummel law firm was the "Cadwalader, Wickersham & Taft of low practice."<sup>34</sup> The only portion of the practice that had the semblance of respectability was Hummel's work for celebrity clients, and particularly, the theatrical profession, including "actors, actresses and managers, men prominent in the world of sport, and wealthy members of the upper strata of society."<sup>35</sup>

The demand for Howe and Hummel's services was great because of their reputation for winning cases. Howe and Hummel had the capability of providing multi-faceted services—each specialized in different types of law, operated in opposite modes and capacities, and attracted customers from different ends of the social spectrum.<sup>36</sup> The firm was extremely successful because the partners worked in a symbiotic manner—"You might say that Hummel was the man you saw when you wanted to commit a crime without getting caught."<sup>37</sup> If you got in trouble, "Howe was there to get you out."<sup>38</sup> Howe enjoyed being in the courtroom and concocting oral arguments, and thus came to specialize in murder and criminal cases. Hummel, on the other hand, preferred to

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<sup>30</sup> ROVERE, *supra* note 25, at 45. The reason Howe hired Hummel, for he recognized "good legal timber" when he saw it. *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> RICHARD O'CONNOR, *COURTROOM WARRIOR: THE COMBATIVE CAREER OF WILLIAM TRAVERS JEROME* 27 (1963).

<sup>33</sup> ROVERE, *supra* note 25, at 7. In order to hire Howe and Hummel, a client had to pay in advance and in legal tender. "Numbering so many gifted forgers among their clients, the partners would not accept checks." *Id.* at 27.

<sup>34</sup> *Id.* at 123. According to William Travers Jerome's biographer, Howe and Hummel were the "mouthpieces of the underworld." O'CONNOR, *supra* note 32, at 27.

<sup>35</sup> *Abe Hummel Dies In London, Aged 75*, N.Y. TIMES, Jan. 24, 1926, at 3.

<sup>36</sup> ROVERE, *supra* note 25, at 89-90.

<sup>37</sup> *Id.* at 90.

<sup>38</sup> *Id.*

stay in the office for the majority of his practice, and specialized in the areas of divorce (which was highly restricted—and thus lucrative—in New York in the late nineteenth and early twentieth centuries), breach of promise suits,<sup>39</sup> the theater industry, copyright, and other civil matters.<sup>40</sup> Hummel willingly admitted that he resembled the shyster lawyer and was “a crook and . . . a blackmailer” with a single redeeming quality—“there’s one thing about me—I’m a neat son-of-a-bitch.”<sup>41</sup>

Howe and Hummel came to be known as the best criminal lawyers of their day. Contemporary lawyers looked upon Howe and Hummel with a mixture of fear, reverence, and awe. Some lawyers, such as Arthur Train, were disgusted by Howe’s courtroom performances, which were often filled with dramatic theatrics to play upon the jury’s emotions.<sup>42</sup> For instance, Train once noted

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<sup>39</sup> A breach of promise suit was an action brought when a man previously betrothed to a woman backed out of his promise of marriage. To break an engagement, especially if the couple engaged in pre-marital sexual relations, was extremely damaging to the reputation of a woman and was a highly undesirable turn of events. See generally *id.* at 94-95. “‘Seduction under promise of marriage,’ as they phrased it, enriched the firm, kept many a young woman in finery, and bedeviled the city’s wealthier womanizers.” O’CONNOR, *supra* note 32, at 27. Though “Howe and Hummel may not have invented the breach of promise suit . . . they developed it to the point where it was a more effective deterrent to stage-struck husbands than wifely tirades or hell-fire sermonizing.” *Id.* And it was known that Howe and Hummel specialized in this type of suit, for “[a]lmost any morning their waiting room contained several charmers from the theatrical district eager to discuss how their activities of the night before could be converted into ready cash.” *Id.* Not only did the women come to Hummel, but as a systematic blackmailer, Hummel searched for male victims according to their social status. Hummel was especially fond of rich men that were well known to the public, since they were most inclined to succumb to the scheming of Hummel in order to avoid public disgrace. *Id.* at 122-23. To these men, great sums of money would be worth spending in order to save one’s name from being slandered and plastered across the front page of the New York newspapers.

<sup>40</sup> ROVERE, *supra* note 25, at 77. The firm’s practice areas broadened over time to include new disreputable areas of law and the firm became even more successful in those areas in which it specialized from the beginning.

By 1890, the firm enjoyed, in addition to its near monopoly over the legal business of organized crime, the patronage of almost the entire theatrical community, a divorce practice larger than that of any other firm in the city, and a breach-of-promise blackmail racket that was said to have enriched the partners by well over a million dollars in the course of its operations.

*Id.*

<sup>41</sup> O’CONNOR, *supra* note 32, at 121; see also ROVERE, *supra* note 25, at 20.

<sup>42</sup> Arthur Train described a particular case in which Howe’s theatrical performance seemed to bring about an acquittal. TRAIN, COURTS, *supra* note 23. The case featured a woman who shot her lover, and whose guilt was essentially pre-determined. In preparation for this case, Train noted that Howe “was rather an exquisite so far as his personal habits were concerned, and allowed his fingernails to grow an extraordinary length.” *Id.* at 171. Howe had planned to

[n]o better actor ever played a part upon the court-room stage than old "Bill" Howe. His every move and gesture was considered with reference to its effect upon the jury, and the climax of his summing-up was always accompanied by some dramatic exhibition calculated to arouse sympathy for his client.<sup>43</sup>

In fact, "Howe's defenses were such good theatre that very often in the nineties the old Bowery Playhouse would contrive an evening's entertainment by acting them out straight from the court records."<sup>44</sup> Not only did Howe appeal to the jury's emotions, often by becoming emotional himself, but he would also hire people to testify or to sit in the courtroom audience and weep during a trial. According to his biographer, "[i]n the line of professional witnesses, Howe and Hummel kept on call as many sweet-faced grannies, fond wives, doting children, true-blue friends, and chin-choppered family doctors as any Broadway casting agency."<sup>45</sup>

While Howe might appear to have been the worst half of the partnership, Hummel also did his fair share of swindling. In fact, Hummel's career was almost forced to an end when he was disbarred for bribing a judge in Westchester County. A few months later, however, Hummel was reinstated, through methods "too sordid even to discuss" according to New York District Attorney William Travers Jerome.<sup>46</sup> Hummel engaged in an assortment of disreputable activities, one of which was framing rich men in breach of promise suits. Hummel would send two of his employees, Lewis Allen and Abraham Kaffenburgh, to solicit women starring in Broadway shows, as these women

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approach his client at the climax of his closing argument, grab her hands from her face as she wept, and challenge the jury to convict such a pitiable woman. What he actually did was "turn suddenly towards his client and roughly thrust away her hands. As he did so he embedded his finger-nails in her cheeks, and the girl uttered an involuntary scream of nervous terror and pain that made the jury turn cold." *Id.* at 171. Howe then asked the jury to "[l]ook in this poor creature's face! Does she look like a guilty woman? No!" *Id.* Howe then instructed that the jury "[s]end her back to her aged father to comfort his old age! Let him clasp her in his arms and press his trembling lips to her hollow eyes! Let him wipe away her tears and bid her sin no more!" *Id.* at 171-72. The client was acquitted. Howe's performance was so heart-stopping, that the jury could not ignore the effect of his exhibition in the courtroom.

<sup>43</sup> *Id.* at 170.

<sup>44</sup> ROVERE, *supra* note 25, at 125.

<sup>45</sup> *Id.* at 14.

<sup>46</sup> O'CONNOR, *supra* note 32, at 122. According to O'Connor, Hummel was reinstated through his attempts to convince "his peers to forget their concern for professional ethics." *Id.* Once he was reinstated, Hummel began to focus on the pecuniary merits of pursuing the breach of promise suit.

were commonly exposed to high-profile figures.<sup>47</sup> Allen and Kaf-fenburgh would tell the actresses and chorus girls how “last year’s infatu-ations could be converted into next year’s fur coats” through their cooperation with Hummel.<sup>48</sup> Then, a woman would (often falsely) claim that a wealthy man whom she previously dated had promised to marry her, sign an affidavit stating that he engaged in “seduction under the promise of marriage,” provide imaginary details, and give her case to Hummel.<sup>49</sup> Hummel would contact the man, inform him of the affida-vit, and provide two options: he could let the case go to court and face wide publicity, or he could arrange to settle the matter outside of court without any publicity. The threat of having his reputation damaged was usually enough to cause a man to choose to settle out of court. It was a costly option, however, since he would essentially buy the affidavit for sums between \$5,000 and \$10,000.<sup>50</sup> Half of this sum would go to the woman, and the other half would go to the Howe and Hummel law firm.<sup>51</sup>

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<sup>47</sup> ROVERE, *supra* note 25, at 93-94.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 92. Hummel made sure that each victim was not victimized a second time by the same woman with a different lawyer. In fact, as an overall precaution, Hummel made each woman involved in a breach of promise suit sign an affidavit before he would turn over her portion of the proceeds from the suit. *Id.* at 99.

‘Before I hand over her share,’ Hummel said, according to [George] Alger [of Alger, Peck, Andrew, & Rohlf], ‘the girl and I have a little talk. She listens to me dictate an affidavit saying that she has deceived me, as her attorney, not believing that a criminal conversation [one of the period’s legal euphemisms for an act of adultery] had taken place, that in fact nothing at all between her and the man involved ever took place, that she was thoroughly repentant over her conduct in the case, and that but for the fact that the money had already been spent she would wish to return it. She signs this, and I give her the money.’

*Id.* Also, since “[t]he firm kept no account books, and it was shy on records of any sort,” it was useless to try to subpoena documents from Hummel and it would have been difficult to black-mail Hummel other than by word of mouth. *Id.* at 27. In general, “Howe & Hummel had no use for paper of any kind, except paper money. All their communication with clients was by word of mouth, directly or by telephone, and by messenger.” *Id.* at 28.

<sup>50</sup> *Id.* at 92.

<sup>51</sup> The misuse of the breach of promise suit eventually led to its demise, for it was not used “to aid feminine virtue but primarily to line the pockets of pettifogging lawyers.” MICHAEL GROSSBERG, *GOVERNING THE HEARTH* 62 (1985). With breach of promise suits, Hummel often ended each suit in his office. The male victim and his lawyer would be invited to join Hummel in his office, complete with a lit fireplace, and Hummel would often provide drinks, Cuban cigars, and the affidavits involved in the case. ROVERE, *supra* note 25, at 96. Usually, the meeting would end with Hummel “tossing [the affidavits] into the fire with a gesture of handsome magnanimity.” *Id.* Hummel’s manner was so grand, that even his victims could not help but admire him. In fact, some of Hummel’s victims later decided that to avoid future suits

The climactic event that brought an end to Hummel's career, and which disgusted Train most of all, was the Dodge-Morse case handled by Hummel from 1903 to 1905.<sup>52</sup> The tactics employed by Hummel in this case were so low and discreditable that Train called Hummel "'a disgrace to his profession' and 'a stench in the nostrils of the community.'"<sup>53</sup> Hummel was presented with a proposition that if he handled a particularly difficult divorce case, he would receive a \$60,000 fee and a \$15,000 retainer.<sup>54</sup> The biographer of District Attorney William Travers Jerome noted that "[f]or that kind of money Abe would separate a man from a whole harem."<sup>55</sup>

The Dodge-Morse case involved Hummel's attempt to invalidate a legitimate divorce, between Mr. and Mrs. Dodge, so that the subsequent marriage between (the former) Mrs. Dodge and Mr. Charles Morse could instead be annulled, enabling Mr. Morse to re-marry.<sup>56</sup> Hummel bribed Mr. Dodge, offering \$5,000 for a perjured affidavit alleging that he had never been served with divorce papers.<sup>57</sup> But, it turned out that William Sweetzer, the attorney employed in the original divorce proceeding, "was highly offended at the suggestion that he had engineered a divorce by fraudulent means, remembered very well that he had served Dodge with the papers, and announced his intentions of contesting the

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by Howe and Hummel "it would be sound economy to pay Howe & Hummel a regular retainer to keep down [legal] expenses." *Id.* at 95.

<sup>52</sup> *Id.* at 138, 148. Train published accounts of the "Downfall of Hummel" in various volumes. See *supra* note 26. It seems that Train wanted to make sure lawyers knew the story of Hummel so they would associate the unethical behavior of Hummel with his subsequent incarceration.

<sup>53</sup> ROVERE, *supra* note 25, at 101. Train was generally disgusted by the amount of power Hummel possessed.

Who could accomplish that in which the law was powerless?—Hummel. Who could drive to the uttermost ends of the earth persons against whom not a shadow of suspicion had previously rested?—Hummel. Who dictated to the chiefs of police of foreign cities what they should or should not do in certain cases; and who could, at the beckoning of his little finger, summon to his dungeon-like offices . . . the most prominent of lawyers, the most eminent of citizens?—Surely none but Hummel.

TRAIN, *STORIES*, *supra* note 23, at 283-84.

<sup>54</sup> TRAIN, *DAY*, *supra* note 16, at 141.

<sup>55</sup> O'CONNOR, *supra* note 32, at 127.

<sup>56</sup> TRAIN, *OFFICE*, *supra* note 26, at 252. The reason Morse wanted an annulment, as opposed to a divorce, was that he wanted "when freed of his second wife, to take a third, who was Roman Catholic by faith and who could not have married him if he had been a divorcé." ROVERE, *supra* note 25, at 139.

<sup>57</sup> TRAIN, *DAY*, *supra* note 16, at 141-42; see also O'CONNOR, *supra* note 32, at 127. The \$5,000 came from a relative of Hummel's client, Morse, and was an irresistible inducement to Dodge, who had difficulty holding down employment. TRAIN, *DAY*, *supra* note 16, at 141-42.

annulment.”<sup>58</sup> Sweetzer looked up records on Dodge’s divorce and found correspondence showing Dodge received the divorce papers. Rather than face the consequences of his conspicuous attempts to flout and obstruct the law, Hummel decided to ensure that Dodge would be kept from testifying about Hummel’s unethical behavior.<sup>59</sup> To this end, Hummel sent one of his own detectives, Edward Bracken, to escort Dodge around the country for months and debase him with all of the drugs, alcohol, and women that he wanted while keeping Dodge away from the authorities.<sup>60</sup>

As time passed, it seemed “Hummel’s plan was to kill Dodge by concentrated dissipation.”<sup>61</sup> Despite the attempts of Hummel and his cronies to hide Dodge from the authorities, Dodge was finally captured on a train headed for San Antonio, Texas.<sup>62</sup> Hummel’s attempt to keep Dodge from testifying was, according to Train, “probably the most spectacular attempt to defeat the law in the history of American crime.”<sup>63</sup> When the case finally went to trial, it took the jury only eighteen minutes to find Hummel guilty of conspiracy.<sup>64</sup> In the end, Hummel was

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<sup>58</sup> O’CONNOR, *supra* note 32, at 126, 128. On October 20, 1903, Hummel appeared before a referee regarding the validity of Clemence’s (Dodge’s first wife) divorce from Dodge. *Id.* Hummel needed to prove that Sweetzer did not serve the divorce papers to Dodge six years earlier and did so by proving Sweetzer could not even identify Dodge. To do this, Hummel had his assistants find a man that resembled Dodge in build and age. They found a man named Herpich in a park, paid him twenty-five dollars, and had him show up in court to be seen with Hummel. *Id.* at 128-29. When Sweetzer arrived, he said hello to Herpich, thinking he was Dodge, and as such, “[t]he hearing was over before it began. Hummel had little difficulty in persuading the referee that, since Sweetzer had mistaken Herpich for Dodge, he was probably mistaken in claiming that he had served Dodge with the divorce papers.” *Id.* at 129. The referee declared the divorce between Clemence and Dodge void. However, Sweetzer felt that his professional honor was at stake and was determined to prove that he had, in fact, served Dodge with divorce papers.

<sup>59</sup> *Id.* at 131. Hummel knew that “[n]o Dodge, no airtight case, was [District Attorney] Jerome’s dilemma.” Hummel was especially concerned about keeping Dodge from testifying about Hummel’s use of bribery to induce Dodge to perjure himself.

<sup>60</sup> TRAIN, DAY, *supra* note 16, at 144; ROVERE, *supra* note 25, at 148-49, 136 (“Life for Dodge, as later became apparent, was at its most joyous when it was featured by a wide variety of erotic experiences, including a rapid turnover in prostitutes, liquor and dope in abundance . . .”).

<sup>61</sup> ROVERE, *supra* note 25, at 157.

<sup>62</sup> TRAIN, STORIES, *supra* note 23, at 302-03, 309; *see also* ROVERE, *supra* note 25, at 151.

<sup>63</sup> TRAIN, DAY, *supra* note 16, at 144. By the time District Attorney Jerome got a chance to talk to Dodge, the latter could barely speak because Hummel’s debasement plan resulted in the loss of Dodge’s every tooth. Jerome had to order a set of false teeth so that Dodge could testify against Hummel. ROVERE, *supra* note 25, at 157.

<sup>64</sup> ROVERE, *supra* note 25, at 161-62.

sentenced to one year of imprisonment on Blackwell's Island and fined \$500.<sup>65</sup>

To counter the sensationalist newspaper articles that reported the legal feats of Howe and Hummel in a virtually laudatory manner, Train undertook his own writing campaign.<sup>66</sup> By exposing the frightening fate of the legal profession if left to the unchecked and outrageously unethical practices of Howe and Hummel, Train was able to stimulate public opinion and help shape a strong basis for the need of ethical regulations. Train's accounts of Hummel's downfall in *True Stories of Crime* and *The Confessions of Artemas Quibble* sought to excite public and legal opinion against lawyers who were willing to practice law as shysters.<sup>67</sup> While the newspapers made the exploits of Howe and Hummel seem thrilling and exciting, Train attempted to portray their practices as disreputable and unacceptable. For instance, in *The Confessions of Artemas Quibble*, Quibble, the character who was Hummel in everything but name,<sup>68</sup> experienced, "[w]ith a harrowing sense of helplessness, the realization of what [he] had thrown away of life."<sup>69</sup> Whether Hummel ever had such a realization in life is unknown, but it seems clear that Train was attempting to make a lesson of Hummel, namely, that despite the money and notoriety he had gained, it was worthless as he had lowered himself into disrepute by abusing the ends of justice.

Although Train used sensationalism to make his lessons apparent, he did so to illustrate Hummel's character as a malefactor and to deter similar behavior by other lawyers. While there were rumors that Howe and Hummel had "bought" the press, which explained their favorable

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<sup>65</sup> *Abe Hummel Dies in London*, *supra* note 35. It is noteworthy that Hummel's sentence was rather light, and it has been attributed to the fact that Hummel made a deal with the District Attorney (William Travers Jerome) to provide crucial information concerning another case. ROVERE, *supra* note 25, at 162-63.

<sup>66</sup> Train's foremost work devoted to vilifying this pair—and Hummel in particular—was *The Confessions of Artemas Quibble*. The book was published both serially in *The Saturday Evening Post*, and as a novel. See TRAIN, CONFESSIONS, *supra* note 23; TRAIN, DAY, *supra* note 16, at 506.

<sup>67</sup> In *The Green Bag*, a popular legal magazine in the early-twentieth century, it was common for short anecdotes to be published about recent happenings. One such anecdote featured Howe being robbed by two men when one of the robbers realized Howe had previously been his lawyer. Howe's client then apologized for the robbery and informed his friend that he might need Howe in the future if he was ever arrested. *Editorial Department*, 14 GREEN BAG 609 (1902).

<sup>68</sup> Train did not actually use Hummel's name in the book, but it is clear that the story is based on Hummel's career and that the character, Artemas Quibble, is meant to be Hummel.

<sup>69</sup> TRAIN, CONFESSIONS, *supra* note 23, at 205.

and frequent treatment in the news, Train used *The Confessions of Artemas Quibble* to demonstrate that exposing truth could be even more exciting and profitable than sensationalist accounts of injustice and the defilement of the judicial process. By way of example, Train noted that once Quibble had been captured, “the papers began a regular crusade against [him],” and Quibble, “in all this storm of abuse and incrimination which now burst over [his] head[ ],” was shocked to find no supporters offering grounds “in mitigation of [his] alleged offence.”<sup>70</sup>

Train’s final point in regard to the practices of Howe and Hummel was that lawyers who practiced unethically, dishonestly, and disreputably should not be allowed to practice law, and punishment should follow. Notably, at the end of *The Confessions of Artemas Quibble*, Train described a scene in which two newly convicted lawyers passed a mob of onlookers on their way to prison. One member of the crowd uttered, “There go the shysters! . . . Sing Sing’s the best place for them!”<sup>71</sup> By demonstrating that corrupt legal practices should not be tolerated, Train’s writing had the effect of nourishing the seed for legal reform in the minds of the public and his colleagues at the bar.

Between the publication of *The Confessions of Artemas Quibble* in 1911, and Train’s first story about his imaginary character, Ephraim Tutt, which appeared in 1919, Train’s literary focus shifted from highlighting the abuses of the law to providing an example for lawyers to follow. In an interview, Train mentioned that he felt a change in his writing, “I felt much more intent about it. It took hold of me very strongly when I was writing about Ephraim Tutt. . . . I think [the Ephraim Tutt stories] were possibly the first stories I had written which made me feel emotion.”<sup>72</sup> Beginning in 1919, Train began to idealize the image of the country lawyer and sought to popularize this image through the character of Ephraim Tutt. It seems that Train hoped if lawyers and judges read the Tutt stories and books, perhaps they would become convinced of the merits of practicing law in the upright and honest manner in which Tutt practiced. By creating Tutt, Train created an archetype of the sort of lawyer he envisioned rendering justice in America. Not only was Tutt appealing to the members of the bar, but because of his conservative views and amiable, humanitarian nature,

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<sup>70</sup> *Id.* at 216-17.

<sup>71</sup> *Id.* at 227.

<sup>72</sup> GRANT OVERTON, *AMERICAN NIGHTS ENTERTAINMENT* 100 (1923).



Tutt was admired by the public as well.<sup>73</sup> Through the character of Tutt, Train was able to reach a wide spectrum of American society and convince his readers that lawyers like Tutt could, and should, exist. For the next twenty-six years, Train published books and stories about the legal feats of Ephraim Tutt, whose life was filled with happenings only possible in fiction.

### III. THE MYTHICAL COUNTRY LAWYER

As the example of Howe and Hummel illustrates, the idea of an honest lawyer in the twentieth century seemed more of a joke than a reality. For instance, in a 1906 poem entitled "The Lawyer," Shearon Bonner revealed the dichotomy between the mythical country lawyer and the modern lawyer.<sup>74</sup> On the one hand, the country lawyer was praised for his honesty, good will, moral character, and being a champion of justice.<sup>75</sup> In comparison, the modern lawyer was associated with a lack of honesty, unethical behavior, and greed.<sup>76</sup> For instance, the characters of Bonner's poem walked past a graveyard, where "on a grave this line they chanced to scan: 'Here lies a lawyer and an honest man.'"<sup>77</sup> The response to this epithet was: "Strange! Here are two men

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<sup>73</sup> Train was able to attract the public's attention to Tutt by publishing short stories on the law in popular magazines such as *The Saturday Evening Post*. Many of these stories were later compiled and published as books.

<sup>74</sup> Shearon Bonner, *The Lawyer*, 18 *GREEN BAG* 451, 451-52 (1906).

<sup>75</sup> *Id.* For instance, Bonner's poem begins by discussing lawyers very favorably.

Of all the men by whom mankind are blest,  
Methinks an honest lawyer is the best.  
Whether he's counsel, or as judge he sit,  
He's man's best friend all men of sense admit;  
He's bulwark of our glorious government,  
And for humanity's good makes argument.  
Whenever quarrels come, with tale of woe  
You straightway to some lawyer's office go,  
Knowing that he can make of foe a friend,  
And by his counsel ancient difference end.  
Even the criminal who makes for strife  
Looks to his attorney for his life[.]

*Id.* Bonner went so far as to say that without lawyers "[t]would be, I know, a very hell on earth!" *Id.* at 451. It seems that Bonner placed lawyers at the pinnacle of society, for he noted, "the lawyer sets the moral tone [o]f each community where he has a home: [y]ou'll find it true, though go you near or far, [a] town's no better than its lawyers are." *Id.* at 451.

<sup>76</sup> *Id.* at 451-52.

<sup>77</sup> *Id.* at 451.

buried in one grave.”<sup>78</sup> Although Bonner used humor to emphasize the rift between myth and reality, the public was not amused. The quality of lawyers seemed to be deteriorating at the cusp of the twentieth century, and although it was necessary for the legal profession to modernize and remain serviceable in the face of the rapid changes in society,<sup>79</sup> the public remained dissatisfied.<sup>80</sup>

The myth of the twentieth-century country lawyer did not exist only in the realm of fiction. Even celebrity lawyers of the twentieth century paid homage to the image of the mythical country lawyer, despite the incongruity between the practices of their large, urban, corporate, firms and that of a small-town country lawyer.<sup>81</sup> For instance,

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<sup>78</sup> *Id.* The popular lawyer journal, *The Green Bag*, often featured poems written about the profession of law. Another poem published at the turn of the twentieth century was L.G. Smith's "The Evolution of the Ambulance Chaser." L.G. Smith, *The Evolution of the Ambulance Chaser*, 14 *GREEN BAG* 263, 263-64 (1902). In this poem, the earth was examined in the year 2, at which time it seemed shocking that trilobites were feasting on "luckless mites." *Id.* at 263. In the year 1902, greedy lawyers, who "in accidents delight," were found to be swarming the streets, "like vultures," engaging in "foul play" as they searched for their next victim and "almighty dollar." *Id.*

<sup>79</sup> One example of how the profession of law modernized was by becoming more professionalized, regulated, and uniform—particularly with legal education. For instance, the corporate law firm and the full-time law professor have been dubbed the "[t]win offspring of modernization and specialization in an urban industrial society." AUERBACH, *supra* note 7, at 74. At a time when the United States was modernizing and becoming increasingly industrialized and urbanized, the profession of law responded. For example, there was a shift in law firm size, moving away from small law offices and toward large corporate firms. Also, legal education was transformed from informal legal study through apprenticeships and self-imposed study, to a mandatory curriculum administered through college and university law programs. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 256-76 (1950).

<sup>80</sup> Eliot, *supra* note 2, at 65-74.

<sup>81</sup> It seems that the public was not alone in embracing the image of the mythical nineteenth-century country lawyer. For instance, in his autobiography, Clarence Darrow reminisced about "the business of the country lawyer in my day," however, Darrow spent little time in the country and made a renowned career for himself once he moved from small-town practice. CLARENCE DARROW, *THE STORY OF MY LIFE* 37 (1996). Another example of a twentieth-century lawyer who attempted to resemble the mythical small-town country lawyer despite being a tycoon of the corporate bar was John W. Davis. On the one hand, Davis' reputation fit within the meaning of a country lawyer, for he was known for his "dignity, clarity, and straightforwardness" and "all-around craftsmanship." WILLIAM H. HARBAUGH, *LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* 42, 59 (1990). By the time he was in his mid-thirties, he was "the recognized leader of the younger bar." *Id.* at 59. In fact, one of his colleagues even noted "[i]ntegrity was a naturally dominant element of his character." *Id.* After serving as Solicitor General, Davis' public-mindedness seemed to cease, as he embraced the opportunity to make huge sums of money. Davis' remuneration package in 1920 included "a \$50,000-a-year guarantee, and fifteen percent of the net." *Id.* at 183. This amounted to "\$469,000 in the first seven months of 1920." *Id.* Davis' clients consisted of large businesses and corporations, including International

John W. Davis noted that “[t]here is one thing you’ve got to learn as a country lawyer, and that is, to take care of yourself, to be confident in your own decisions and efforts.”<sup>82</sup> Davis never addressed the “contradiction between his views on small-town training and his firm’s practice of hiring associates directly out of law school.”<sup>83</sup> Nor did he reconcile the wide divergence between his urban, corporate firm, Davis Polk Wardwell Gardiner & Reed, and small-town country practice. The image of the mythical country lawyer was an extremely powerful symbol in the early twentieth century; no character better demonstrated the power of the myth than Ephraim Tutt.

In order to grasp the role that Ephraim Tutt played in the saga of the country lawyer myth versus the twentieth-century reality, it is important to identify the traits attributed to the mythical country lawyer. First, country lawyers were known for their absolute “devot[ion] to the profession,” and the “conscientious thoroughness with which they prepared every cause which was entrusted to their care.”<sup>84</sup> Beyond these characteristics, the mythical country lawyer undertook

professional labors [that] were enormous. They did the kind and amount of work which only a man who is a true lover of the law and jealous of the ancient reputation of his profession can do. . . . [They never] made a fortune, but each of them made a name which the mightiest multi-millionaire of modern times could not purchase. They enjoyed the unbounded confidence, the unmeasured admiration of their fellow citizens, not only because of their transcendent abilities, but because they were known to be men whose honor money could not buy.<sup>85</sup>

The country lawyer was respected by his neighbors and community and was their chief source for guidance and advice. Country lawyers were known for their wide professional knowledge of esoteric concepts, which enabled them to take any case that came their way.<sup>86</sup> Moreover, the

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Paper, the Associated Press, and J.P. Morgan and Company. *Id.* at 202, 182-83, 318. In these respects, Davis was certainly not a country lawyer.

<sup>82</sup> HARBAUGH, *supra* note 81, at 253.

<sup>83</sup> *Id.*

<sup>84</sup> Marbury, *supra* note 1, at 65.

<sup>85</sup> *Id.*

<sup>86</sup> AUERBACH, *supra* note 7, at 15; *see also* ARTHUR TRAIN, *YANKEE LAWYER: THE AUTOBIOGRAPHY OF EPHRAIM TUTT* (1943) [hereinafter TRAIN, *YANKEE*]. *Yankee Lawyer*, the quintessential book on Tutt, is perhaps the best example of Train’s conception of the country lawyer.

image of the archetypal country lawyer symbolized “equal opportunity, social mobility, and professional respectability.”<sup>87</sup> Beyond these characteristics, the country lawyer had practical wisdom, good judgment, broad knowledge, and was sympathetic towards various causes.<sup>88</sup> Tutt possessed all of these traits; his “outstanding characteristics” were once described as including

erudition, a thorough knowledge of the law, a great ability to make use of this knowledge in the interest of his clients, a choice of his clients irrespective of whether or not they are able to pay for his services, a highly idealistic approach to the legal profession, and a readiness to combat any betrayal of its ideals by either judge, prosecutor or attorney-at-law.<sup>89</sup>

The combination of these character traits created a tremendous burden that haunted the twentieth-century lawyer. Considering that it was impossible for most nineteenth-century lawyers to embody the traits this fictitious image possessed, it was even more impractical to suggest that lawyers in the twentieth century could encompass all of these characteristics.

### III. EPHRAIM TUTT: THE PARADIGMATIC COUNTRY LAWYER

The most popular of all of Arthur Train’s books was Ephraim Tutt’s “autobiography,” *Yankee Lawyer*.<sup>90</sup> It is important to note that this book was actually written by Arthur Train although it was called an “autobiography” of Tutt.<sup>91</sup> In a review by the *American Bar Association Journal*, *Yankee Lawyer* was said to be “by far the best book in existence by a contemporary lawyer about a contemporary lawyer and the laws of our time.”<sup>92</sup> This acclamation for the book reveals the central problem behind the Tutt character. Tutt was not a contemporary lawyer at all,

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<sup>87</sup> AUERBACH, *supra* note 7, at 16.

<sup>88</sup> *Id.* at 15-16.

<sup>89</sup> Maximilian Koessler, *Mr. Tutt at His Best*, 47 A.B.A. J. 719 (1961) [hereinafter Koessler] (reviewing ARTHUR TRAIN, *MR. TUTT AT HIS BEST* (1961)).

<sup>90</sup> TRAIN, *YANKEE*, *supra* note 86.

<sup>91</sup> When the book was published, there was great confusion over who authored the book. For instance, when the identity of Train and Tutt were called into question, one devoted Tutt reader insisted that “Mr. Train is himself Mr. Tutt.” *Sure, Virginia, There’s a Mr. Tutt*, SAT. EVENING POST, Apr. 8, 1944, at 4.

<sup>92</sup> Reginald Heber Smith, *Yankee Lawyer*, 30 A.B.A. J. 630 (1944) (reviewing ARTHUR TRAIN, *YANKEE LAWYER: THE AUTOBIOGRAPHY OF EPHRAIM TUTT* (1943)).

but a fictitious character. When periodicals—some tailored to the legal profession, others to the public at large—confused the myth of the country lawyer with contemporary practice, it is easy to imagine how simply and quickly readers became confused. The uncertainty over Tutt's existence exacerbated the developing dilemma that the legal profession faced: trying to ensure the ethical practice of law in an increasingly complex and changing profession. The willingness of readers to believe that Tutt's anomalous and antiquated practices were viable in modern, twentieth-century law firms made it virtually impossible for drafters of ethical rules to create functional standards guiding lawyers through the ethical and moral minefields involved in an increasingly corporate society.

According to Tutt's "autobiography," he was born in 1869 in Vermont and rose from a humble background to that of a Harvard University graduate.<sup>93</sup> Tutt excelled in all of his classes and upon completion of his undergraduate work he applied and was accepted to Harvard Law School.<sup>94</sup> Following graduation, Tutt chose to practice law in Pottsville, a small country town in New York.<sup>95</sup> At the time, the town's only lawyer had recently died, and Tutt was offered the deceased's office, complete with books, for five dollars per month.<sup>96</sup> Tutt hung a sign outside of his office, and waited for clients, though none came. It was not until Tutt found an old stovepipe hat<sup>97</sup> in his office and wore it around town that he began to attract clients. For Tutt, the hat proved to be signifi-

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<sup>93</sup> TRAIN, *YANKEE*, *supra* note 86, at 1, 36.

<sup>94</sup> *Id.* at 15-36. It is noteworthy that there is some similarity between Tutt's and Train's lives. Tutt was "born" in 1869, Train was born in 1875, and both went to Harvard Law School within the same time period. Also, both worked in the New York District Attorney's Office and then engaged in private practice. Paradoxically, Train developed Tutt's character as well-rooted in the image of the nineteenth-century country lawyer, yet Tutt went to the most progressive law school in the nation, Harvard, at a time when law schools were beginning to replace the traditional modes of legal education: the apprenticeship and self-study of the law. *See also supra* note 79.

<sup>95</sup> *Id.* at 44.

<sup>96</sup> *Id.* at 47.

<sup>97</sup> The mention of a stovepipe hat conjures up images of Abraham Lincoln, who practiced law temporarily in a small country town. In fact, a *New York Times* book review on *Tutt and Mr. Tutt* reveals that the likeness of Tutt to Lincoln cannot be lost on the reader. It was noted that, "[t]he hero of the book is Mr. Tutt, who in the first story has a frame like Lincoln's, and by the end of the book has progressed so far that his face looks like Lincoln's: an admirable character, and one whom every reader will wish he could hire to defend him." *Tutt and Mr. Tutt*, N.Y. TIMES, Apr. 18, 1920, at 199 (reviewing ARTHUR TRAIN, *TUTT AND MR. TUTT* (1920)). The comparison between Tutt and Abraham Lincoln reveals the extent to which Train portrayed Tutt as a noble, honest man who was admired by the public and his colleagues for his legal skill and

cant, for as he noted, "through the fortuitous combination of . . . a stovepipe hat and a few ambiguous Latin phrases I became locally famous."<sup>98</sup>

As a country lawyer, Tutt's practice was to take every meritorious case that came his way, regardless of whether or not clients could afford to pay a fee. Since few clients were able to pay Tutt in cash, he had the tendency to accept goods and services as remuneration. In fact, Tutt's "autobiography" notes, "[i]n the country doctors and lawyers often have to take their payment 'in kind,' and during the four years of my practice in Pottsville I received in lieu of cash a total of several cart loads of apples, onions, turnips, beets and potatoes[.]"<sup>99</sup> True to the ideals of the mythical country lawyer, Tutt's philosophy was that "pay in cash was negligible, but what I learned was beyond all price."<sup>100</sup> In reality, taking cases without payment was practically unheard of, even in nineteenth-century law practice.

It seems that Train intended to write *Yankee Lawyer* so that his readers might believe that Tutt was an actual lawyer.<sup>101</sup> In order to make his book realistic, Train had Tutt interact with well-known people. For instance, while Tutt was on a visit to New York City, a man near him slipped and sprained his ankle. Tutt helped him to a cab, the man gave Tutt his card and told Tutt to come to his office the following day. The man turned out to be the infamous Tammany boss, Richard Crocker, and when Tutt went to his office the next day, he was offered the job of deputy assistant district attorney.<sup>102</sup> Tutt took the job, claim-

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sense of humanity. See STEPHEN B. OATES, *WITH MALICE TOWARD NONE: THE LIFE OF ABRAHAM LINCOLN* (1977) (outlining the life and legal career of Abraham Lincoln).

<sup>98</sup> TRAIN, *YANKEE*, *supra* note 86, at 51. After promenading around town with his new hat, Tutt no longer had a dearth of clients—nor did he reach immediate financial prosperity.

<sup>99</sup> *Id.* at 54.

<sup>100</sup> *Id.* at 61; see HURST, *supra* note 79, at 311-14 (outlining lawyers' incomes from the mid-nineteenth century to the early-twentieth century). Hurst makes it clear that money was the only mode of payment accepted by lawyers. He also discusses the conditions of law firms and typical practices of lawyers during this time period.

<sup>101</sup> Train went to great lengths to make it seem that Tutt was in fact a real person. At times, when people wrote to Train regarding Tutt, Train would respond on stationary with the likeness of Tutt printed in the corner and sign Tutt's name. See *infra* text accompanying note 140.

<sup>102</sup> Train's inclusion of Tammany politicians and government corruption is likely a product of a job he held in 1910, when Governor Charles Evans Hughes named Train to be a special deputy attorney general "to investigate political offenses in Queens County." *Arthur Train Dead*, *supra* note 19, at 18. Through Train's ten-week investigation of graft in Queens, he was able to indict ninety-five politicians. *Arthur C. Train is Dead at 70*, N.Y. HERALD TRIB., Dec. 23, 1943, at 14. However, his assignment was short-lived, for as soon as Governor John Alden

ing complete naïveté to the nature of political machine politics, and insisting he worked with an “honest capable lot.”<sup>103</sup> Tutt did not last long in the city or with the bosses. In Tutt’s words, he soon found out that “the worst enemies of society were not those who were daily dragged to the bar before my eyes but those in power who profited by the alliance between politics and crime, vaguely known in New York at that time as ‘The System.’”<sup>104</sup>

Since the mythical country lawyer held the law in great esteem and worked to promote justice, it was no wonder that Tutt grew increasingly dissatisfied with his job and the law. Like his readers, Tutt voiced dissatisfaction with the way in which law was used to serve private ends, and saw the administration of law by modern lawyers as featuring unfairness and greed.<sup>105</sup> After witnessing the shortcomings of the law in public practice, Tutt hoped to render the even-handed distribution of justice to all by leaving the corruption of machine politics at the district attorney’s office and joining private practice.

Tutt accepted an offer to be a junior partner at the Wall Street “law factory,” Hotchkiss, Levy & Hogan.<sup>106</sup> This firm was not conducive to the type of work with which Tutt was most familiar, and desired to perform. When Tutt compared the client rosters of his country and city practices, he found that “[u]ntil I joined Hotchkiss, Levy & Hogan, my clients had all been humble folk; now, and for the next five years, they were chiefly bankers, railroad presidents, mine owners or industrialists.”<sup>107</sup> This quickly became an anathema to Tutt, because he did not

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Dix replaced Governor Hughes, Train was removed from his post. TRAIN, DAY, *supra* note 16, at 262.

<sup>103</sup> TRAIN, YANKEE, *supra* note 86, at 89.

<sup>104</sup> *Id.* at 103.

<sup>105</sup> *Id.* at 107. Tutt found the large fees lawyers charged clients an obstacle of justice. He noted, “one of the chief reasons why law was not justice was because law was a luxury which the poor could not afford. To enforce one’s rights costs money.” *Id.* at 107. Over a decade before Tutt’s creation, the American Bar Association had already begun to convey its concern with “the growing tendency of the newer lawyers to regard their calling . . . as a money-getting trade,” and the passage of the 1908 Canons of Ethics was a response (and purported solution) to this and other ethical problems. George P. Costigan, Jr., *The Proposed American Code of Legal Ethics*, 20 GREEN BAG 57 (1908).

<sup>106</sup> TRAIN, YANKEE, *supra* note 86, at 142. This also mirrored the career of Train, who served as assistant district attorney for seven years, and then joined private practice for several more. TRAIN, DAY, *supra* note 16, at 253.

<sup>107</sup> Compare TRAIN, YANKEE, *supra* note 86, at 148-49, with *supra* text accompanying notes 99-100 (comparing Tutt’s old clients who sometimes could not even pay Tutt in cash to Tutt’s new, big business, clients). The type of clients Tutt had at Hotchkiss, Levy and Hogan were

find the legal problems of his “big business” clients compelling, for “[w]hatever wrongs they had suffered did not affect their personal lives; irrespective of the result of the cases they would be just as comfortable as before.”<sup>108</sup> Tutt longed for small civil and criminal trials, in which he was fighting for a client’s liberty—or even one’s life. Corporate firms, such as Hotchkiss, Levy & Hogan, “symbolized a new role of the bar. They reflected the demands of big business clients.”<sup>109</sup>

As the nation became more industrial, commercial and urban, law in the cities seemed to grow distant from the individual.<sup>110</sup> In fact, one popular author noted “[l]aw, in the city, is as distant from the individual as the stars. With the exception of the few called for jury duty . . . the only New Yorker who ever sees the inside of a courthouse is the unfortunate individual in quest of a divorce or in possession of a ticket for [a] traffic violation.”<sup>111</sup> Yet, in the country, “the machinery of the law is as familiar to the countryman as the machinery for cutting hay. He knows a lawyer to go to. . . . [h]e is probably acquainted with the judge. And it is quite likely that he understands a thing or two about the legal aspects of the question at issue.”<sup>112</sup> Lawyers in the country were seen as more likely to be engaged in the affairs of individuals and small businesses while lawyers in cities increasingly gave their attention to the service of large businesses and commercial interests. Concern began to grow that in the cities, “commerce ha[d] succeeded in imposing her own standards of worth, success, and respectability . . . and indifference to the ethical quality of any successful method for meeting [wealth] [was] deepen[ing].”<sup>113</sup> It was feared that lawyers had come to place higher

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similar to the clients Davis had at Davis Polk Wardwell Gardiner & Reed, only Tutt clearly viewed these types of clients as those of a “city firm” and did not associate country law practices to such “big business” clients. *Compare id.* at 149, *with supra* notes 81-83 and accompanying text.

<sup>108</sup> *Id.* at 149.

<sup>109</sup> HURST, *supra* note 79, at 307.

<sup>110</sup> Another popular author who perpetuated the myth of the country lawyer was Bellamy Partridge. He lamented the changing role of law and wrote of an embellished distinction between the role of law in the cities versus the country. BELLAMY PARTRIDGE, *COUNTRY LAWYER* (1939). Partridge noted that people residing in small country towns in the late-nineteenth century liberally used their country lawyer to resolve disputes, while people living in the city saw law as far removed from their grasp. *Id.* at 263-65.

<sup>111</sup> *Id.* at 263.

<sup>112</sup> *Id.* at 264.

<sup>113</sup> Charles F. Chamberlayne, *The Soul of the Profession*, 18 GREEN BAG 397 (1906) [hereinafter Chamberlayne, *Soul*]; *see also* AUERBACH, *supra* note 7. The myth of the country lawyer wreaked havoc on the profession of law in the twentieth century, for lawyers felt a need to



regard on the fee they would earn by representing a client than on the principle upon which a case was based.<sup>114</sup> Despite these trends, Tutt seemed to move against the grain of twentieth-century law practice, for his foremost concerns were the fair administration of justice, the provision of legal services to every client with a worthy case, and the ethical practice of law.<sup>115</sup>

After five years with his "nose flattened against the legal grindstone,"<sup>116</sup> Tutt left the city and returned to small-town practice. The decisive event that caused Tutt to quit Hotchkiss, Levy & Hogan occurred during a meeting in which medical experts negotiated for an exorbitant fee in exchange for their false testimony regarding the mental state of a testator whose will was being contested.<sup>117</sup> Enraged, Tutt exclaimed that though the doctors might practice medicine in such a dishonest manner, "I'm not willing to practice law that way. If you try to break this will you'll have to do it without my help. . . . I retire. To hell with all of you!"<sup>118</sup>

During the early twentieth century, many people felt that it was an abomination to the search for truth and justice for lawyers to hire experts "to appear in court, for money, to set forth so much of the truth as tells in favor of one side of the case, while suppressing all parts of the

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emulate this figure even though it was impossible for them to attain its every characteristic. For instance, Auerbach was one of the most ruthless critics of modern, twentieth-century lawyers, and used the myth of the country lawyer to criticize the successful corporate lawyer, John W. Davis. Auerbach maintained that Davis declared that the "'supreme function' of lawyers [was] to serve as 'sleepless sentinels on the ramparts of human liberty and there to sound the alarm whenever an enemy appears.'" AUERBACH, *supra* note 7, at 253. However, once in private practice, Davis typically did not take human liberty cases. Unfortunately for Davis, people noticed that his actions and rhetoric were not aligned. *Id.* at 254; *see also* HARBAUGH, *supra* note 81.

<sup>114</sup> In a discussion of the then-proposed Canons of Ethics, one commentator noted, "[u]nfortunately, there are still many lawyers who think that an attorney should not concern himself with the question of the right or wrong of his client's cause." Costigan, *supra* note 105, at 60.

<sup>115</sup> These themes are apparent in any tale about Tutt. Most noteworthy, however, is Tutt's "autobiography," because Tutt is placed in circumstances in which unethical behavior might have been the easier route to take, yet he remained true to his upright character and refused to forfeit his high standards of honesty and integrity. *See* TRAIN, YANKEE, *supra* note 86. *See, e.g., infra* notes 117-18 and accompanying text.

<sup>116</sup> *Id.* at 156.

<sup>117</sup> *Id.* at 180-87. The lawyers were attempting to prove the testator was incapable of understanding how she distributed her possessions and money in her will and that the will was therefore invalid.

<sup>118</sup> *Id.* at 187.

truth which support the contention of the other side.”<sup>119</sup> What was even more disappointing to the public was the number of “unscrupulous lawyers” who were “all too ready to avail themselves of such facilities.”<sup>120</sup> The effect of such actions on the public was distrust and disrespect for lawyers as a whole.

Imagine . . . what effect it has for a lawyer to either directly or indirectly suggest the procuring of false testimony for the purpose of winning a lawsuit. . . . He has no respect for his honesty *and he has not been made a respecter of the profession*. Clients have a general impression that if they only entrust their cases to the right counsel, *they can accomplish any end*. Such an impression is . . . at the root of the failure on the part of the public to properly respect the lawyer in general, and prevents the public from holding that profession in the esteem to which it would otherwise be entitled.<sup>121</sup>

In the midst of the “unscrupulous practices” of many lawyers, Tutt embodied integrity. He stood steadfastly against engaging in unethical practices, and his decision to quit his dishonest firm served as a discreet ethics lesson for his readers.<sup>122</sup>

While Tutt practiced law in the city, the fabric of country life had slowly begun to change. Though the nature of most cases still revolved around country life, the impact of the growth of corporate America in the cities had begun to influence the small country town as well.<sup>123</sup>

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<sup>119</sup> Eliot, *supra* note 2, at 69.

<sup>120</sup> *Id.*

<sup>121</sup> Christian Doerfler, *The Duty of the Lawyer as an Officer of the Court*, 24 GREEN BAG 74, 77 (1912).

<sup>122</sup> See *supra* notes 117-18 and accompanying text. The role of Tutt as a teacher of legal ethics to the profession and the public should not go unnoticed. In fact, some law schools included the book *Mr. Tutt's Case Book* as required reading. *Arthur Train Dead*, *supra* note 19, at 18. See also ARTHUR TRAIN, *MR. TUTT'S CASE BOOK* (1936). Shortly after the Canons of Ethics were passed in 1908, there was discussion of the idea of incorporating a legal ethics class at law schools. One concern was that the type of lawyer who would be a proper instructor for such a course would be hard to find.

[T]he instructor should be a practising [sic] lawyer of high repute, deserved eminence and general esteem. The very presence of such a man, the knowledge that his highly successful career has resulted from following the moral principles which he announces, is in itself no small argument, in quarters where the information is valuable, against the false idea that in “smartness” lies the royal road to professional success.

Chamberlayne, *Idealism*, *supra* note 6, at 439. While Chamberlayne surmised that it would be difficult to find a professor that had these traits, Tutt possessed them all.

<sup>123</sup> Change in the country was well underway prior to the twentieth century. It seems that Train exaggerated the differences between city and country in the twentieth century in order to

Though many of Tutt's clients continued to be "common folks," he sometimes worked as counsel for railroads and big businesses.<sup>124</sup> America had changed by the twentieth century due to the influence of immigration, urbanization, and commercialization.<sup>125</sup> Only because Tutt existed in the realm of fiction was he able to uphold the standards of the mythical nineteenth-century country lawyer, which in actuality, were impossible to meet regardless of the time period. For instance, only in fiction would a lawyer have the luck of Tutt, to serendipitously receive a large inheritance from a wealthy client, enabling the provision of legal services to those in need for the remainder of his life without charging a fee.<sup>126</sup>

Country lawyers believed that even their own personal well-being was worth jeopardizing in order to secure justice. Perhaps the most stirring example of Tutt's dedication to justice was in the case of Ivan Zalinski.<sup>127</sup> Zalinski was accused of killing Michael Kelly, a politician who was in Zalinski's neighborhood the night he was murdered. Zalinski denied shooting Kelly and insisted he was on his way home to his daughter's second birthday party when he heard a shot and saw Kelly's body fall in front of him.<sup>128</sup> The assistant district attorney had little doubt that Zalinski was guilty and tried to taint the jury during the trial by implying that Zalinski was a Communist and the father of illegitimate children. Tutt, however, believed Zalinski was innocent and felt that it was his duty and honor to protect his client's rights.

To this end, when Tutt delivered his closing argument, he stood on the principle of his client's integrity and his right to a fair trial. Tutt waxed eloquent, giving a Webster-like<sup>129</sup> speech:

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produce a stark contrast between the two and to illuminate the problems he viewed with city law practice. See, e.g., TRAIN, PURITAN, *supra* note 3, at 152-57 (listing many new inventions and their effect on country life). Even in the mid-nineteenth century, the country "was experiencing the first tremors of the Industrial Revolution." *Id.* at 157.

<sup>124</sup> TRAIN, YANKEE, *supra* note 86, at 202.

<sup>125</sup> AUERBACH, *supra* note 7, at 20.

<sup>126</sup> TRAIN, YANKEE, *supra* note 86, at 309. In her will, Tutt's former client and friend, Miss Abigail Pidgeon, directed Tutt "to distribute at [Tutt's] discretion 'among such victims of injustice as shall be in need of legal assistance or otherwise'" the large inheritance she had left him. *Id.* at 309. As such, Tutt had \$15,000-\$20,000 per year to put towards representing individuals who were unable to pay legal fees, but who had worthy cases. *Id.* at 309-10.

<sup>127</sup> *Id.* at 221.

<sup>128</sup> *Id.* at 221-22.

<sup>129</sup> *Id.* at 223-24. Daniel Webster was known for his skill as an orator. In fact, Stephen Vincent Benét was so taken by the stories of Webster's eloquence in public speaking that Benét wrote the well-known short story, "The Devil and Daniel Webster." See *Stephen V. Benet is*

'The law . . . is supposed to be impartial, to give every man an equal chance. . . . What chance has this poverty stricken defendant against the power of the State? . . .

. . . [S]ubstantial justice might be done if the law were fairly administered and the poison gas of prejudice were not allowed—nay often invited—to creep into a case. This, gentlemen, has not been a trial by law, but trial by prejudice. It is not the sort of trial guaranteed to American citizens under the Bill of Rights.<sup>130</sup>

As Tutt continued to talk about the equal advantages all people were guaranteed by law, the judge chastised Tutt and threatened him with being held in contempt, but Tutt continued to speak as though the judge had said nothing.<sup>131</sup> Though held in contempt, he did not care. Tutt's purpose was greater than protecting his reputation or keeping himself from contempt charges. He wanted to show the jury that he was willing to face fines and imprisonment in order to keep his client from being convicted of a crime that he did not commit.<sup>132</sup> Accordingly, Ivan Zalinski was acquitted.

Towards the end of *Yankee Lawyer*, Tutt voiced an increasing disillusionment with law, which reflected the prevailing twentieth-century

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*Dead Here at 44*, N.Y. TIMES, Mar. 14, 1943, at 25. In this tale, Webster defended Jabez Stone, a fellow New Hampshireman who sold his soul to the devil in exchange for a number of years of prosperity on his farm. The only thing Webster received from the Stones was a warm dinner. Stephen Vincent Benét, *The Devil and Daniel Webster*, MASTERPIECES OF LEGAL FICTION 341, (Maximilian Koessler, ed., The Lawyers Co-operative Publishing Company 1964). Once a trial was underway, and a jury was requested, the devil produced twelve criminals and ruffians to serve as jurors, and selected the judge of the Salem Witch Trials to preside over the proceedings. *Id.* at 351-52. Webster sized up the jury and decided a humanistic appeal to the weaknesses of the common man would be the most fitting approach. *Id.* at 353. Webster began his oration by speaking very softly, and as he grew closer and closer to the end of his speech, he allowed his voice to crescendo to such a pitch that all spectators were paralyzed in awe. Webster reasoned with the jury that it was human nature to make mistakes, and that Jabez Stone was an ordinary man who simply wanted to succeed, but selected a wrong path as a means to that end. *Id.* at 353-54. Though Webster's jury consisted of hardened men from hell, his skill as a speaker and, in turn, as a lawyer, had grasped the jury in such a way that by the time Webster finished speaking, "they were men again." *Id.* at 354. The jury decided in favor of Jabez Stone and noted "[p]erhaps 'tis not strictly in accordance with the evidence . . . but even the damned may salute the eloquence of Mr. Webster." *Id.* at 355.

<sup>130</sup> TRAIN, *YANKEE*, *supra* note 86, at 223-24.

<sup>131</sup> *Id.* at 224-25. Admittedly, Tutt's behavior may seem to be discourteous toward the court and thus unethical. However, one of the foremost duties of a country lawyer was to ensure that justice be done for all. As such, his duty to protect the rights of Zalinski trumped his duty to behave courteously in court.

<sup>132</sup> *Id.*

sentiment toward lawyers. Outside the walls of Tutt's fictitious world, legal publications, such as *The Green Bag*, published articles about the deficiency of legal ethics and the low character of the bar.<sup>133</sup> Among the detriments noted in the character of twentieth-century lawyers was their lack of a sense of professional responsibility and their tendency to "prostitute the finer sensibilities of their nature to the service of their clients."<sup>134</sup> The character and philosophy of Tutt were antithetical to these views, and thus appealed to many Americans who favored stability over change, the irreproachable myth over reality.<sup>135</sup> It is not surprising that the public hoped and believed that Tutt was real; that they marveled and wondered if it was possible for a lawyer with such an impeccable reputation and character to exist. By convincing many people that Tutt existed and that lawyers could uphold such unblemished character, Arthur Train disseminated and strengthened the myth of the country lawyer.

#### IV. THE CRUX OF THE ETHICAL DILEMMA: PUBLIC CONFUSION BETWEEN MYTH AND REALITY

The publication of *Yankee Lawyer*, Tutt's so-called "autobiography," led to one of the greatest literary pranks in American history. Train had developed the character of Ephraim Tutt for a quarter of a century by publishing seemingly realistic accounts of his law practice, which included reference to "law actually in effect at the time and place involved."<sup>136</sup> When Tutt's "autobiography" was published in 1943, the

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<sup>133</sup> See, e.g., Chamberlayne, *Idealism*, *supra* note 6.

<sup>134</sup> T.H. Marshall, *The Lawyer's Conscience*, 14 AM. LAW. 244, 245, June 1906.

<sup>135</sup> One measure of Tutt's popularity, and the desire of the public to believe that Tutt truly existed, is the amount of "fan mail" that Charles Scribner's Sons received for Tutt. Train, *Apolo-gize*, *supra* note 4, at 11-12.

<sup>136</sup> Koessler, *supra* note 89, at 719. By discussing real laws, the cases Tutt undertook were easily confused as being real, and as a result, readers familiar with the law were easily fooled into thinking Tutt was a real lawyer. In fact, the accuracy with which Train wrote about the law was such that lawyers and students were able to utilize Tutt's analysis to win cases and score well on tests. In fact, Train noted that two lawyers from Pennsylvania, who had cases similar to that described in the short story "Mr. Tutt Takes a Chance," decided to "change [their] tactics after reading the story and [having] utilize[d] the authorities there cited had won [their cases]." TRAIN, DAY, *supra* note 16, at 488. In addition, Train noted in his biography that a Tutt story helped a law student pass a course.

Recently, a young candidate for the Texas bar . . . abandoned his text-books on the evening before his final test and took up *The Post* instead. It so happened that he chanced on a Tutt story which interested him. What was his surprise and joy the next morning to find the identical problem on his paper! He wrote me that, owing to his apparent familiarity with an abstruse point, the decisions regarding which he was able

American public began to question whether, in fact, he was a real person. A review of the events surrounding the publication of *Yankee Lawyer* further exposes the ethical dilemma that the legal profession faced. The public wanted lawyers to be like Tutt, however, the standard which Tutt had set was one that could not realistically be carried out in a society that had experienced incredible growth in population, commercialization, and urbanization in a short period of time. If "[l]aw is a mirror of social forces,"<sup>137</sup> then as society modernized, the profession of law was expected to do the same. As long as the example of Tutt had such a grip on the public, dissatisfaction with the legal profession seemed inevitable.<sup>138</sup> The reaction to the news that Tutt was not a real person emphasizes the degree to which the public desired such a lawyer and the disappointment in facing the reality that their conception of the country lawyer did not exist.<sup>139</sup>

Perhaps the foremost source of public confusion over Tutt's existence was Arthur Train himself. For example, when Train received mail regarding Tutt, or addressed to Tutt, he would sometimes write back in the hand of Tutt. Reginald Heber Smith of the *American Bar Association Journal* wrote a review for *Yankee Lawyer* and attempted to tackle the question of whether Tutt actually existed. "What mixes you up," he noted, "is that you write Arthur and you get a postal card back signed 'Eph.' In the upper lefthand corner is the beloved gentleman himself. . . . I have carried on, and am still carrying on, an extensive correspondence with 'Eph.'"<sup>140</sup> Hundreds of people wrote letters to Tutt. In fact, Train received letters from Tutt's "long-lost cousin, an old Harvard classmate and the publishers of *Who's Who*, who wanted to include [Tutt] in their 1945 edition."<sup>141</sup> Train, not missing the opportunity to promote his best character, filled out the *Who's Who* application with Tutt's data, based on *Yankee Lawyer*. However, to Train's dismay, his publishers, "in a pusillanimous moment yielded to the admonitions of

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to quote, he passed with flying colors. He was now a lawyer, he said, but had it not been for Mr. Tutt he would probably be working in a filling station.

*Id.*

<sup>137</sup> AUERBACH, *supra* note 7, at 12.

<sup>138</sup> See, e.g., Train, *Apologize*, *supra* note 4, at 55.

<sup>139</sup> *Id.* The public was so disappointed that Tutt did not exist that Train tried to appease his readers by explaining why he wrote an "autobiography" of Tutt. The disappointment of one man, Lewis Linet, was so great, that he sued Train and Train's publisher for fraud. See *infra* notes 164-69 and accompanying text.

<sup>140</sup> Smith, *supra* note 92, at 630.

<sup>141</sup> *Arthur Train Dead*, *supra* note 19, at 18.

their consciences, or perhaps of their lawyers, and intervened just in time to prevent its inclusion in the forthcoming volume.”<sup>142</sup> Frustrated at his plan being foiled, Train noted, “What the cowards saw fit to do is no affair of mine.”<sup>143</sup> Despite Train’s vigorous efforts to conceal the true identity of Tutt, he would sometimes reveal the truth. For instance, when Train received letters from people seeking Tutt as their lawyer, Train often admitted that the “lanky legal friend of the widow, orphan and more recently the service man was the product of a fertile imagination.”<sup>144</sup>

Another source that Train used to propagate the idea that Tutt truly existed was book reviews. For instance, when the *Yale Law Journal* published a review of Train’s *Yankee Lawyer*, the author of the review was none other than Train himself.<sup>145</sup> He pretended that he was Tutt’s friend, stating, “it was I who originally suggested to Mr. Tutt the desirability of writing his reminiscences.”<sup>146</sup> In fact, Train even discussed in this book review that some tension existed between himself and Tutt, for Tutt believed Train to be “a conscienceless literary hack,” and noted that Tutt “has used such expressions about me that I have been tempted to sue him for libel per se; he has gone so far as to accuse me of manufacturing stories about him out of whole cloth.”<sup>147</sup>

Aside from referring to Tutt as an acquaintance and describing him as an actual person, Train then turned to commenting on his own role in writing the book review. Train audaciously noted that “[t]here should be no traffic between author and critic,” when in fact, he *was*

<sup>142</sup> Train, *Apologize*, *supra* note 4, at 55. Train went on to say, “As far as I am concerned, I remained true to Eph—faithful, as it were, unto his literary death.” *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Arthur Train Dead*, *supra* note 19, at 18. Yet, Train also noted in one of his final articles in the *Saturday Evening Post* that “it is, of course, possible that there is an Ephraim Tutt. Who can tell? My personal denial is not conclusive. He may still exist, even if I honestly assert to the contrary.” Train, *Apologize*, *supra* note 4, at 55.

<sup>145</sup> Arthur Train, *Yankee Lawyer*, 52 *YALE L. J.* 945 (1943) [hereinafter *YALE*] (reviewing ARTHUR TRAIN, *YANKEE LAWYER: THE AUTOBIOGRAPHY OF EPHRAIM TUTT* (1943)).

<sup>146</sup> *Id.* Train noted that “[a]lthough I had watched Ephraim Tutt in court, played poker and gone fishing with him for over forty years, I was wholly unprepared for the wealth of pungent narrative and the richness of human philosophy which his entertaining autobiography contains.” *Id.*

<sup>147</sup> *Id.* at 946. Train’s sense of humor about his Tutt ruse is clear in his *Yale Law Journal* book review and in other publications of the time. See, e.g., *infra* text accompanying notes 152-55. Ironically, since most of the public seemed to believe that Tutt was real, the only person who could really appreciate the humor of the situation was probably Train.

author and critic.<sup>148</sup> Train also expressed concern over the idea “that some people might think him merely a figment of my imagination.”<sup>149</sup> However, after Train discussed the literary skill of the author of *Yankee Lawyer* and how exciting the book was, he concluded the review by noting the significance of the book, for through it, “Ephraim Tutt’s actuality is established forever.”<sup>150</sup> For a reputable law journal to publish an article that so clearly discussed Tutt as if he were an actual person demonstrates how easily readers (and possibly editors) could be led to believe that Tutt actually existed.<sup>151</sup>

Perhaps the book review that had the greatest public significance to the question of whether Tutt existed was John Chamberlain’s review of *Yankee Lawyer* in the *New York Times*.<sup>152</sup> In this review, Chamberlain contended that Arthur Train was an imaginary character, and Tutt was real. He argued that Tutt had invented the “fictional character of Arthur Train, behind whose undoubtedly pseudonymous front Tutt operated when he felt like romancing about the law.”<sup>153</sup> In fact, he assured readers that “[t]here isn’t any fake stuff in the pages of ‘Yankee Lawyer,’” and that *Yankee Lawyer* was a work that was “composed of sterling realism, absolute fidelity to the facts of history, and the truth about a great human character.”<sup>154</sup>

Overall, it seems likely that some publications agreed to participate in Train’s hoax since other well-known periodicals were reporting contemporaneously that Tutt was merely a figment of Train’s imagination.<sup>155</sup> For instance, *Time Magazine* reviewed *Yankee Lawyer* and

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<sup>148</sup> *Id.* at 945.

<sup>149</sup> *Id.* at 947.

<sup>150</sup> *Id.* Another source that demonstrates Train’s collaboration with propagating the idea that Tutt was a real person was a book review in the *Lawyers Guild Review*. Arthur Garfield Hays, *Yankee Lawyer*, 3 LAW. GUILD REV. 57 (1943). Hays noted that he “raised several questions with Train about the methods Tutt used.” *Id.*

<sup>151</sup> It is possible that the Yale Law School complied with Train’s wishes to perpetuate the confusion regarding Tutt’s existence by allowing Train to write the review of his own book, but whether or not Yale was aware of Train’s authorship and Tutt’s non-existence is unknown.

<sup>152</sup> John Chamberlain, *Books of the Times*, N.Y. TIMES, Sept. 2, 1943, at 17 (reviewing ARTHUR TRAIN, *YANKEE LAWYER: THE AUTOBIOGRAPHY OF EPHRAIM TUTT* (1943)).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> There were many sources that confused Tutt’s character for a real person. The following list provides examples of such confusion, but is by no means exhaustive. See *Hoaks*, NEWSWEEK, Sept. 13, 1943, at 90-91 [hereinafter *Hoaks*] (reviewing ARTHUR TRAIN, *YANKEE LAWYER: THE AUTOBIOGRAPHY OF EPHRAIM TUTT* (1943)); Chamberlain, *supra* note 152 (noting that Ephraim Tutt was “[a] man who could invent the fictitious character of Arthur Train” and that



commented that "Ephraim Tutt is one of the few fictitious characters who has ever written his autobiography."<sup>156</sup> Also, *Newsweek* played its own hoax on the public in a book review by creating the character Sir Herring-Hoaks, who expressed outrage that he had never before heard of Tutt.<sup>157</sup> At the conclusion of the book review, however, it was clearly stated that *Yankee Lawyer* was "one of the most elaborate literary spoofs of the century" and that Sir Herring-Hoaks did not exist either.<sup>158</sup> Aside from these exceptions, Train was largely successful in his prank and thoroughly convinced a significant portion of the public that Tutt was real.<sup>159</sup>

The primary evidence of Train's success in convincing people Tutt existed was letters to Tutt. Train noted, "[e]very mail brought letters to the publishers from people anxious to have Mr. Tutt's address, in order that they might retain him to defend them on criminal charges, to litigate claims in their behalf or merely to make his acquaintance."<sup>160</sup> For instance, one such letter to Tutt, written by "a lonely old woman," stated that she had spent "so many happy hours before my fire in your company [reading Tutt stories] that I am sure you will forgive me when I say that the privilege of knowing you would be a great joy and consolation to me."<sup>161</sup> Besides admirers, there were also many people who

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"[t]he truth would seem to be that Tutt himself has kidded us about a fictitious Arthur Train all these years"); YALE, *supra* note 145, at 945 (showing Yale's confusion over authorship—or assistance in the conspiracy of confusing the public—by having Train review his own book); J.M. Maguire, *Yankee Lawyer*, 57 HARV. L. REV. 258 (1944) (reviewing ARTHUR TRAIN, *YANKEE LAWYER: THE AUTOBIOGRAPHY OF EPHRAIM TUTT* (1943)) (showing uncertainty as to the authorship of *Yankee Lawyer*). Maguire noted in a footnote that the publisher of *Yankee Lawyer*, Charles Scribner's Sons, "assure[s] us that the author is 'the best-known lawyer now alive.'" *Id.* at 258 n.1. This rather vague authority was augmented by another footnote that cross-referenced the above noted *Yale Law Journal* article, stating that "Mr. Train, in a published review of the present book, now disclaims authorship of Mr. Tutt's being. But will he hold to this disclaimer?" *Id.* at 258 n.2 (citation omitted). It seemed the answer to this question was both yes and no.

<sup>156</sup> *Yankee Lawyer: The Autobiography of Ephraim Tutt*, TIME MAG., Sept. 20, 1943, at 98 (reviewing ARTHUR TRAIN, *YANKEE LAWYER: THE AUTOBIOGRAPHY OF EPHRAIM TUTT* (1943)).

<sup>157</sup> *Hoaks*, *supra* note 155, at 90-91.

<sup>158</sup> *Id.* at 90-91.

<sup>159</sup> For instance, letters to Tutt poured into the offices of Train and his publisher, some of which were addressed directly to Tutt, and others of which sought an answer to whether Tutt existed. See Train, *Apologize*, *supra* note 4, at 11, 52.

<sup>160</sup> *Id.* at 11.

<sup>161</sup> *Id.* Train's reaction to this and other letters was that "Mr. Tutt had started something." *Id.* Train ended up writing a letter to the author of the above-quoted letter, telling her Tutt was not real, but that Train would be very much obliged to visit in Tutt's place. *Id.*

thought they had known Tutt before his fame. Letters were received by "several [Harvard] alumni who think, or imagine, that they knew the youthful Ephraim well in his undergraduate days and even participated in reckless escapades in his company."<sup>162</sup> Train also received a letter from a purported cousin, as well as many others "who claim[ed] [an] acquaintance with him . . . some vicariously, some personally."<sup>163</sup>

At its pinnacle, the confusion that had sprung forth as to Tutt's existence materialized in the form of a lawsuit. Following the publication of *Yankee Lawyer*, Train and his publisher, Charles Scribner's Sons, were sued in New York Supreme Court by Lewis Linet, "who charged that Mr. Tutt's failure to materialize in the flesh constituted fraud."<sup>164</sup> Linet wanted a refund for his book because he claimed that it was "a hoax and a fraud upon its readers because it purports to be the life not only of a genuine living person but one of the best-known and outstanding lawyers now alive."<sup>165</sup> It seems that this lawsuit fed the fury surrounding Tutt, as it manufactured additional confusion. Notable people and institutions stepped forward, making statements and publishing articles that embellished the Tutt ruse.<sup>166</sup> For instance, Tutt's publisher, Charles Scribner's Sons, retained John W. Davis, the famous lawyer and 1924 Democratic candidate for President of the United States, to represent Tutt.<sup>167</sup> The *New York Herald Tribune* reported that Davis, being "an old Tutt follower . . . rallied to his friend's defense immediately."<sup>168</sup> Such a statement was clearly far-fetched, since Davis

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<sup>162</sup> *Id.* at 54.

<sup>163</sup> *Id.*

<sup>164</sup> *Arthur Train Dead*, *supra* note 19, at 18; *see also* "Mr. Tutt" Called a Fraud, 145 PUBLISHER'S WKLY. 2000 (1944).

<sup>165</sup> *Real Lawyer Goes to Court Here Charging Ephraim Tutt Is "Fraud,"* N.Y. TIMES, May 16, 1944, at 23.

<sup>166</sup> *See, e.g., supra* notes 145-55 and accompanying text. In retrospect, Judge Harold Medina seemed convinced that Yale cooperated with Train in publishing the book review, but upon what source Medina rests his assurance is unknown. *See* ARTHUR TRAIN, MR. TUTT AT HIS BEST xii-xiii (1961) [hereinafter TRAIN, BEST].

<sup>167</sup> Indeed, it seems that Davis was hired by Charles Scribner's Sons, to represent itself and Maxwell Perkins, Train's editor, not Tutt. However, newspaper articles tended to smudge the details and suggested that Davis was representing Tutt. *Mr. Tutt Faces His First Battle in a Real Court*, N.Y. HERALD TRIB., May 16, 1944, at 17 [hereinafter *Real Court*]. Despite its title, which suggests Tutt was not real, the article still seems to indicate the possibility that Tutt did exist.

<sup>168</sup> *Id.* at 17.

must have known that Tutt did not exist. The publication of statements such as this continued the confusion over Tutt's existence.<sup>169</sup>

Even prior to the lawsuit, Train began to realize that his spoof on the public might have gone too far. Train began to offer defenses for his actions, ranging from a denial of any responsibility for the confusion to providing a detailed summary of the events surrounding Tutt as they existed from his point of view.<sup>170</sup> For instance, Train's most outright refutation of accountability for the misunderstanding over Tutt was in a statement for the *New York Herald Tribune*, in which Train said, "I was foolish enough to believe that any member of the public who reads current literature would know that Mr. Tutt was a fictional character."<sup>171</sup> Train noted in the *Saturday Evening Post*, that "[i]t would be no exaggeration to estimate that since 1919 [Tutt] has figured in 200,000,000 copies of The Saturday Evening Post and 100,000 printed books all under my name,"<sup>172</sup> and thus it should have been clear to readers that he was a fictitious character. Yet, there was still reason for confusion. For instance, in *Yankee Lawyer*, Train included copies of actual photographs of people, claiming that the photographs were of Tutt's relatives. It was not until Train's article in the *Post* entitled, "Should I Apologize?", that Train revealed the true identity of the people in the photographs.<sup>173</sup> Also, even in the *Saturday Evening Post*, Tutt stories were generally accompanied by life-like drawings by Arthur William Brown, which made Tutt seem real despite Train's authoring of the Tutt tales.<sup>174</sup>

Overall, it seems that Train wanted to convince the public that Tutt was real because Train was concerned that the reputation of the legal profession was plummeting. By providing an example of what the

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<sup>169</sup> Linet's case against Train, Charles Scribner's Sons, and Maxwell Perkins was settled before final judgment, and thus there is no official report of the case. Koessler, *supra* note 89, at 719 n.2. Linet's second cause of action, an injunction to cease the sale of *Yankee Lawyer*, was dismissed on summary judgment. *Id.* However, the first cause of action, "seeking damages [for fraud], was discontinued by stipulation on May 2, 1947." *Id.*

<sup>170</sup> *Compare Real Court*, *supra* note 167, at 17, with Train, *Apologize*, *supra* note 4, at 9.

<sup>171</sup> *Real Court*, *supra* note 167, at 17.

<sup>172</sup> Train, *Apologize*, *supra* note 4, at 9.

<sup>173</sup> The pictures of Tutt's family included in the "autobiography" were actual photographs of real people, most of whom Train knew. For instance, Train took a picture of a guide he had once hired on a canoe trip and included it in *Yankee Lawyer*, stating that it was Tutt on a fishing trip. *Id.* at 11; see also TRAIN, *YANKEE*, *supra* note 86, at 34-35. Pictures of Tutt's parents were actually pictures of Train's aunt and uncle. Train, *Apologize*, *supra* note 4, at 11. Train even included a picture of a young boy who was supposed to be Tutt, but the true identity of this child was unknown. *Id.*

<sup>174</sup> See *id.* at 10.

legal profession would be like if all lawyers were ethical, upright, and selflessly engaged in the pursuit of justice, Train helped galvanize support for legal ethics regulations.

#### V. THE LEGACY OF TUTT AND HIS ROLE IN STIMULATING CHANGES IN LEGAL ETHICS

Even though Tutt was a creature of fiction, the power he held over the profession of law was profound. In fact, seventeen years after Train died, a memorial volume of Tutt stories, *Mr. Tutt at His Best*, was published, which suggests Tutt's lasting appeal even decades after the death of his creator.<sup>175</sup> In this commemorative volume, Judge Harold Medina surmised that Tutt's popularity endured because "[e]very lawyer, good bad and indifferent, at some time in his life dreams of himself . . . fighting for right and justice, protecting the poor and the helpless, humbling the rich and the powerful, and making the world a better place to live in."<sup>176</sup> Medina suggested that Tutt's longevity might be attributed to his living out this dream. Tutt "touches our hearts so closely" because "he represents the ideal of what lawyers and those who are not lawyers think lawyers ought to do."<sup>177</sup> Tutt's example was not merely fiction, but it embedded itself in the minds of his readers, influencing the views of lawyers, bar associations, and the public.<sup>178</sup>

Train's and Tutt's influence on the public and the legal profession created pressure for reform and change in the areas of legal ethics and professional responsibility.<sup>179</sup> Train's stories stimulated discourse

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<sup>175</sup> TRAIN, BEST, *supra* note 166.

<sup>176</sup> *Id.* at xi-xii. It seems that Medina may have fallen under the spell of the nineteenth-century mythical country lawyer, for his comments romanticize the dreams of each lawyer. *Id.* Even earlier in the century, a Columbia Law School professor tried to dispel the power of such an idealized view:

Th[e] phantasy of every man his own lawyer; of a judiciary so honest, so astute to detect the truth, so capable of discovering the real principle involved in every litigation, that the public and rival presentation of the opposite sides by skilled lawyers, is not only unnecessary, but positively baneful, has enjoyed a great but undeserved popularity.

Francis M. Burdick, *The Lawyer: A Pest or a Panacea?*, 16 GREEN BAG 226, 227 (1904).

<sup>177</sup> TRAIN, BEST, *supra* note 166, at xii.

<sup>178</sup> See, e.g., *supra* notes 155, 159 and accompanying text.

<sup>179</sup> In fact, the profession of law had not been subject to uniform regulation in areas such as legal education until the late-nineteenth century. See, e.g., HURST, *supra* note 79, at 262-63 (discussing how Dean Langdell of Harvard Law School transformed legal education by adopting a uniform law school curriculum, written examinations, a required number of instruction hours to graduate, etc.).

amongst the public and within the legal profession of what was expected of the bar and what it lacked. For instance, in publishing *The Confessions of Artemas Quibble*, Train emphasized a vision of lawyers that the public despised and of which the profession was ashamed—shyster lawyers. It was Train's intention to demonstrate that lawyers who practiced law unethically, as Howe and Hummel did, were not only a disgrace to the profession of law, but belonged in jail.<sup>180</sup> This sentiment grew amongst members of the bar. For instance, in a 1907 American Bar Association Report on the need for legal ethics, it was noted that the shysters and ambulance chasers "pursue their nefarious methods with no check save the rope of sand of moral suasion."<sup>181</sup> These lawyers wreaked havoc on the image of law and lowered esteem for the profession. The American Bar Association Committee noted further that

[n]ever having realized or grasped that indefinable ethical something which is the soul and spirit of law and justice, they not only lower the *morale* within the profession, but they debase our high calling in the eyes of the public. They hamper the administration, and even at times subvert, the ends of justice. Such men are enemies of the republic; not true ministers of her courts of justice robed in the priestly garments of truth, honor, and integrity. All such are unworthy of a place upon the rolls of the great and noble profession of the law.<sup>182</sup>

Although *The True Confessions of Artemas Quibble* was published too late to serve as a catalyst for the 1908 Canons of Ethics,<sup>183</sup> its importance rested in its accessibility to the public and its effect of causing people to

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<sup>180</sup> See *supra* text accompanying note 71.

<sup>181</sup> Costigan, *supra* note 105, at 59.

<sup>182</sup> *Id.* The association of lawyers with religious figures or doctors was not uncommon in early-twentieth-century legal literature. For example, in Shearon Bonner's poem, "The Lawyer," it is noted:

The lawyer's and doctor's work stand side by side;  
Both to divinity's are close allied:  
'Tis by men's sins that preachers earn their bread,  
And their disease by which the doctor's fed;  
The lawyer, likewise, lives upon their strife;—  
And thus the three together go through life.

Bonner, *supra* note 74, at 451.

<sup>183</sup> See TRAIN, CONFESSIONS, *supra* note 23. The American Bar Association's passage of the Canons of Ethics ("Canons") in 1908 was meant to restore "the legal profession's prestige in the eyes of the general public." James M. Altman, *Considering the ABA's 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2413 (2003). State bar associations subsequently adopted these Canons: twenty-two states had adopted them by 1910, thirty-one states by 1914, and by 1924 the

critically examine the image of lawyers that so frequently appeared in sensationalist newspapers. Rather than write an exploit on shyster lawyers that reveled in their usurpations of justice, Train wrote about Quibble (the character based on Hummel) so as to shock and outrage his readers and alert them of the injustice rendered by shysters. By doing so, Train pitted his readers against lawyers who engaged in the unethical practice of law.

Though no connection explicitly links Train's influence to the passage and amendment of ethical guidelines, it is unmistakable that the publication of his writing swayed and reinforced the public's (and many lawyers') perception of the legal profession's snares. Train's writing worked as an important intermediary between the bar and the public, for Train's stories verbalized, in a public forum, the concerns voiced by leaders of the legal profession in legal periodicals and other lawyer-oriented sources. This is apparent when comparing the language Train used in his stories to the rhetoric of bar associations and legal figureheads in connection with the need for change in legal ethics. For instance, the attack on ambulance chasers and shyster lawyers, noted above in the 1906 committee report of the American Bar Association, resembles Train's attack on Howe and Hummel.<sup>184</sup> In fact, an article by Charles Boston appearing in a popular lawyer's magazine in 1908 discussed the merits of adopting a code of ethics for the legal profession, especially in the aftermath of "[t]he successful notoriety of a particular firm whose surviving member was recently in prison for his practices" and who had gained "national cognizance" over the years.<sup>185</sup> This article mirrored the sentiment Train expressed in *The Confessions of Artemas Quibble*, which had been serialized and published in *Cosmopolitan* magazine in 1908.<sup>186</sup> Boston noted that even though the shyster practices of Howe and Hummel were well known, the legal duo escaped discipline and punishment for decades.<sup>187</sup> Reaching the same message that Train

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Canons had been adopted by most state and local bar associations with few or no modifications. *Id.* at 2395-96.

<sup>184</sup> See, e.g., *supra* notes 67-71 and accompanying text.

<sup>185</sup> Charles A. Boston, *A Code of Legal Ethics*, 20 GREEN BAG 224, 228 (1908). Surely Boston was referring to Hummel.

<sup>186</sup> Arthur Train, *The Fall of Hummel*, COSMOPOLITAN, May-June 1908.

<sup>187</sup> Boston, *supra* note 185, at 228.

figuratively illustrated in *The Confessions of Artemas Quibble*, Boston declared, “[i]t is for such conditions that a code of ethics is essential.”<sup>188</sup>

Through Tutt, Train also articulated dissatisfaction with certain areas of the law, opening the eyes of the public and the profession to the need for steady reform. For instance, Tutt noted in his autobiography that he “wanted the law to be more efficacious, more speedy and above all more human.”<sup>189</sup> This reinforced the views expressed in many law articles of the early twentieth century, which linked the public’s dissatisfaction with the law to, amongst other things, the “evil” of delay.<sup>190</sup> The 1908 Canons addressed the importance of “punctuality and expedition” in Canon 21.<sup>191</sup> The concern over unnecessary delay is also reflected in the Model Code of Professional Responsibility, which replaced the Canons of Ethics. In Disciplinary Rule (DR) 7-102, it is noted that a lawyer “shall not: (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.”<sup>192</sup> Tutt served an im-

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<sup>188</sup> *Id.* Boston further indicated the need for well-drafted rules, “for it would be perfectly easy for the unmoral craft of which I speak, to evade all specific rules by inventing devices which they would not fit.” *Id.* at 228-29. While the need for the Canons of Ethics was reinforced by Train’s viewpoint, as indicated in his writing, the similarities between the maxims by which Tutt lived and those which the Canons professed were striking. For instance, Canon 32 stated that a lawyer “advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law.” CANONS OF ETHICS §32 (1908). Tutt’s existence was based on his close adherence to the “strictest principles of moral law.” *Id.* For example, when Tutt quit his job at Hotchkiss, Levy and Hogan, he did so because of the unethical methods by which the firm attempted to “buy” favorable testimony from medical doctors. See *supra* text accompanying notes 117-18. Also, Tutt’s practice of taking any worthy case that came his way (as opposed to focusing on corporate and commercial interests) promoted the administration of justice and brought honor to the profession. In many ways, Tutt provided moral guidance to lawyers by way of example and reinforced the substance of the Canons. In explaining why he took cases that seemed destined to lose, Tutt explained “[i]t was a matter of principle. . . .” ARTHUR TRAIN, TUTT AND MR. TUTT 304 (Charles Scribner’s Sons 1925) (1920).

<sup>189</sup> TRAIN, YANKEE, *supra* note 86, at 386.

<sup>190</sup> See, e.g., Marbury, *supra* note 1, at 69 (attributing the delay of justice to postponements “granted for the convenience of counsel”); see also Eliot, *supra* note 2, at 72 (noting the value of “prompt and effective judicial procedure”).

<sup>191</sup> Canon 21 reads, “It is the duty of the lawyer not only to his client, but also to the Courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.” ABA CANONS OF ETHICS Canon 21 (1908) reprinted in 20 GREEN BAG 512 (1908).

<sup>192</sup> MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(A)(1) (1983).

portant role in galvanizing public support for legal reforms by educating the public of problems with the legal profession. This phenomenon strengthened a mutually reinforcing relationship between Train and the substance of ethical regulations in the twentieth century. For instance, sometimes principles that Train thrust upon his readers captured the import of ethical regulations, and, in other circumstances, the ethical behavior mandated in ethics rules became more established as Tutt emerged as an archetypal champion of those ethical principles.

One final recommendation that was woven throughout many Tutt stories was Tutt's wish that the law become more humane. Specifically, Tutt was referring to society's need for lawyers who would serve the public at large, not just the wealthy, or clients pursuing popular and accepted causes.<sup>193</sup> During the twentieth century, the corporate bar was increasingly blamed for the growing inhumanity in law and lack of public-spiritedness amongst lawyers.<sup>194</sup> To try to ameliorate this growing criticism, the 1969 Code of Professional Responsibility included an Ethical Consideration explicitly stating that "[a] lawyer has an obligation to render public interest and pro bono legal service."<sup>195</sup> As the influence of the corporate bar grew during the early twentieth century, Tutt provided an example for lawyers to follow in doing public interest and pro bono work.<sup>196</sup>

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<sup>193</sup> One example of Tutt representing an "unpopular cause" was when he took the Zalinski case, in which the accused was allegedly the father of illegitimate children and a Communist. See *supra* notes 127-32 and accompanying text. In 1949, the constitutionality of the Smith Act, which "virtual[ly] outlaw[ed] . . . the Communist party," was questioned. HARBAUGH, *supra* note 81, at 441. When John W. Davis, a famous and respected lawyer, was given the opportunity to represent a group of Communists in their appeal to the Supreme Court, he decided, "I do not want to argue the 'Commie' case; Learned Hand's remarks on the constitutionality of the Smith Act are quite sufficient for me." *Id.* Considering how heated the issue of Communism became in the age of McCarthyism, representing Communists would be a very bold move to make. For Tutt to zealously argue a case in which his client was hinted to have been a Communist could have been the equivalent of career-suicide in real life. Tutt represented the ideal of taking any case that had merit, even if it meant representing a person with potentially unpopular beliefs.

<sup>194</sup> See, e.g., Chamberlayne, *Soul*, *supra* note 113; Chamberlayne, *Idealism*, *supra* note 6; Doerfler, *supra* note 121.

<sup>195</sup> MODEL CODE OF PROF'L RESPONSIBILITY EC 2-25 (1983).

<sup>196</sup> Some articles suggest that as long as a lawyer was linked to corporate law, the ability of such a lawyer to "aid in the administration of justice in the courts" was destroyed. Marbury, *supra* note 1, at 74. Marbury did not give up hope for the profession, for he believed "[t]here are still in the ranks of the legal profession men who would rather have a moderate income coupled with the fame of a great lawyer than the larger emoluments which go with the reputa-



Despite the fact that Tutt stories were being written as the influence of the urban corporate law firm expanded enormously, Tutt stuck to the image of the "independent small-town lawyer, whose clients were his friends, acquaintances, and townsmen."<sup>197</sup> Rather than provide an example of an upright twentieth-century commercial lawyer, which might have provided much-needed guidance to this emerging sector of the legal profession, Train cast Tutt within a law practice that was reminiscent of the nineteenth century. While Tutt's practice was essentially archaic when compared to the twentieth-century urban law firm, it had the effect of reinforcing a view of the legal profession that was equally out-dated. For many people, "[t]he looming presence of the metropolitan firm" caused unease "because no other institution so accurately reflected the altered contours of professional and economic life in the new century."<sup>198</sup> As a result, the city law firm became the target of criticism. People transferred their resentment and confusion regarding the expansive changes society underwent onto one symbol of this change: the corporate law firm.<sup>199</sup> While Tutt stories provided an example for lawyers of the ease with which one could ethically practice law, he was also a source of angst and distress. The more the public read about Tutt's impeccable practices, the more unsatisfied the public became with the reality of twentieth-century lawyers.

Perhaps the foremost criticism of the twentieth-century urban lawyer was his alliance with business, which some viewed as trumping his duty to render justice.<sup>200</sup> A corporate lawyer was seen as "more of a business man than a professional man. . . . He makes more money by conducting and directing the business affairs of his clients than he can make by the discharge of his functions as an aid to the courts in the administration of justice."<sup>201</sup> This state of affairs resulted in lawyers "develop[ing] a growing disinclination towards those functions."<sup>202</sup> In other words, "the low standards of the profession" were created by its transformation into "a trade, a business, a money-getting, power-pro-

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tion of a great financier. And I believe that the future standing of the bar in America will depend upon its ability to develop such a class." *Id.*

<sup>197</sup> AUERBACH, *supra* note 7, at 31.

<sup>198</sup> *Id.* at 31.

<sup>199</sup> *Id.* at 32.

<sup>200</sup> Marbury, *supra* note 1, at 66.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

curing, success-securing occupation.”<sup>203</sup> The rise of corporate law firms in the early twentieth century “symbolized a new role of the bar,”<sup>204</sup> one that Tutt shunned and to which the public grew hostile. However, for the first time in American history, lawyers were faced with the challenge of meeting the needs and demands of a growing corporate sector. Nonetheless, many people viewed the rise of big business as causing the deterioration of America’s small-town heritage. From this premise flows an explanation for the public’s hostility and resentment toward the corporate bar: “[b]y attacking corporate lawyers and a commercialized profession [people] could displace some of the anger, fear, and resentment stirred by their perception of the declining quality of life in an urban industrial age.”<sup>205</sup>

The concerns expressed by Tutt resembled those of prominent and respected leaders of the legal community and the nation who began to speak out in the early twentieth century against the rise of the corporate bar. For instance, Woodrow Wilson was particularly outspoken in his views on the degradation of the law and the corporate lawyer’s responsibility for this phenomenon.<sup>206</sup> In a 1910 address to the American Bar Association, a comparison was drawn between the “constitutional advocate, once the pride of the profession [but who] had virtually disappeared” and what Wilson described as “lawyers who have been sucked into the maelstrom of the new business system of the country.”<sup>207</sup> To this end, Wilson noted that such lawyers “do not practice law,” nor do they “handle the general, miscellaneous interests of society.” As such, Wilson concluded these lawyers “[do] not do what [they] ought to do.”<sup>208</sup>

Louis Brandeis also voiced concern that lawyers were “allow[ing] themselves to become adjuncts of great corporations and have neglected their obligation to use their powers for the protection of the people.”<sup>209</sup> Brandeis not only frowned upon corporate law firms, but he found the

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<sup>203</sup> Chamberlayne, *Idealism*, *supra* note 6, at 437. One particularly blunt metaphor was that the modern, corporate law firm was like a “money-making mechanism, inelastic, rigorous, unsympathetic; into which the young man, just from his studies, fits . . . like a fresh adjusted cog into a well-oiled machine.” AUERBACH, *supra* note 7, at 31 *quoting* Chamberlayne, *Soul*, *supra* note 113, at 397.

<sup>204</sup> HURST, *supra* note 79, at 307.

<sup>205</sup> AUERBACH, *supra* note 7, at 32.

<sup>206</sup> *Id.* at 34-35.

<sup>207</sup> *Id.* at 34.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 35.

practice of specialization, which was established in these firms, equally troubling. He noted “[t]he last fifty years have wrought a great change in professional life. Industrial development and the consequent growth of cities have led to a high degree of specialization,” specialization not just in an area of law, but also “in the character of clientage.”<sup>210</sup> With this “growing intensity of professional life” came a lack of “participation in public affairs.”<sup>211</sup> Altogether, Brandeis found that “[t]he deepening of knowledge in certain subjects was purchased at the cost of vast areas of ignorance and grave danger of resultant distortion of judgment.”<sup>212</sup> The legal profession responded to these concerns through the passage of the 1908 Canons of Ethics and their frequent revision. Although the Canons imposed much needed restraints on the ills previously committed by lawyers like Howe and Hummel, they were soon criticized for “measur[ing] the social texture of twentieth-century urban practice against antebellum memories.”<sup>213</sup> The Canons, though remaining largely intact for over sixty years, drew almost as much criticism as the problems the Canons were supposed to remedy.

While the objective of the Canons and the image that Tutt represented tended to reinforce and strengthen one another, both tended to avoid the reality of twentieth-century urban law practices. For example, when Tutt’s firm sought to engage in unethical practices, he quit and moved to the country.<sup>214</sup> Actual lawyers were not likely to take such a bold stance. Similarly, perhaps the foremost problem with the Canons was that they did not specifically address many of the problems that arose in modern law practices. As a result, they seemed to grow “increasingly inadequate as a comprehensive statement of professional responsibility for lawyers.”<sup>215</sup> In fact, the 1935 American Bar Association Special Committee on Canons of Ethics found that revision of the Canons was necessary because the Canons did not provide “proper guidance” in matters of professional responsibility and legal ethics and were particularly lacking “so far as present-day problems are concerned.”<sup>216</sup>

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<sup>210</sup> Louis Brandeis, *The Living Law*, in DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 572, 575 (Melvin I. Urofsky & Paul Finkelman, eds., 2002).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> AUERBACH, *supra* note 7, at 42.

<sup>214</sup> See *supra* notes 117-18 and accompanying text.

<sup>215</sup> Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1, 3 (1970).

<sup>216</sup> *Id.* at 4 (quoting 60 A.B.A. Rep. 94-95 (1935)).

While Tutt followed the excessively broad and vague statements of the Canons with ease, these precepts did not seem binding to actual lawyers and were not enforced with any frequency.<sup>217</sup> One 1955 study by the American Bar Foundation reported causes for the inadequacy of the Canons.<sup>218</sup> Among its findings was that "[t]he Canons do not present in sufficient detail and variety the guides useful to the individual lawyer in the determination of solutions to ethical problems arising in specific situations encountered in actual practice."<sup>219</sup> Furthermore, lawyers were unable to distinguish between "the inspirational and proscriptive," which brought confusion because "when hortatory statements are intermixed with prohibitory rules," it was "easier for lawyers to mistake such a code as a guide for action that accords with highest morality, while at the same time rendering it difficult for courts to enforce the document as a disciplinary code."<sup>220</sup> As a result, the ethical regulations that were intended to "preserve our faith in the 'integrity and proper virtue' of our judiciary,"<sup>221</sup> in effect provided little guidance.<sup>222</sup> It was not until the Canons of Ethics were replaced by the Model Code of Professional Responsibility in 1969 that many of these criticisms were mollified.<sup>223</sup>

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<sup>217</sup> Comment, *Controlling Lawyers by Bar Associations and Courts*, 5 HARV. C.R.-C.L. L. REV. 301, 306, 308 (1970).

<sup>218</sup> See Wright, *supra* note 215, at 4.

<sup>219</sup> *Id.* It was also found that "[t]he form and content of the Canons are not suited to disciplinary proceedings." *Id.* Without the possibility, or perhaps the threat, of disciplinary hearings, the ability of the Canons to restrain lawyers from acting unethically was not great. See *id.*

<sup>220</sup> *Id.* at 5, 11.

<sup>221</sup> *Crisis of Confidence Forces Ethics Issue*, TRIAL MAG., June-July 1969, at 10.

<sup>222</sup> See e.g. Wright, *supra* note 215, at 4-5.

<sup>223</sup> For instance, the Code of Professional Responsibility consisted primarily of two components: Ethical Considerations and Disciplinary Rules. This distinction helped clarify whether a provision was "aspirational in character" (Ethical Considerations) and those that were "mandatory in character," that set "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action" (Disciplinary Rules). John F. Sutton, Jr., *Professional Responsibility: What's New About the New Code?*, 41 PA. BUS. ASS'N Q. 127, 129 (1969-1970). The American Bar Association Special Committee on Evaluation of Ethical Standards, the drafters of the new Code of Professional Responsibility, cited four improvements that the new Code had over the old Canons of Ethics:

First, it is the result of a thorough review of the functions of lawyers in modern-day society. Although many provisions of the old Canons have been retained, generally they have been modified, expanded, or made more accurate. The guidance given by the Code in regard to various situations, such as the role of an advocate, is generally more complete than most of the Canons. Second, the concepts included in the Code are expressed in orderly sequence and groupings. Third, a complete separation is

The impetus that drove the legal profession to promulgate ethical regulations in the twentieth century was its acceptance of the mythical image of the lawyer. Even in the twenty-first century, the inclination to “lament the loss of some romanticized past,” rather than “forthrightly face the challenges of its future” has been blamed as the source of discontent.<sup>224</sup> Herein lies the dilemma that Tutt perpetuated throughout much of the twentieth century: he achieved iconic status perpetuating a mythical version of a “romanticized past,” as America was growing into an industrialized, urban future. The law could not stand still while the rest of the nation was modernizing; it had to change to remain serviceable. Both “[p]rofession and society” were “each wrenched by change; each crippled in its choice of means to cope with change by its tenacious hold on the past.”<sup>225</sup> In such a context, Tutt became tremendously popular because of Train’s unbridled depiction of an idealized fictitious legal era, which conveniently satisfied the public’s appetite for reminiscences of a more stable time. Put simply, Tutt was an anachronism, albeit a very popular one.<sup>226</sup> Similarly, “the legal profession abided by nineteenth-century values; indeed soon after the twentieth century began, it vigorously reasserted these in its Canons of Ethics.”<sup>227</sup> The alacrity and celerity with which these Canons were embraced by bar associations throughout the United States demonstrates the widespread hunger for lawyers to emulate hopelessly idealized (and outdated) standards. “Until lawyers could discard their myths and memories, their profession would teeter precariously between the world that was lost and the world that

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made between the inspirational and the proscriptive. Fourth, the Code has been so structured that it may be amended on an orderly basis in the light of future developments.

Wright, *supra* note 215, at 17-18.

<sup>224</sup> DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 23 (2000).

<sup>225</sup> AUERBACH, *supra* note 7, at 18.

<sup>226</sup> Train’s stories on Tutt were so widely recognized that as late as 1980, in a case before the United States Court of Appeals for the Second Circuit, the Court characterized legal advice given to a client as “very informal advice the kind of small-town country-lawyer advice that was written about so well in the Arthur Train stories.” *Hansen v. Harris*, 619 F.2d 942, 949 (2d Cir. 1980). While the Second Circuit had no confusion as to Tutt’s and Train’s inapplicability to twentieth-century legal practice, Train’s readers were not so convinced. Ironically, however, while Tutt symbolized standards often characterized as belonging to the nineteenth century, at least one court has cited a non-Tutt story written by Train as support for the right of women to serve on juries, a rather progressive idea in the early-twentieth century. See *State v. Yazzie*, 218 P.2d 482, 483 (Wyo. 1950).

<sup>227</sup> AUERBACH, *supra* note 7, at 18.

was becoming—unable to relinquish one; unable, therefore, to enter the other.”<sup>228</sup>

Throughout the twentieth century, the legal profession endeavored to maintain ethical standards that might uplift its reputation in the minds of the public.<sup>229</sup> Whether or not the Canons of Ethics, the Model Code of Professional Responsibility, or the Model Rules of Professional Conduct actually had the effect of changing the public’s perception of lawyers has been questioned. The importance of the public’s perception of lawyers is derived from the “obligations owed to . . . society” by the legal profession.<sup>230</sup> The Preamble to the 1908 Canons of Ethics reflects the importance of gaining the public’s respect for the profession of law:

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.<sup>231</sup>

While a premium has been placed on the public’s perception of lawyers, some lawyers have questioned whether it is more important for the profession to *appear* upright as opposed to actually *operating* in a respectable manner. For instance, one reason for the disapproval of the proposed Model Rules of Professional Conduct was that “[t]he practical effect of such rules is to make it more difficult for lawyers to practice conscientiously, and to subject them to the threat of disbarment for matters having nothing to do with ethics, in the name of the image of

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<sup>228</sup> *Id.*

<sup>229</sup> For a chronological assessment of the findings of the ABA’s Committees on Ethics and amendments and revisions made to the Canons of Ethics see Altman, *supra* note 183, at 2395-2508; and Wright, *supra* note 215, at 1-18.

<sup>230</sup> HURST, *supra* note 79, at 329. Hurst noted that the “obligations owed to the society” in which lawyers practiced were “above and beyond the personal advancement of its practitioners.” *Id.*

<sup>231</sup> Canons of Ethics, Preamble, ¶ 1 (1908).

'the' legal profession."<sup>232</sup> As evidence of this phenomenon, it was noted that Canon Nine of the Code of Professional Responsibility placed the "highest moral aspiration [in] avoiding, not impropriety, but the *appearance* of impropriety."<sup>233</sup> In opposition to this notion is the view that the profession of law needs to *appear* respectable, with its integrity intact, in order for it to summon the esteem of the public and to successfully guide the administration of justice. "[B]y refraining from conduct that might give the appearance of being improper," lawyers would "encourage the faith of laymen in the legal system."<sup>234</sup> These sentiments provide the rationale behind Train's writing of stories about Tutt: Train sought to infuse the public with faith in the legal profession while giving lawyers an example to follow.<sup>235</sup>

Tutt gained the public's confidence by being an honorable, respectable lawyer who always did the right thing.<sup>236</sup> Despite the dilemma Tutt caused, as modern lawyers could not compare to his impeccable career, he still captured the admiration of lawyers. For instance, in a 1961 book review of *Mr. Tutt at His Best* that appeared in the *American Bar Association Journal*, it was noted "there cannot be any doubt that the book under review . . . will be welcome to quite a few readers of this *Journal*."<sup>237</sup> While Tutt caused much frustration for setting "the bar" too high, Tutt was still able to garner the respect and esteem of twentieth-century lawyers.<sup>238</sup> Tutt's influence upon the legal profession was truly profound despite his non-existence. He was able to rouse lawyers

<sup>232</sup> Mark H. Aultman, *A Moral Vision Refuses to Die*, 8 J. LEGAL PROF. 31, 31-32 (1983). Aultman went so far as to assert that the ethical rules "can only be justified, in fact, on the rationale that there is *no* agency to enforce them." *Id.* at 33. In Aultman's point of view, "the Commission promulgated an unreasonable code, full of over-regulatory pipe dreams." *Id.* at 40.

<sup>233</sup> *Id.* at 32. Canon 9 actually reads, "A lawyer should avoid even the appearance of professional impropriety," which connotes a different meaning than what Aultman suggests in his article. ABA CANONS OF ETHICS Canon 9 (2004); see AULTMAN, *supra* note 232.

<sup>234</sup> Wright, *supra* note 215, at 9. "An important role of any code of legal ethics is to remind lawyers of the nature of their calling and to facilitate their understanding of the resulting obligations . . . ." *Id.*

<sup>235</sup> The emphasis placed on the "image" of law by the bar associations and ethics rules seems to be for the benefit of the administration of justice as a whole, for to gain the public's confidence in lawyers would also benefit the entire legal system. See *id.* at 8. "Lawyers of lesser moral persuasion may do irreparable harm to the interests of clients. Lawyers are the face of our legal system that laymen most often see; the impressions that laymen have of our legal system are often in large measure by their impressions of lawyers." *Id.*

<sup>236</sup> In this respect, Tutt provided a semblance of honor to the profession notwithstanding the fact that he was a figment of fiction.

<sup>237</sup> Koessler, *supra* note 89, at 719.

<sup>238</sup> See *supra* note 176 and accompanying text.