

*The Way We Lived Then: The Legal Profession and the 19th-Century Novel**

Nicola Lacey^{**}

Abstract

This article contributes to the use of the novel as an interpretive resource in legal and social history. It focuses on an issue which appears to have been neglected amid the rich skeins of recent debate. Particularly in relation to criminal defence, from the debate in the run-up to the advent of general legal representation in the *Prisoners' Counsel Act 1836* through to James Fitzjames Stephen's interventions in defence of lawyers in the 1850s and 1860s, the ethical standards of advocacy and of legal representation more generally were a salient preoccupation of the novel, as of contemporary public debate in newspapers and reviews. Given the significant expansion of the legal profession, and the gradual changes in its organisation, this was hardly surprising. But amid the illuminating interpretation of this mutual engagement between (the overlapping categories of) novelists, journalists, essayists and lawyers, little has been done by way of contextualising this debate within the development of the professions, and of professionalism more generally, in 19th century Britain. As I shall try to show, an understanding of the struggle to come to terms with the extraordinary — yet incomplete — rise of professionalism, both in and beyond law, can be helpful in explaining the form which literary representations of law took, and the fact that certain kinds of lawyer and of legal practice were singled out for particular literary attention and indeed opprobrium. In asking how attitudes to professionalisation affected the literary treatment of law, and what the developing treatment of legal themes in the novel can tell us about contemporary understandings of professionalism and of what justified and legitimated it, I will

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** Senior Research Fellow, All Souls College Oxford: Professor of Criminal Law and Legal Theory, University of Oxford. I am grateful to Zelia Gallo for exemplary research assistance; to participants at a seminar following the Julius Stone Lecture 2010 at the University of Sydney Faculty of Law for stimulating discussion and helpful feedback on an earlier draft of this paper; and to three anonymous readers for the *Sydney Law Review* for their constructive comments.

focus in particular on the novels of Anthony Trollope, while drawing examples and analogies from the work of other authors.

Introduction

[Miss Marrable] always addressed an attorney by letter as Mister, raising up her eyebrows when appealed to on the matter and explaining that an attorney is not an esquire. She had an idea that the son of a gentleman, if he intended to maintain his rank as a gentleman, should earn his income as a clergyman, or as a barrister, or as a soldier, or as a sailor ... She would not absolutely say that a physician was not a gentleman, or even a surgeon; but she would never allow physic the same absolute privilege which in her eyes belonged to law and the church.¹

Throughout the latter half of the 18th and for most of the 19th century, the British novel was preoccupied with law. The fields of literary history and of law and literature have, accordingly, been much concerned with questions about the representation of law in the novel and about what can be learned from both the frequency and the quality of literary representations of law. The field is as varied as it is extensive. Analyses run across a spectrum: from modest attempts at historical charting; through engagement with literary treatment of a range of contemporary issues of legal reform such as the ballot, Catholic emancipation, Chancery reform, the law of succession, married women's property, divorce, breach of promise and illegitimacy;² to ambitious attempts to infer general propositions about the development of British society from the dialogue between law and literature which emerges in the pages of not only the realist novel, but also the (not entirely distinct) genres of sensation literature, Newgate fiction and, late in the 19th century, the detective story. Among the most ambitious arguments, persuasive accounts include an analysis of the significance of a persistent contest between writers and lawyers for narrative dominance in representing the conscience of the age and the most persuasive ethical standards;³ an interpretation

¹ Anthony Trollope, *The Vicar of Bullhampton* (Bernhard Tauchnitz, 1870), quoted in A M Carr-Saunders and P A Wilson, *The Professions* (Oxford University Press, 1st ed, 1933) 295 n 1.

² In relation to the law of succession see generally: Cathrine O Frank, *Law, Literature and the Transmission of Culture in England, 1837-1925* (Ashgate, 2010); Saskia Letmaier, *Broken Engagements: The Action for Breach of Promise of Marriage and the Feminine Ideal, 1800-1940* (Oxford University Press, 2010); Martha Nussbaum, 'The Stain of Illegitimacy: Gender, Law and Trollopian Subversion', in Alison Lacroix and Martha Nussbaum (eds), *Gender, Law, and the British Novel* (Oxford University Press, forthcoming); Gary Watt, *Equity Stirring: The Story of Justice Beyond Law* (Hart Publishing, 2009).

³ Jan-Melissa Schramm, *Testimony and Advocacy in Victorian Law, Literature and Theology* (Cambridge University Press, 2000); Jan-Melissa Schramm, 'The Anatomy

of the changing protocols of evidence and proof to be found in law and in the novel as providing clues to a more fundamental debate about epistemology;⁴ and the suggestion that the changing form of legal representation in the novel provides insights into law, and lawyers', role as purveyors of culture, generating myriad clues about the broad development of British society and social relations on its path to political, social and economic modernisation, standardisation and bureaucratisation.⁵ Formally, many literary critics have noted the structural similarities between the novel and the law. Most obviously, both the novel and key forms of legal argumentation, notably advocacy, rely on narrative.⁶ More specifically, it has been argued that writers like Wilkie Collins and Anthony Trollope, structure their novels like jury trials or pleadings, suspending the omniscient authorial voice or deploying epistolary forms to present the plot/case to their reader/juror, who in effect 'tries' the issue in their reading.⁷ The novel, in short, has been extensively mined as a historical resource for the interpretation of contemporary law and society — albeit as a resource which must, for obvious reasons, be handled with discretion.

In this paper, I attempt to contribute to the use of the novel as a resource in legal and social history by focusing on one issue which appears to me to have been neglected amid the rich skeins of recent debate. Particularly in relation to criminal defence, from the debate in the run-up to the advent of general legal representation in the *Prisoners' Counsel Act 1836*, 6 Wm 4, through the 'War Between the

of a Barrister's Tongue: Rhetoric, Satire and the Victorian Bar in England,' (2004) 32 *Victorian Law and Culture*, 285–303; and Jan-Melissa Schramm, 'Is Literature More Ethical than Law? Fitzjames Stephen and Literary Responses to the Advent of Full Legal Representation of Felons' in Michael Freeman and Andrew Lewis (eds) *Current Legal Issues Volume 2: Law and Literature* (Oxford University Press 1999) 417–35.

⁴ Schramm, *Testimony and Advocacy in Victorian Law, Literature and Theology* above n 3; Alexander Welsh, *Strong Representations: Narrative and Circumstantial Evidence in England* (Johns Hopkins University Press, 1992); Coral Lansbury, *The Reasonable Man: Trollope's Legal Fiction* (Princeton University Press, 1981).

⁵ Jonathan H Grossman, *The Art of Alibi: English Law Courts and the Novel* (John Hopkins University Press 2002); Frank, above n 2; Nicola Lacey, *Women, Crime and Character: From Moll Flanders to Tess of the d'Urbervilles* (Oxford University Press, 2008); Patrick Brantlinger, *The Spirit of Reform in British Law, Literature and Politics* (Harvard University Press, 1977); D A Miller *The Novel and the Police* (University of California Press, 1988); Kieran Dolin, *A Critical Introduction to Law and Literature* (Cambridge University Press, 2007).

⁶ Jerome Bruner *Making Stories: Law, Literature, Life* (Harvard University Press, 2003).

⁷ Dougal MacEachen, 'Wilkie Collins and British Law' (1950) 5(1) *Nineteenth Century Fiction* 121; Clement Franklin Robinson, 'Trollope's Jury Trials' (1952) 6(4) *Nineteenth Century Fiction* 247; specifically, Lansbury, above n 4, argues that Trollope was influenced by his post office training, which included a study of Archbold's instructions on how to construct pleadings.

Bar and the Press' of the 1840s,⁸ and right through to James Fitzjames Stephen's interventions in defence of lawyers in the 1850s and 1860s,⁹ the ethical standards of advocacy and of legal representation more generally were a salient preoccupation of the novel, as of contemporary public debate in newspapers and reviews.¹⁰ Given the significant expansion of the legal profession, and the gradual changes in its organisation,¹¹ this was hardly surprising. But amid the illuminating interpretation of this mutual engagement between (the overlapping categories of) novelists, journalists, essayists and lawyers, little has been done by way of contextualising this debate within the development of the professions, and of professionalism more generally, in 19th century Britain. As I shall try to show, an understanding of the struggle to come to terms with the extraordinary — yet incomplete — 'rise of professionalism', both in and beyond law,¹² can be helpful in explaining the form which literary representations of law took, and the fact that certain kinds of lawyer and of legal practice were singled out for particular literary attention and indeed opprobrium.

In asking how attitudes to professionalisation affected the literary treatment of law, and what the developing treatment of legal

⁸ [W M Thackeray] 'War between the Press and the Bar: Mr Punch to the Gentlemen of the Press' 9 *Punch* (1845) 64–5; see also Schramm, *Testimony and Advocacy in Victorian Law, Literature and Theology* above n 3, 117.

⁹ James Fitzjames Stephen, 'The License of Modern Novelists' (1857) 106 *Edinburgh Review* 124–56; James Fitzjames Stephen, 'The Morality of Advocacy' (1861) 3 *Cornhill Magazine* 447–59 (1861): Stephen's interest in the ethics of defence persisted, as his *The Story of Nuncomar and the Impeachment of Sir Elijah Impey* (Cornell Library Digital Collections, www.library.cornell.edu, first published Macmillan, 1885) attests.

¹⁰ Schramm, *Testimony and Advocacy in Victorian Law, Literature and Theology* above n 3.

¹¹ Daniel Duman, 'Pathway to Professionalism: The English Bar in the Nineteenth Century', (1980) 13 *Journal of Social History* 615; Raymond Cocks, *Foundations of the Modern Bar* (Sweet & Maxwell, 1983); Wesley Pue, 'Exorcising Professional Demons: Charles Rann Kennedy and the Transition to the Modern Bar' (1987) 5 *Law and History Review* 135; Patrick Polden, *A History of the County Court: 1846-1971*, (Cambridge University Press 1999). On the longer term history of the legal profession, see Paul A Brand, *The Origins of the English Legal Profession* (Blackwell, 1992); and William Cornish et al, 'Part Four The Legal Professions', *The Oxford History of the Laws of England* (Oxford Scholarship Online Monographs, 2010). On the contemporary profession, see Richard L Abel *The Legal Profession in England and Wales* (Blackwell, 1988).

¹² Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (University of California Press, 1977); see also Harold Perkin, *The Rise of Professional Society: England since 1880* (Routledge 2002); Wilfrid Prest (ed), *The Professions in Early Modern England* (Croom Helm, 1987); W J Reader *Professional men: the rise of the professional classes in nineteenth-century England* (Weidenfeld, 1966); Daniel Duman, 'The Creation and Diffusion of a Professional Ideology in Nineteenth-Century England' (1979) 27 *Sociological Review* 113–38; Penelope J Corfield, *Power and the Professions in Britain, 1700-1850* (Routledge, 1995); A M Carr-Saunders and P A Wilson, *The Professions* (Clarendon Press, 1933).

themes in the novel can tell us about contemporary understandings of professionalism and of what justified and legitimated it, I will focus in particular on the debate about criminal defence, and on the novels of Anthony Trollope, while drawing examples and analogies from other areas of law and from the work of other authors. The debate about criminal defence presents itself as an obvious focus given the rich — contemporary and recent — literature analysing its course and significance. Its interest also derives from the fact that it relates to a decisive legislative change relatively early in the century (1836), but one which arguably had its origins in a well-documented and very gradual process of development from the middle of the 18th century,¹³ whose ramifications for both the legal profession and the broader society continued to be debated for the best part of half a century after its legislative enactment.

I focus on Trollope for two reasons. First, Trollope was writing consistently about law over almost three decades, from *The Warden* (1855) to *Mr Scarborough's Family* (1883); so we can track his changing attitudes over much of the period during which debates about law and the development of the legal profession were of salience.¹⁴ Second, Trollope's attitude to law is more measured than Dickens' mesmerising but perhaps overdrawn condemnation, as well as being more thoughtful than Wilkie Collins' rather uncritical view of the profession to which, after all, he himself belonged. Focusing on the persisting debate about the representation of criminal defendants, I shall argue that the novelistic ambivalence about legal professionals and their ethics is illustrative of the way in which Victorian institutions such as law managed the business of legitimating their emerging institutional arrangements in an era of continuous reform and transition from a pre-industrial, rural society to an industrial, urban, formalised

¹³ John M Beattie, *Crime and the Courts in England 1660-1800* (Princeton University Press, 1986); John M Beattie, 'Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries' (1991) 9 *Law and History Review* 221; 'Policing and Punishment in London 1660-1750: Urban Crime and the Limits of Terror' (Oxford University Press, 2001); David J A Cairns, *Advocacy and the Making of the English Criminal Trial 1800-1865* (Clarendon Press, 1998); John H Langbein, 'The Criminal Trial before the Lawyers' (1978) 45 *University of Chicago Law Review* 263; John H Langbein, 'Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources' (1983) 50 *University of Chicago Law Review* 1; John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2003); Lacey, above n 5.

¹⁴ See eg, Nussbaum above n 2; Marco Wan, *Stare Decisis, Binding Precedent and Anthony Trollope's The Eustace Diamonds*', in Marco Wan (ed) *Reading the Legal Case: Cross Currents between Law and the Humanities* (Routledge, forthcoming 2012). On Trollope's view of lawyers, see also Henry S Drinker, 'The Lawyers of Anthony Trollope — Barristers in Trollope's Novels: From Address Delivered November 15 1949 at Grolier Club, New York City' (2008) 55(1) *Federal Lawyer* 50.

society.¹⁵ I shall show how prevailing social practices, including the law and the novel, drew on discursive and institutional forms of legitimation which spanned pre-industrial and modern frameworks. These very different frameworks of legitimation sat together in a strange companionship which worked most of the time, yet which was particularly vulnerable to critique (and indeed to satire) because of the illogical way in which it appealed at once to traditional and to modernising rationales. More generally, I shall argue that, by setting the law and literature debates in the context of the history of professionalisation and of attitudes to the rise of the professions, we get a better sense of the uneven and incomplete trajectory towards modernisation of institutions such as law in the 19th century. The juxtaposition of law and the realist novel provides fascinating evidence of Victorians' attachment to the ancient symbols of status and credit amid the rationalistic marks of professional credibility which they were so active in inventing.¹⁶

Before moving on, it is important to acknowledge that there are sceptics about this enterprise of literary legal history. The first, modest scepticism comes from literature scholars who, very reasonably, observe that the functions of law and literature are entirely different, and that lawyers' occasional preoccupation with 'mistakes' in the literary representation of law — a preoccupation which has sometimes reached intemperate heights,¹⁷ but which is more often merely dull — simply misses this basic point. An inaccuracy in the description of law or legal procedure may, in short, be an advantage from the point of view of the narrative and other artistic priorities of literature. The second, more serious and rather more interesting form of scepticism

¹⁵ Jonathan Grossman has argued that this process of modernisation and, ultimately, bureaucratisation is reflected in a gradual shift in literary representations of law from the gallows to the trial, and on to detective work and policing. Grossman above n 5. Similarly, Cathrine Frank has argued that both literary treatment of wills and the right to dispose of property and the relevant legal arrangements move from an individualistic, personal model to a bureaucratic model during the course of the 19th century, Frank, above n 2.

¹⁶ Elsewhere, I have explored the ways in which older notions of criminal responsibility as founded in evil were juxtaposed with scientific accounts of responsibility as an essentially mental fact: Nicola Lacey, 'Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility' (2010) 4(2) *Criminal Law and Philosophy* 109.

¹⁷ Sir Francis Newbolt, *Out of Court* (P Allan, 1925), including an essay reported in the *Law Journal* LVIII (10th February 1923) 5, discussed by Robinson, above n 7; R D McMaster, *Trollope and the Law* (Palgrave Macmillan, 1986) 10; Glynn-Ellen Fischelli, 'The Language of Law and Love: Anthony Trollope's *Orley Farm*' (1994) 61 *English Literary History* 635–53; Kieran Dolin, *Fiction and the Law: Legal Discourse in Victorian and Modernist Literature* (Cambridge University Press, 1999), 97–120; on earlier treatments of legal inaccuracy in *Orley Farm*, see in particular 99–103; Sir Owen Dixon, 'Sir Roger Scatcherd's Will in Anthony Trollope's *Dr Thorne*', in Sir Owen Dixon, *Jesting Pilate* (Law Book Company, 1965), 7.

suggests that novelists often use law as a metaphor for more general ethical concerns or simply as a convenient form in which to represent issues about human conflict and the prevailing forms of social power. In *Bleak House* (1853) — a standard resource for law and literature scholars, for obvious reasons — Dickens' coruscating critique of Chancery and its lawyers is, on this view, not a straightforward criticism of the relevant legal arrangements and professional interests, but rather stands as a metaphor for the general corruption of society, just as the fog which hangs over Dickensian London symbolises a deeper urban and social disorder which is Dickens' real concern.¹⁸ This kind of scepticism has some force, and I shall bear it in mind in what follows. But it can also be overdone — as indeed is suggested by a careful analysis of the ways in which Dickens' plotting of *Bleak House*, as indeed of his other novels, tracks contemporary developments including the debate about Chancery reform.¹⁹ And even were this not known to have been the case, we would have to ask ourselves why Dickens, along with so many other novelists, chose law as one of his most pervasive metaphors.²⁰

Trollope's Law

It is generally acknowledged that the origins of novelists' interest in law lay in the law's increasing importance as not only a practical but also a symbolic source of order in a rapidly urbanising and industrialising society, and a society in which, though the term 'secularising' seems far too crude, it is certainly the case that religion, and the Church of England in particular, was losing some of the social authority which it had once enjoyed.²¹ Perhaps the perception of rapidly increasing power for one particular social group always invites some suspicion. Nevertheless, it is striking that, across the varied terrain of the 19th-century novel, the competence and integrity of lawyers and of legal processes is regularly put in question, with shady, self-serving or inefficient lawyers outnumbering their reliable, skilled and gentlemanly colleagues by a generous margin. Like his contemporary, Charles Dickens, Trollope fits the prevailing pattern, articulating a vision of lawyers which is anything but flattering. Lucius Mason of *Orley Farm* (1861-62) speaks to a significant extent in his author's voice when he declares that 'I have an idea that lawyers are all liars'.²² It is not clear that Trollope ever completely

¹⁸ Richard A Posner, *Law and Literature* (Harvard University Press, 3rd ed, 2009) 32.

¹⁹ John Butt, 'Bleak House in the Context of 1851' (1955) *Nineteenth-Century Fiction* 1.

²⁰ Philip Collins, *Dickens and Crime* (Macmillan, 2nd ed, 1965).

²¹ On this development in the 18th century, see E P Thompson, *Whigs and Hunters: The Origin of the Black Act* (Allen Lane, 1975).

²² *Orley Farm* (1861-62) (Penguin Classics, 1994, with an introduction by Robin Gilmour), vol II, 19.

revised his early view, encapsulated in Sir Abraham Haphazard QC of *The Warden* (1855), of legal argumentation as worryingly amoral or even immoral in its tendency to focus on technicalities to the exclusion of matters of ethical substance, and as excluding the emotional, and hence fully human insight which novelists could offer.²³

But whereas Dickens' vision of the law — epitomised by his savage portrait of a sclerotic and self-serving Chancery in *Bleak House* (1853) — is firmly rooted in the survival of profitable (to lawyers) archaic practices, Trollope's is Janus-faced. In *The Way We Live Now* (1875), for example, we have not only the Dickensian family solicitors, the hopelessly negligent Messrs Slow and Bideawhile, but also the more ruthless firm of Round and Crook and the vigorous, skilful and ambitious Mr Squerum — a man who gets things done in a 'marvellous and new fashion'.²⁴ Accordingly he is no respecter of tradition, as witnessed by his reputation for 'having no hesitation in supporting the interests of sons against those of their fathers'.²⁵ Similarly, in *The Eustace Diamonds* (1873), it is clear that traditional Mr Dove — a master of legal fictions such as those which angered Jeremy Bentham²⁶ — is of a rather different order of lawyer from go-ahead Frank Greystock, while the emerging power relations between solicitors and barristers are amusingly sketched in the *de haut en bas* with which family solicitor Mr Camperdown is treated by specialist barrister Mr Dove. The status of the law is hardly shown in a good light here: even with Mr Dove's assistance, it seems to be impossible to come up with a clear account of the legal status of the diamonds — as if, Trollope seems to suggest, the rights and wrongs of Lizzie Eustace's desire to keep them could really be as simple as a matter of law anyway.²⁷

The legal profession, in each of these cases, is portrayed in very much the same way as the world of commerce: as a profession divided between lazy and unprofessional old-world lawyers who seem to regard their authority vis-a-vis clients in terms of some sort of *noblesse oblige*,

²³ This was a very general complaint: see Jan-Melissa Schramm *Testimony and Advocacy in Victorian Law, Literature and Religion* above n 3; cf Frank, above n 2.

²⁴ *The Way We Live Now* (1875) (Penguin Classics, 1994), with an introduction by Frank Kermode, 443.

²⁵ *Ibid* 444.

²⁶ C K Ogden, *Bentham's Theory of Fictions* (Kegan Paul, Trench, Trübner & Co, 1932); Marjorie Stone, 'Dickens, Bentham and the Fictions of the Law: A Victorian Controversy and its Consequences' (1985) 29 *Victorian Studies*, 125; see also Lansbury, above n 4.

²⁷ See Albert D Pionke, 'Navigating "Those Terrible Meshes of the Law": Legal Realism in Anthony Trollope's *Orley Farm* and *The Eustace Diamonds* (2010) 77 *English Legal History* 129: at variance with my interpretation, Pionke sees Trollope as viewing the archaic and obscure legal notion of the heirloom quite positively, as representing a romantic survival.

and ambitious younger men — talented and energetic, but often unscrupulous or ‘sharp’²⁸ — who are willing to work hard for their clients, of whatever moral colour, and are motivated primarily by the pursuit of their own career ambitions. It should be noted that Trollope’s satirical dissection of the more unscrupulous parts of the legal profession is often scarred by a particular opprobrium applied to Jewish lawyers, and notably of Mr Solomon Aram in *Orley Farm*.²⁹ This is a painful reflection of contemporary anti-Semitic sentiment in his writing, though it is countered by positive examples, notably Ezekiel Brehgert in *The Way We Live Now*.³⁰

These tensions between an older and a newer vision of the legal profession and of legal representation — neither of them, in Trollope’s view, particularly appealing — is, unsurprisingly, most evident in his most thoroughly legal novel, *Orley Farm*.³¹ Here, the choice between old-style legal authority, in the person of Felix Graham, is pitched against that of the unappealing but highly skilled Mr Chaffanbrass of the criminal defence bar, with Mr Furnival poised between the two poles, and ultimately moving towards the latter. The choice between different forms of legal profession is thrown into sharp relief by being pitched in terms of its implications for a key ethical question which forms a second legal theme which we can draw out of Trollope’s novels: what should be the professional duty of a lawyer asked to defend a client whom they believe to be guilty? In *Orley Farm*, Trollope makes this dilemma particularly acute by making us highly sympathetic to the guilty client, Lady Mason; and, by introducing her confession early in the book, focuses our attention on the ethical question and not the issue of legal guilt.

In the choices and machinations which characterise the run-up to Lady Mason’s trial, Trollope looks at every aspect of what he sets up as the central moral question: is it ethical to make a bad case appear better in return for money? In the pre-trial section of the novel, he appears to

²⁸ A word Trollope uses in relation to, for example, Mr Dockwraith and Mr Squercum: see *The Way We Live Now*, above n 24, 443.

²⁹ ‘Many among [Mr Squercum’s] enemies said he was a Jew’: *The Way We Live Now* above n 24, 444; cf Jonathan Usbech of *Orley Farm*.

³⁰ See Trollope, *The Way We Live Now*, above n 24, ch 79, 601–11. Georgiana Longestaffe’s parents are nonetheless appalled by her engagement to him. Anti-Semitism was rife at the time, as is confirmed by contemporary journalism: see for example ‘On View at a Furniture Sale — All among the Noses — An Escape’ *Punch* (June 5, 1875); ‘The Other View of the Picture’ *Punch* (June 19, 1875). See also Paul Delany, ‘Land, Money, and the Jews in the Later Trollope’ (1992) 32 *Studies in English Literature, 1500-1900* 765–87. As on women, however, Trollope’s views were complicated, and his sympathetic treatment of marriage between Jews and Christians, for example in *Nina Balatka* (1866), shows that it would be inaccurate to label him anti-Semitic. The courageous and honourable — if inscrutable — Madame Max Goesler of the Palliser novels, of whom Trollope reports rumours that she is Jewish, is another positive example.

³¹ Trollope, *Orley Farm* above n 22. See especially chs LXII, LX, and LXXVIII.

suspend judgment. But when it gets to the trial itself, his view is as clear as crystal. The issues so widely and fiercely debated in the earlier part of the century, in the run-up to and the wake of the passage of the *Prisoners' Counsel Act 1836*, which gave felony defendants the right to be fully represented by a lawyer for the first time,³² were still being debated as vigorously as ever. As scholars like Jan-Melissa Schramm and David Cairns have shown, the issues highlighted by Lord Brougham's controversial defence of Queen Caroline in 1820 persisted throughout the debate on the Act, and resurfaced with renewed vigour in the 1840s in the so-called 'War Between the Bar and the Press',³³ in part as a result of the Oxford and Western Circuits' 1845 decision, in an effort to bolster professional standards (of which more below) to prohibit their members from reporting cases for the press.³⁴ The decision unleashed a stream of invective about the ethics of the bar in the pages of the most influential periodicals. As the debate heightened in intensity, the criticism crystallised in a depiction of lawyers representing reputedly guilty clients as accessories after the fact to the crime: As the *Examiner* put it in 1840:

We should like to know the breadth of the distinction between an accomplice after the fact and an advocate who makes the most unscrupulous endeavours to procure the acquittal of a man whom he knows to be an assassin.³⁵

Moreover, these worries about the propriety of criminal defence advocacy were enhanced by suspicion about the way in which, in the wake of the Act, the defendant was silenced, further increasing the dominance of the advocate in the trial process.³⁶ The critical reaction was exacerbated by extravagant flights of rhetoric indulged in by defence advocates such as Charles Phillips in a number of notorious cases, notably the *Courvoisier* case³⁷ in 1840.³⁸ Indeed, in the very year

³² Until 1836, felony defendants had no right to be fully represented by counsel, and while no such bar affected those charged with misdemeanours, by no means all of them would have had the resources to pay a lawyer. Although of distinctive social and legal importance, the misdemeanour cases initiated on the Crown side of King's Bench at Westminster seem likely to have constituted a tiny fraction of overall criminal cases. For further discussion see Nicola Lacey, 'What Constitutes Criminal Law?' in R A Duff et al (eds), *The Constitution of Criminal Law* (Oxford University Press, forthcoming 2012).

³³ See [W M Thackeray] 'War between the Press and the Bar: Mr Punch to the Gentlemen of the Press', above n 8.

³⁴ See Schramm, *Testimony and Advocacy in Victorian Law, Literature and Theology*, above n 3, 117.

³⁵ The *Examiner*, 28 June 1840 quoted in Schramm, 'Is Literature More Ethical than Law? Fitzjames Stephen and Literary Responses to the Advent of Full Legal Representation of Felons' above n 3, 424.

³⁶ Schramm, *ibid* 430–1, Cairns above n 13.

³⁷ *Regina v Courvoisier* (1840) 173 ER 869.

³⁸ Schramm, 'Is Literature More Ethical than Law? Fitzjames Stephen and Literary Responses to the Advent of Full Legal Representation of Felons' above n 3, 423.

of *Orley Farm*'s publication, James Fitzjames Stephen was weighing in with his essay, 'The Morality of Advocacy'.³⁹ Trollope's line is robust. He represents the advocates as 'hired bravos'⁴⁰ who will 'assassinate' witnesses and, in effect, say more or less anything in pursuit of money and professional success. The minutely choreographed trial scene — probably one of the most detailed accounts of a criminal trial among the many which adorn 19th-century fiction, albeit one which has been subject to some of the most heated legal criticism⁴¹ — is a morality play on the adversarial system, which is compared to a system in which each side hires assassins to fight the other. The only morally correct position, it seems, is to do as Felix Graham does, and to compromise his client's defence by refraining from an (in his view) over-vigorous cross-examination of a key witness whom he believes to be telling the truth. A few years later — long after the dust had settled on the 'War Between the Bar and the Press' — Trollope's clergyman Josiah Crawley of *The Last Chronicle of Barset* (1867) accused of theft, protests in similar vein;

I will have no one there paid by me to obstruct the course of justice or to hoodwink a jury. I have been in courts of law, and know what is the work for which these gentlemen are hired. I will have none of it... I say nothing as to my own innocence, or my own guilt. But I do say that if I am dragged before that tribunal, an innocent man, and am falsely declared to be guilty, because I lack money to bribe a lawyer to speak for me, then the laws of this country deserve but little of that reverence which we are accustomed to pay to them... And if I be guilty... I will not add to my guilt by hiring anyone to prove a falsehood or to disprove a truth.⁴²

Yet Trollope leaves us with the question of how a defendant might better — both professionally and ethically — be represented. It is a question to which no answer is given, though in *Orley Farm* the more sympathetic of his legal actors take a vigorous interest in the inquisitorial system on the continent as a model to be emulated.⁴³ Yet

³⁹ Fitzjames Stephen, 'The Morality of Advocacy', above n 8, 447–59; see further Schramm, 'The Anatomy of a Barrister's Tongue: Rhetoric, Satire and the Victorian Bar in England' and 'Is Literature More Ethical than Law? Fitzjames Stephen and Literary Responses to the Advent of Full Legal Representation of Felons' above n 3.

⁴⁰ Trollope, *Orley Farm*, above n 22, vol II, 359.

⁴¹ See above n 17.

⁴² Anthony Trollope, *The Last Chronicle of Barset* (1867) (Penguin Classics, 2002), ch 21, 208. Mr Crawley is ultimately persuaded to accept legal assistance, and Trollope's ultimate judgment on the ethics of advocacy, reflected in the resolution of the plot, is more ambivalent than Mr Crawley's. For further discussion, see David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press, 2007) ch 9; Shirley Robin Letwin *The Gentleman in Trollope* (Palgrave Macmillan, 1982).

⁴³ Trollope, *Orley Farm*, above n 22, vol I ch VII, especially 246–7, 253; vol II 152, 408.

the extended debate about the relative merits of inquisitorial versus adversarial systems, and their respective implications for truth-telling, is part of a satire on the Victorian mania for comparison in scholarship; and beyond his support for truth-telling as a value, and his view of legal argumentation as corrosive to that value, and as potentially corrupting, Trollope's view on reform remains, in this book, opaque.⁴⁴

But elsewhere Trollope's view is more ambivalent. For example, Josiah Crawley's resistance to accepting legal representation is portrayed as a product of not just principled integrity but also a dangerously obsessive inflexibility, utterly contrary to common sense. In the end, his friends more or less force representation upon him. Moreover, that representation takes the benign form of Mr Mortimer Gazebee — an effective and altruistic lawyer whose affectionate indulgence to his immediate family and generosity to his distant relative Crawley puts the lawyer in a positive light (though Trollope is quick to remind us that he is, after all, not quite out of the right social box). Even Mr Chaffanbrass appears in a more positive light in *Phineas Redux* (1874), when his professional skills prove effective in illuminating Phineas's innocence. And it is this very ambivalence between lawyers as necessary and skilful professionals versus lawyers as hired assassins or meddlers with truth — masking a deep uncertainty about the role of professional representation in mid-Victorian Britain — which, I shall argue, represents a broader dilemma and discomfort about the place and ethics of professions as sources of regular and even profitable income for an increasingly significant minority of the population; as powerful social institutions; and as relatively

⁴⁴ Ibid vol I: 178–80; ch VII; vol II, 153, 208. While sympathising with Sanford Kadish's view that Trollope's critique of — indeed misunderstanding of the rationale for — defence advocacy is an example of 'moral excess', I part company from Professor Kadish's view that the core of Trollope's disapproval lies in the opinion that defence lawyers are 'moral accomplices of the wrong of their guilty clients in seeking to escape justice', Sanford H Kadish, ('Moral Excess in the Criminal Law' (2000) 32 *McGeorge Law Review* 63, 68. Rather, as David Luban has argued (David Luban, 'A Midrash on Rabbi Shaffer and Rabbi Trollope', in *Legal Ethics and Human Dignity* (Cambridge University Press, 2007); see also William H Simon, 'The Past, Present, and Future of Legal Ethics: Three Comments for David Luban' (2008) 93 *Cornell Law Review* 1365, 1372), Trollope in fact takes a complex view of Lady Mason's moral status, using her case to develop an extended meditation on the relationship between law and morality. The core of Trollope's distaste for the lawyers is the commercialised self-interest which drives them (on the commercialisation of the bar see Pionke, above n 27, 130), and the hypocrisy which their role entails. As I argue, this critique is however not developed in terms of any coherent view of how criminal defence should be organised, and when Josiah Crawley and Phineas Finn are in need of criminal defence, Trollope is quick to provide them with effective legal representation. For a detailed analysis of Trollope's critique of the lawyers' dehumanising of witnesses, see Pionke above n 27, 135–6).

autonomous and, hence, relatively unassailable producers of criteria of expertise, knowledge and truth.⁴⁵

The Rise of the Professions in 19th-Century Britain

The development of a higher standard of professional competence was one of the greatest needs of the age...⁴⁶

This statement on the contribution of professionalisation to the era of reform, by Sir Llewellyn Woodward, one of its most influential historians, sets the development of the professions at the very core of the reformist project. Yet, at the start of the era, the Victorians themselves were slow to grasp and reflect on the general importance of the professions and their organisation. As Woodward puts it:

[a]n engineer could be described as a ‘mediator between the philosopher and the working mechanic’, and public opinion still took almost a fatalistic attitude towards questions for which, a few decades later, ‘expert’ knowledge and advice found a solution. Even Bentham, for all his belief in the possibility of a better organization of social life, failed to realize the full significance of this growing body of technical knowledge. The public at large, in 1815, may well have felt that the machinery of state was powerless to deal with problems which private enterprise had raised.⁴⁷

In her persuasive analysis of the rise of professionalism in 19th-century Britain and the United States, Magali Sarfatti Larson⁴⁸ shows how pressure for the expansion of the professions and for the ending of aristocratic gatekeeping developed alongside, and as a result of, the advent of industrial capitalism. In the pre-industrial era, professions such as law and medicine had elite and ‘common’ forms. In each case, the agents of change were the ‘lower’ orders of the professions, who, in the context of economic growth fuelled by industrial capitalism, producing a larger, if still a modest, population with surplus income, saw opportunities for opening up new markets for

⁴⁵ As I have argued elsewhere, much else is to be learned from Trollope’s representations of law, not least about prevailing gender relations and attitudes to women’s place (or lack of place) in the public sphere: see Nicola Lacey, ‘Could He Forgive Her? Gender, Agency and Women’s Criminality in the Novels of Anthony Trollope’ in Alison Lacroix and Martha Nussbaum (eds), *Gender, Law and the British Novel* (Oxford University Press, 2011); see also Paula Jean Reiter, ‘Husbands, Wives and Lawyers: Gender Roles and Professional Representation in Trollope and the Adelaide Bartlett Case’ (1998) 25 *College Literature* 41; Fisichelli above n 17.

⁴⁶ Sir Llewellyn Woodward, *The Age of Reform 1815-1870*, vol XIII in Sir George Clark (ed) *The Oxford History of England* (Clarendon Press, 2nd ed, 1962) 17–18.

⁴⁷ *Ibid* 19.

⁴⁸ Larson, above n 12.

services which would generate sufficient income to support a larger number of full-time jobs.⁴⁹ Larson enumerates a cluster of necessary and sufficient conditions for the emergence of an autonomous profession, distinguished from other forms of labour:

Emerging themselves with an emergent social order, the professions first had to create a market for their services. Next, and this was inseparable from the first task, they had to gain special status for their members and give them respectability....⁵⁰

First, for a professional market to exist in a modern sense, a distinctive 'commodity' had to be produced.... Second,... [f]or a secure market to arise, the superiority of one kind of services had to be clearly established with regard to competing 'products'. The various professional services, therefore, had to be *standardized* in order to clearly differentiate their identity and connect them, in the minds of consumers, with stable criteria of evaluation. A tendency to monopoly by *elimination* of competing 'products' was inherent in this process of standardization.... Professional entrepreneurs ... were therefore bound to solicit state protection and state-enforced penalties against unlicensed competitors.⁵¹

The state protection of a monopoly would also be needed in order to underpin a further key mechanism: the production of, as it were, the professional producers, who would have to have incentives to sacrifice time and money to acquiring the necessary qualifications. And a key part of this dynamic was the need for legitimation:

[C]reating professional markets required, as in every other case, establishing social credit or, to paraphrase Durkheim, creating non-contractual bases of contract. Because of the pre-existing competition, this task demanded strong and quasi-monopolistic protective devices.... [In order to] identify the 'commodity' they provided ... a cognitive basis was crucial. The *kind* of knowledge that each profession could claim as distinctively its own was therefore a strategic factor in their organisational effort. However, a cognitive basis of any kind has to be at least approximately defined before the rising modern professional could negotiate *cognitive exclusiveness* — that is, before they could convincingly establish a teaching monopoly on their specific tools and techniques, while claiming absolute superiority for them.⁵²

⁴⁹ Ibid 4, 11–12, 16.

⁵⁰ Ibid 8.

⁵¹ Ibid 14.

⁵² Ibid 15; see also 17–18.

This need for cognitive exclusiveness, in Larson's view, implied both that the development and control of training would be central to the successful establishment of a profession, and that the institutions providing training should also be those producing the relevant knowledge — hence protecting the emerging professions from the production of competing knowledges outside their control. In other words, the need for specialist professional training in order to legitimate professional exclusiveness drove the development of modern universities offering specialist training rather than the gentlemanly 'liberal education' characteristic of the ancient universities. But — and key to my argument — the relevant qualifications, both social and technical, could not be defined and stabilised immediately, for at least two reasons. First, the bourgeois social group of which professionals were to become a key part was still trying fully to establish its own power, social identity and distinctive version of respectability. Second, the 'scientific' cognitive rationalisation which, at least in the case of medicine, would have been the most obvious justification for cognitive exclusiveness, had yet to be established or to command wide support. In law, the analogues of that 'scientific' rationale were both insecure and very unevenly distributed across more and less 'technical' areas of practice. For example, until half a century earlier, criminal defence had been a simple matter of the 'accused speaking for himself';⁵³ the novelty of the defence lawyer's role here, and the fact that his primary technique appeared to be not strictly legal argumentation but rather the distinctly non-exclusive technique of rhetoric, placed criminal defence lawyers firmly at the end of the spectrum where distinctively legal expertise was hardest to establish.⁵⁴

In this context, it was hardly surprising that the early professions, while seeking to invent an autonomous, technical language and body of knowledge through which to legitimise their own monopoly and qualifications, concurrently borrowed from older, pre-industrial sources of legitimation and credit.⁵⁵ As Larson puts it:

[T]he only general ideological structures on which professional ethicality and social credit could be convincingly established were those inherited from the passing traditional order. They were antithetical to the principles of the acquisitive society, although it should not

⁵³ See Langbein, *The Origins of Adversary Criminal Trial* above n 13.

⁵⁴ Cf Frank's account of the persistent effort to convince testators that, in the light of a more formalised law of wills following the *Wills Act 1837* 7 Wm 4, legal advice was essential to secure succession: Frank, above n 2.

⁵⁵ Similarly uneven processes have been observed in relation to science — Steven Shapin, *A Social History of Truth: Civility and Science in Seventeenth-Century England* (University of Chicago Press, 1983) — and debt — Margot C Finn, *The Character of Credit: Personal Debt in English Culture, 1740-1914* (Cambridge University Press, 2003).

be forgotten that, ultimately, an appeal to those ideological structures was paradoxical...⁵⁶

Codes of professional ethics became a key resource for filling the legitimacy deficit pending the more secure establishment of a scientific or quasi-scientific rationale for exclusiveness. The professions' commitment to a service ideal, their belief in the intrinsic value of their work, and of work itself, and their self-conscious ethics, became key to their distinctiveness and respectability. Yet the fact that professionals earned their living from this work, and operated in markets, constantly threatened to undermine their claim to integrity via the taint of commercial self-interest. The early professions were, in short, caught in a tension between their need to appeal to the legitimising resources of the traditional order while essentially being part of the new one. Reminiscent of Weber's analysis of a 'Protestant work ethic', the professions fused two distinct components which did not necessarily fit comfortably together: an entrepreneurial component and the notion of a calling or vocation:

Anti-market and anti-capitalist principles were incorporated in the professions' task of organising for a market because they were elements which supported social credit and the public's belief in professional ethicality. Thus, at the core of the professional project, we find the fusion of antithetical ideological structures and a potential for permanent tension between 'civilizing function' and market-orientation, between the 'protection of society' and the securing of a market, between intrinsic and extrinsic values of work.⁵⁷

In this complex mix, notions such as 'gentility' and 'honour' remained key marks of integrity — and, hence, of professional competence.

The Legal Profession: an Uneven Path to Modernisation

Larson's account is, of course, a structural model which we would not expect completely to correlate with real events. As she herself emphasises, the cognitive and institutional situation of the various professions differed significantly; and, in her historical comparison of the development of medicine and engineering, she shows that organisational differences, such as the location of practice within individual relationships (family doctors, family solicitors) or complex organisations (specialist medical consultants, commercial lawyers),

⁵⁶ Larson, above n 12, 57.

⁵⁷ Ibid 63; on the blend of pre-modern and modern sources of legitimation, see generally 5, 8, 13, 57, 61–3.

can be highly influential. Nonetheless, an examination of how well her account fits the development of the English legal profession provides a useful point of departure for our attempt to unravel the professionalisation process in law and its social implications. It is immediately apparent that the legal profession — already relatively organised and clearly identified as a profession, but highly fragmented — followed a further process of significant if uneven professionalisation through the whole course of the 19th century; and that there were many tensions between the different interests of different parts of the legal profession, as well as marked differences in their capacities to conform to the conditions for robust professionalisation. As Woodward summarises the position:

The legal profession was caught, like the law itself, in a net of vested interests, formalism, and pedantry. During the eighteenth century the decline in intellectual level of the Inns of Court had been more serious even than the decline of higher study in the universities. The legal corporations did not reform themselves until the middle years of the nineteenth century, and the lawyers, as a body, were perhaps the greatest obstacle to the reform of the law...⁵⁸

The central requirement of a fully-organised system of professional training came late. The Council of Legal Education was set up in 1852 by the four Inns of Court, in part as a response to a parliamentary inquiry into legal education in 1846. The solicitors — confirming Larson's argument that the 'middling' or 'common' sectors of the professions were the driving agents of change — organised themselves somewhat more quickly, and the Law Society, incorporated in 1831, held lectures from 1833. Three years later, the judges agreed that candidates for admission as attorneys would henceforth have to pass an examination in common law, and in 1837 the same rule was applied to solicitors at the Court of Chancery. From 1843 the Law Society was authorised to keep a register of solicitors.⁵⁹ But a code of conduct for the bar did not come until the 1890s, and, while law was gradually inching its way into the modern universities by the latter part of the Century, a 'liberal university education' followed by a specialist professional training elsewhere remained the favoured route of entry, particular to the elite parts of the profession, well into the second half of the 20th century. No wonder, then, that even amid the considerable literature on the reform of the profession in the 19th century, there are many voices insisting that there was a strong continuity in the ethics and organisation of the profession between the 17th and 18th centuries and the Victorian era of reform.⁶⁰ The slow and uneven development of

⁵⁸ Woodward, above n 46, 18.

⁵⁹ Ibid 618–19.

⁶⁰ Duman, above n 11; Cocks, above n 11; Pue, above n 11.

professional training must have deepened legitimation problems, particularly for newer parts of the profession such as criminal defence, many of whose practitioners moreover came from social groups not previously much represented at the bar.⁶¹ Further legitimation problems were created by the expansion and decentralisation of the profession and, particularly in relation to the bar, by the breakdown of the disciplinary system organised around the mess, which was suitable only to a much smaller and more socially cohesive profession.⁶² As in Larson's model, much of the pressure for expansion and for the creation of new markets and ways of earning money was coming from a vanguard involved in the less elite areas of practice. Criminal law cases were significant in this expansion, not only because of the *Prisoners' Counsel Act* but also as a result of the expansion of regulatory offences and of summary jurisdiction in the mid-century. Indeed, much of the profession was confronted with a double bind in its attempt to define the marks of exclusive expertise. For the most obviously legally exclusive techniques were precisely those whose complexity and technicality opened them up to the Benthamite critique of law as deliberately fostering archaic and obfuscatory fictions.⁶³ Modernising the law, on this influential view, implied making it more transparent. But this seemed to cut across the need for cognitive exclusiveness. As I shall try to show, the defence lawyer's role put him in a very particular relationship to these cross-cutting pressures.

Of particular interest for the purposes of my argument is the way in which the legal profession fulfils so neatly Larson's observation of an uncomfortable yet relatively enduring combination, in its legitimating ideology, of, as it were, ancient and modern elements. Even as the profession was being better trained and more rationally organised; as its ethics and system of discipline were being debated; as the law itself was subject to efforts at rationalisation through (attempted) codification; and as legal procedures were being radically reformed in a rationalising direction, the marks of legitimation of the legal profession remained strongly tied to marks of social credit and of gentility, as well as to yet more evidently *ancien régime* symbols and rituals such as the use of wigs and gowns. Again, this made legitimation a much more straightforward business for the elite parts of the profession — and correspondingly difficult for those who, in Miss Marrable's terms, were neither the sons of gentlemen nor 'esquires'.

⁶¹ David Lemmings, *Gentlemen and Barristers: The Inns of Court and the English Bar 1680-1730* (Clarendon Press, 1990); see also Allyson M May, *The Bar and the Old Bailey 1750-1850* (University of North Carolina Press, 2003).

⁶² See Cocks, above n 11, and Duman, above n 11. Much of the relevant historical scholarship focuses on the elite parts of the profession, notably the bar (in which criminal defence lawyers tended to be of the lowest rank): for an honourable exception, see Patrick Polden above n 11.

⁶³ Ogden, above n 26.

Moreover Trollope's novels testify to the continuing importance of evaluations of character in the sense of reputation and respectability to the operation of criminal justice (as of social life more generally). During the years leading up to Lady Mason's trial in *Orley Farm* (1861-62), at the time of the original challenge to the will, and in court itself, Trollope makes it clear that Lady Mason's connections, her social credibility and reputation, are far more important to her legal safety than either her actual legal position or the quality of her legal representatives. Just as it is Lady Glencora's support which prevents, for a while, Lord Fawn from repudiating Lizzie Eustace, thereby delaying her downfall in *The Eustace Diamonds* (1873),⁶⁴ it is Lady Mason's good character — in the sense of her reputation and respectability — which underpins her legal credibility.⁶⁵ Similarly, in *The Way We Live Now* (1875), in a different context, it is the financier Melmotte's reputation for wealth and financial sagacity which allows him to hoodwink the dozy Bideawhiles, being allowed to complete the 'purchase' of a property from the Longstaffes without any money changing hands. (It must be admitted that Melmotte helps things along a little by forging a letter.) Conversely, Mr Chaffanbrass's successful demolition of Mr Dockwrath by cross-examination in *Orley Farm* is accomplished by means of an assault on his character, by showing the latter's interest in the case.

That the legal profession kept one foot firmly in the *ancien régime* may, perhaps, help to explain the particular opprobrium with which novelists and journalists treated and indeed spotlighted the potential bad faith implicit in the tension between claims to gentility and integrity on the one hand and commercial reality on the other — and the reason why so much of this spotlight fell, amid various possible forms of practice, on criminal defence. Similarly, the relatively recent encroachment of the bar on a role formerly occupied by defendants themselves, when combined with the still incomplete formalisation of criminal law (as opposed to civil law) doctrine at the time, marked criminal lawyers out as particularly fair game for a critique of the professions as a conspiracy on the laity. Moreover, as Larson notes, certain kinds of practice — notably medical practice, but also the work of, for example, a family solicitor — are susceptible of being analogised to the role of the priest, and hence located within a more familiar, traditional justification grounded in socially-sanctioned trust relationships. This legitimating frame would have applied hardly at all to the isolated service transactions typical of the bar (though it would certainly have applied in modified form to the barrister's relationship with solicitors). The relatively recent expansion of the criminal bar, and

⁶⁴ Trollope, *The Eustace Diamonds* (Penguin Classics, 2004, with an introduction by John Sutherland and Stephen Gill) 617.

⁶⁵ Trollope, *Orley Farm* above n 22, vol I, 250; vol II, 207, 288.

the fact that many criminal defence lawyers would have been drawn from the middling people rather than from insider elites (note, for example, that Charles Phillips, Courvoisier's barrister, is invariably described in contemporary reports as 'Irish', something which must have been quite irrelevant to anything other than implicit comment on his social position). Indeed, as Cairns shows, there was a widespread perception in the early 19th century that the 'new men' of the criminal defence bar were driven by ambition rather than principle — a view which seems to have been driven as much by elite snobbery as by popular anxiety about ethics.⁶⁶ The partial and relatively late formalisation of both substantive doctrines of criminal law and the rules of criminal evidence, and the fact that the large majority of criminal trials in the early part of the 19th century remained relatively summary affairs — in which fact rather than law, moral judgment rather than technical expertise, were in the driving seat⁶⁷ — posed a particularly acute problem of professional legitimation for criminal barristers, though one which was set gradually to resolve itself as formalisation of the law proceeded through the century.

The Professions and the Novel

There is, then, every reason to think that the position of the legal profession, and of criminal defence lawyers among legal professionals, was an obvious candidate for literary representation of the more general concerns underlying the decisive growth of (dubiously accountable) professional power, with its knock-on challenge for elite authority and its potentially adverse effect on the middling classes who were the primary consumers of both legal services and realist novels. Schramm and others may well be right to argue that lawyers' and novelists' shared techniques of narrative and rhetoric set up what was, in effect, a competition for dominance in the establishment of meaning and truth, and one which persisted across a number of decades.⁶⁸ But the other professions, too, are well represented in the 19th-century novel; a fact which supports the claim that the concern here was general rather than exclusive to law.

At the start of the 19th century, there were only three professions which offered any hope of generating a respectable living for a man

⁶⁶ Cairns, above n 13.

⁶⁷ Peter King, *Crime and Law in England 1750-1840* (Cambridge University Press, 2006) ch 1; James Q Whitman, *The Origins of Reasonable Doubt: Theological Origins of the Criminal Trial* (Yale University Press, 2008) chs 6 and 7; Arlie Loughnan, 'Manifest Madness: Towards a New Understanding of the Insanity Defence' (2007) 70 *Modern Law Review* 379-401; Lacey, *Women, Crime and Character* above n 5.

⁶⁸ Schramm, 'Is Literature More Ethical than Law?' above n 3; see also Frank, above n 2.

with insufficient inherited wealth: law, medicine and the church. All three professions underwent decisive reform during the course of the century; and all three — along with, though to a lesser degree than, new professions such as engineering,⁶⁹ which were slowly establishing themselves — make regular appearances in the social world of the 19th-century novel. These representations reflect many of the themes of Larson's analysis. For example, George Eliot's *Felix Holt* (1866) displays precisely the kind of quasi-professional ethic which the professions were studiously trying to invent at an institutional level when he rejects the inheritance of his father's business in selling powders which he believes to be medically inefficacious. And both Dr Lydgate, of Eliot's *Middlemarch* (1871-72), and Dr Thorne, of Trollope's eponymous novel (1858), struggle against not only anti-scientific prejudice but also the survival of social credit and elite connections as the main driver of patient choice. In Lydgate's case, he is brought to a vivid and painful realisation of the limits of his individual power and of his vulnerability to local interests, symbolising some of the special challenges of the professionalisation process for activities focused on an individual client/practitioner relationship.⁷⁰ Conversely, doctors like *Dr Thorne* (1858) and Dr Gibson of Elizabeth Gaskell's *Wives and Daughters* (1865) are also shown astutely to combine a commitment to the integrity of practice with an (unconscious) manipulation of the norms of gentility and respectability. Each of them occupies something akin to a 'priest-like' role in relation to their long-term patients. Also significantly, they are held up in contrast to both more unscrupulous, profit-seeking new men and unprofessional older men who rely exclusively on their social connections.

The Church, of course, figures prominently in the 19th-century novel — in which its place is becoming much concerned with issues of professionalisation, broadly understood. For example, many of Trollope's 'Barchester' novels are concerned with issues of church reform which would ensure a more standardised and equitable distribution of resources, providing for more regular career paths open to talent rather than influence. It may indeed be true that Bishop Proudie of *Barchester Towers* (1857) has been appointed on merit, but Trollope displays more than a little sympathy for the disappointed expectations of Archdeacon Grantly, the son of the former Bishop; as well as no little affection for his old-world values. In the church, as in

⁶⁹ For example, Roger Scatcherd of Trollope's *Dr Thorne* (1858); Robert Rouncewell of Dickens' *Bleak House* (1852-53). In Scatcherd's case, the wealth and the honour earned from his exceptional professional success propels him into a life of quasi-aristocratic decadence and decline — symbolising the fact that by this time professional work and pride were regarded as significant sources of both respectability and fulfilment.

⁷⁰ Larson, above n 12, ch 3.

law, parvenus like Mr Slope are held up to our scrutiny just as critically as lazy incumbents like Reverend Stanhope, while the injustices of accidental differences in stipend are held up to vivid scrutiny in both *Framley Parsonage* (1861) and *The Last Chronicle of Barset* (1867). It is important to note that the literary representation of the Church in the mid-19th century was as much concerned with issues of professionalisation — with the Church as a source of careers as well as of moral and social authority — as it was with issues of doctrine, faith and dissent.

Another example of literary concern with professionalisation — that of politics — is perhaps less obvious. Weber's early 20th-century idea of 'politics as a vocation'⁷¹ was, however, firmly on the agenda of many 19th-century novels, including Eliot's *Felix Holt* (1866) and *Middlemarch* (1871-72) and Trollope's Palliser series. In *Phineas Finn* (1869), *Phineas Redux* (1874), *The Prime Minister* (1876) and *The Duke's Children* (1880) Trollope shows us a struggle between aristocratic *noblesse oblige* and the new politicians which is reminiscent of his characterisation of the Church in the Barchester novels. Many of the Trollope's 'new' politicians, like Finn and Francis Tregear, are gentlemen but without resources, and hence have to balance their commitment to politics as a vocation with a struggle to earn their living. This imperative makes it very hard for them to escape from dependence on traditional sources of wealth, notably elite patronage; and this in turn compromises the independence which is central to their implicit definition of professional standards. In the age of reform, the gradual emergence of politics itself as a profession was surely one of the most potent symbols of a changing distribution of power across the classes, accelerating with every Reform Act, and leaving the bourgeois class, which had been in a minority at the outset of the century, with clear dominance by its end. Yet in politics as in law, the ancient marks of credit and character — the House of Lords, parliamentary rituals, systems of patronage — long outlasted the system which had borne them, and constantly disrupted the claim to reason and modernity central to the project of reform.

Conclusion: The Triumph of Professionalism?

It would be an exaggeration to claim that the major interest in law, so evident in 19th-century realist novelists such as Trollope, is propelled first and foremost by a preoccupation with the rise of the professions. There are, of course, many other sources of novelists' interest in law. Perhaps most strikingly, we can draw out of Trollope's texts a deep concern for equity in the impact of the law, and particularly of the

⁷¹ Max Weber, 'Politik als Beruf,' *Gesammelte Politische Schriften* (Muenchen, 1921), 396–450; the text was originally a speech at Munich University in 1918.

criminal law. For example, in *The Eustace Diamonds*, Trollope comments on the reluctance to deal with what we would today call the white-collar crimes of the powerful — especially in the case of women. ‘Evil-doing will be spoken of with bated breath and soft words even by policemen, when the evildoer comes in a carriage, and with a title’.⁷² As the lawyer for one of the (lower-status) men accused of stealing the diamonds expostulates when, at the end of the book, Lady Eustace pleads illness and fails to turn up to give evidence, ‘I say again that she ought to be here in that dock, — in that dock in spite of her fortune, in that dock in spite of her title, in that dock in spite of her castle, her riches, her beauty, and her great relatives.’⁷³

Nonetheless, there is much to be learnt about Victorian attitudes to both law and the wider social world from Trollope’s and other novelists’ treatment of the legal profession. In particular, Trollope’s changing view as between his earlier and his later novels, symbolised by his more sympathetic characterisation of Mr Chaffanbrass in *Phineas Redux* (1874) as compared with *Orley Farm* (1861–62), tells us a great deal about the gradual consolidation of the criminal defence bar’s professional status, itself premised on a significant formalisation and consolidation of criminal law. The novels show that the legal profession in general, and the criminal bar in particular, were making progress in solving the problem of professional legitimation: as the practices of professional accreditation were consolidated, and legal doctrine was rationalised, the status of lawyers became more secure. In the decades following the *Prisoners’ Counsel Act 1836*, notwithstanding the failure of the codification projects of successive Criminal Law Commissions, both the substantive law and the law of evidence were significantly reformed and rationalised. The gradual development of legal education and training, of systematic law reporting, and, finally, of an appellate system in which points of law could be tested, entirely changed the co-ordinating capacities and the legitimation problems of criminal law. The detailed account of these processes belongs to another project.⁷⁴ The central argument of this paper is that the increasing technical specification of criminal law through the 19th century, along with the graduate organisation of professional accreditation, increased the purchase for professional legitimation. Not least, it did this by tempering rhetoric with legal knowledge and accredited skill as the key qualifications for criminal barristers. Like other significant social and legal developments, the realist novels of the 19th century open a window onto this fascinating and hitherto neglected aspect of the development of criminal law.

⁷² Trollope, *The Eustace Diamonds*, above n 64, ch 74.

⁷³ *Ibid* 752.

⁷⁴ See Nicola Lacey, ‘In Search of the Responsible Subject: History, Philosophy and Criminal Law Theory’ (2001) 64 *Modern Law Review* 350–71; Lacey, above n 32.

