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Not So Great Moments in Trial Advocacy: Clement Vallandigham

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The subject of this session is "The Lawyer as Hero." Being the contrarian that I am, I thought I would present the story of someone who I do not consider to have been a hero—Clement L. Vallandigham.\(^1\) History has not been kind to him.\(^2\) I am sure those of you who do remember his name think of him as a traitor and a rascal—a loathsome individual. But to some, and for a time, he was a hero and a champion in court. This just goes to show that one person's hero is another person's goat.

In addition to being a contrarian, I have also harbored the ambition, if it can be called an ambition, to document some "not so
great moments in trial advocacy." I have grown weary of all of the self-congratulatory trumpeting of professional triumphs. I want to see more of the agony of defeat. Perhaps this is just a reflection of my own somewhat disappointing professional career. In any event, one of my favorite lawyer anecdotes (tall tales) goes something like this:

A woman sued a cosmetics company claiming that she had used their tanning lotion under a sun lamp as directed, and that she had been severely burned when the lotion exploded in flame. The defense lawyer experimented with the lotion and lamp at his firm, to no effect. The confident lawyer repeated the process as a demonstration for the jury. His arm burst into flame. He settled the case on the way to the hospital.

One day, when I was following my usual research "method," I ran across a mention of Vallandigham in an obscure book by "historian/biographer" Jasper Ridley. In one chapter Ridley collected the names of, and brief stories about, famous Freemasons on both sides of the American Civil War. He noted briefly that Clement Vallandigham "appeared for the defence in a murder case, and demonstrated in court to the jury how a gun might have been fired. He accidentally fired a shot from the gun and killed himself." Well, I obviously had to find out more about this. Surely it was too good to be true. In one detail it was, but Ridley was not that far off. Here we go.

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5 No method.
6 JASPER RIDLEY, THE FREEMASONS: A HISTORY OF THE WORLD'S MOST POWERFUL SECRET SOCIETY (1999). That I would sit around reading stuff like this is conclusive proof that I have no life.
7 Id. at 190 (citing 4 WILLIAM R. DENSLOW, 10,000 FAMOUS FREEMASONS 268-69 (1961)).
To understand Vallandigham’s one-time popularity, we have to try and get a handle on the times. We will be returning to the days immediately preceding and then following the American Civil War. If you saw the movie *The Gangs of New York*, you were probably surprised by the history you did not know. That is partly due to the fact that the movie was not accurate history.\(^8\) It was a cross between *The Godfather* and *Braveheart*. Still, the movie did give us a sense of just how riotous the period was. According to one historian, there were roughly 1200 riots in the United States in the forty years leading up to the Civil War.\(^9\) Not everyone could vote, and for many ethnic groups rioting was a way of getting heard by the establishment.

The subject of this inquiry was an Ohioan who served as a United States Congressman from the Dayton area, and who later sought the Governorship of Ohio—from exile in Canada.\(^10\) Insofar as his courtroom exploits are concerned, we will be looking at a case that arose from a shooting in Hamilton, Butler County, Ohio,

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\(^{8}\) That is not to say that there were not many clever and accurate historical references. For example, Bill the Butcher refers to his father’s murder by the British on July 25, 1814. Presumably, the allusion is to horrific night action at Lundy’s Lane (now Niagara, Ontario) during the War of 1812. For a more accurate portrayal of New York gangs during the period in question, see TYLER ANBINDER, *FIVE POINTS: THE 19TH-CENTURY NEW YORK CITY NEIGHBORHOOD THAT INVENTED TAP DANCE, STOLE ELECTIONS, AND BECAME THE WORLD’S MOST NOTORIOUS SLUM* (2001). The battles featured in the movie were between various Irish (the most prominent being the Dead Rabbits) and Nativist (the most prominent being the Bowery Boys) gangs. For the sake of coloring everything with a sort of medieval honor, no guns were permitted. The violence portrayed was presumably based on the 1857 "Bowery Boys Riot." In actual fact, the Bowery Boys opposition was the Irish Roche Guard, a political social club very like a militia unit. The "Dead Rabbit" gang was largely an invention of the press. As the fighting escalated the guns came out. The Bowery Boys had more guns. Most of the deaths were from gunshot wounds. The Roche Guard suffered the most casualties, but they ended up being the ones prosecuted. *Id.* at 283-89. It is also worth pointing out that the riot was actually intraethnic rather than interethnic. *Id.* at 290-91.


\(^{10}\) He was a 60s kind of guy, but in the 1860s.
which was tried in Lebanon, Warren County, Ohio. So, to get our bearings, we might do well to look at the political and legal climate in and around Cincinnati (neighboring Hamilton County, Ohio) during the relevant period.

In the mid-nineteenth century, Cincinnati experienced a number of race riots (in those days, white rioters attacked African-Americans). These riots were fueled by fears among Irish and German immigrants that emancipated slaves "would come over the river and take [their] jobs." But this was not some kind of unique regional phenomenon. Indeed, the New York Draft Riots that were shown in The Gangs of New York were instigated, in part, by Democratic Party rabble rousers. For example, General Leslie Combs of Kentucky roused the rabble at a mass meeting in New York with claims that if Southern slaves were emancipated, they would come North and take the jobs of Irish longshoremen and laborers. This was the strategy of the "fusion Democratic ticket." The demagogic Mayor of New York City, Fernando Wood, pushed the charge that Lincoln and the Republicans would conscript all of the Irish and German immigrants into the armed forces to make jobs available for emancipated slaves. The colorful Wood actually wanted to have New York City secede from New York State and from the United States, and go it alone as a free city—"a nineteenth-century Occidental Hong Kong." After all, the South was New York City's best customer. In 1860,

11 For all of you yuppies (you know who you are), Lebanon has a cool historic inn called the Golden Lamb. I recommend it.
14 Man, supra note 13, at 378.
15 One commentator quips that the Welsh-Prussian Wood received his first name because "his mother was reading a lurid Spanish novel at parturition." Bill Kauffman, The Blue, the Gray, and Gotham, July/Aug. 2000, available at http://www.theamericanenterprise.org/issues/articleID.17309/article_detail.asp (last visited Oct. 19, 2003).
16 Id.
17 Id.
Wood backed James Kerrigan as a candidate for Congress. Kerrigan was a Five Pointer and a leader of the Nativist Bowery Boys. In support of South Carolina’s preparation to secede from the Union, Kerrigan placed an ad in the *New York Herald* which essentially called for the New York Militia Units to fight for the Confederacy in the event of war.\(^{18}\)

![1862 painting by D.G. Blythe showing Lincoln fighting the dragon of rebellion while being hindered by Tammany Hall.](image)

But not all of the riots of the period were racially motivated. There were also clashes in Cincinnati between the "new Germans" (who had fled Europe after the failed Revolution of 1848) and the so-called Nativists, who were the force behind the American or Know-Nothing Party. In 1855 there was a major clash between the Germans and Nativists. The Germans apparently had become quite a political force and had even managed to successfully push for bilingual education\(^{19}\) and Sunday beer sales\(^{20}\). The Germans barricaded the streets going into their "Over-the-Rhine" area\(^{21}\). When a mob of Nativists moved on them, the Germans rolled out a

\(^{18}\) *See* ANBINDER, *supra* note 8, at 297.

\(^{19}\) *There is* nothing new under the sun.

\(^{20}\) *My source is* an excellent newspaper article. *See* John Kiesewetter, *supra* note 9.

\(^{21}\) *This area is now* African-American, and it was racked by riots in April, 2001. *A City Council member exclaimed, "There is no precedent for this! None!" See* id.
cannon, which belonged to a local German physical fitness club, and fired it at the Nativists. In addition to these clashes, there were serious (Irish versus African-American) race riots in 1861 and 1862. These resulted from economic competition between ethnic groups, and the economic hardship was associated with disruption of river traffic caused by the war. The riots did not end after the Civil War.

The last half of the century was surprisingly wild and woolly. In fact, the worst Cincinnati riot occurred in 1884, ten years after Vallandigham’s death. This was the so-called "Law and Order Riot!" There was a lot of political unrest caused by the prevalence of corruption in the city government. The riot was triggered by the perceived light sentence (twenty years) given to a convicted murderer. A mob moved on the courthouse and burned it down. Ohio National Guard units had to be called in to put down the disturbances, which reportedly involved as many as ten thousand rioters.

Although this is a digression, here are some prints from Harpers showing the extent of the destruction.

![Scenes from the infamous 1884 "Law and Order Riot" in Cincinnati, Ohio, from Harpers Weekly.](image)

22 If there are any NRA members in my audience (unlikely) they will probably note, with interest, that the Enquirer article alludes to several riots in which privately owned cannons were employed.

23 John Kiesewetter, supra note 9 (citing Don Heinrich Tolzman, the University of Cincinnati’s Director of German-American Studies).

24 Id.
Having set the scene, we need to return to the subject—certain aspects of the life and, more particularly the bizarre death, of Clement Vallandigham. Let us return to the years of the Civil War. In the winter of 1862-63, Lincoln once remarked that "[t]he enemy behind us is more dangerous to the country than the enemy before us." He was speaking of Fernando Wood, the fifth-column Knights of the Golden Circle, and the pro-Southern Democrat peace party known as the Copperheads. He did not need anymore enemies. Enter Clement Vallandigham.

A Fifth Column Menaces the Union Rear

An 1863 cartoon depicting the Copperheads as serpents.

26 For a discussion of the activities of the Knights see id. at 159-60, 328. When he was urged to round up and arrest all of the Knights, Lincoln asked his advisor "if the jails will hold the Knights of the Golden Circle, they are numerically too small to be a serious menace to the government. If the jails will not hold the Knights of the Golden Circle, what will you do with them?" Id. at 159.
Vallandigham thrived in this tumultuous political environment. He was pro-Southern, anti-abolition, and anti-New England. He was also virulently racist. For these reasons, he could appeal successfully to three groups—the Irish-Americans in the cities, the "low" Germans of the Catholic faith, and "upland Southerners" who had come north into Ohio, Indiana, and Illinois (the "Butternuts").

To the Butternuts, Vallandigham appeared to be something of a champion. He played the role of spokesperson for Midwestern farmers and city laborers, and he certainly "cater[ed] to their prejudices." Ideologically, he played the role of a conservative dissident and a proponent of Western sectionalism who opposed the Industrial Revolution and Lincoln's revolution—that is, the wartime transformation of "the federal union into 'a new nation,' giving industry ascendancy over agriculture, extending rights to the black man, ending the upper Midwest's chance to play balance-of-power politics, and [in Vallandigham's mind] threatening civil rights and personal freedoms."

From the start of his political career (as a state legislator), "Vallandigham quickly became known as a Jacksonian Democrat with a strong states' rights bent and a conviction that the Union should not be split over slavery." He secured a leading role in the Democratic National Committee and campaigned for Buchanan. Finally, in 1858, he gained a contested seat in the 35th Congress from Dayton, Ohio. During his term, he developed close ties to and personal friendships with a number of Southern congressmen.

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27 KLEMENT, supra note 2, at 107-08.
28 Id.
29 Id. at 26.
30 Id. at 1.
31 Id. at 9. For example, Vallandigham voted for a law that would have prevented "people of color" from emigrating to Ohio. Id.
32 Id. at 20.
During the war years, Republican newspaper editors made Vallandigham a target of abuse, and Republican constituents tried to get their congressmen to expel him from the House.\textsuperscript{33} Republican propaganda attempted to tie Vallandigham to everything from the Knights of the Golden Circle, the New York\textsuperscript{34} and Cincinnati race riots, and Confederate General John Hunt Morgan's cavalry raid on Indiana and Ohio; modern folklore continues the tradition.\textsuperscript{35}

\textsuperscript{33} \textit{Id.} at 95.

\textsuperscript{34} Conspiracy theories were in vogue. Consider Sandburg's observation in \textit{Abraham Lincoln, The War Years}: "The mobs were not driven... by mere blind wrath. Somebody had done some thinking, somebody had chosen a time when all the State guards the Governor could scrape together had gone to Gettysburg." \textsc{Sandburg, supra} note 25, at 361. Still, while the riot may have been triggered by the draft, it was as much a race riot as anything else. It is also worth noting that of the 161 "Five Pointers" drafted, 59 were exempted, 11 hired substitutes, and 88 simply failed to report. The authorities did not have the means or will to track them down. Only one Five Pointer was actually compelled to serve and he later deserted. \textsc{Anbinder, supra} note 8, at 317-18.

\textsuperscript{35} See \textsc{Klement, supra} note 2, at 232-33; \textsc{Robert W. Schilling, Yellow Creek Stories}, Chapter XVII \textit{The Copperheads}, http://www.garlock-elliot.org/archive/YllwCrkSt/CHAPTER17.htm (last visited Sept. 29, 2003). Schilling tries hard, but not all that convincingly, to tie Vallandigham to Morgan. I get a kick out of the folksy title he bestows on Morgan—"Horse Thief Plenipotentiary." A Parson Brownlow penned a "brutal" obituary in which he stated that "[t]here should be a salute fired in front of every horse-stable in the land, in honor of his death, and all fine horses and mules should be notified that they may now repose in quiet at night and graze in peace in the daytime." \textsc{Sandburg, supra} note 25, at 611. John Hunt Morgan's home town, Lexington, Kentucky, now claims the title of "Horse Capitol of the World."
Meanwhile, the depression of 1861-62 and Union military failures led to something of a Democratic resurgence. Vallandigham looked forward to political victory and a second term. But, by now, he had become such a thorn in Lincoln’s side that Lincoln and Treasury Secretary Salmon P. Chase decided to oust him by promoting their own rival candidate—Union war hero General Robert C. Schenk. Vallandigham lost. Seemingly undaunted by his unsuccessful campaign, Vallandigham returned to Washington to serve out the rest of his lame-duck term. His new strategy was to be an outspoken "apostle of peace." He delivered a lengthy speech on the floor, but his incendiary pleas and arguments sounded anything but practical. Still, Vallandigham thought that a "peace platform" would revitalize his political career. He had his eyes on the office of Governor of Ohio.

Timing is everything. Looking ahead in time for a moment, it must be said that Vallandigham’s arrival in Canada after his exile (see infra notes 43-50 and accompanying text) coincided with the New York draft riots. Furthermore, the timing of Morgan’s raid did not help Vallandigham’s election campaign for Governor of Ohio (see infra notes 51-54 and accompanying text).

36 KLEMENT, supra note 2, at 125.
37 See SANDBURG, supra note 25, at 125 ("He [Vallandigham] outlined a plan for the soldiers of both armies to fraternize and go home . . . ").
38 See KLEMENT, supra note 2, at 125.
Returning to Ohio, Vallandigham found that sentiments in Dayton were in his favor. He exploited fear of conscription and also capitalized on the depredations of Republican mobs that destroyed a number of pro-Democratic Party newspaper offices. Unfortunately, he overestimated his support in the rest of the state, and he exercised poor judgment by recklessly testing the limits of dissent. He was about to be undone by two factors—Lincoln's tendency to believe what was written by the Republican press and the overreaching of Union Major General, Ambrose Burnside.

Following the disaster at Fredericksburg, Burnside was appointed to the command of the Department of Ohio, headquartered at Cincinnati. For a former politician, Burnside did not appear to be very politically sensitive. He tended to believe anything written in the Republican papers and confused contrary reportage as treason. He issued a notorious General Order No. 38, which basically defined criticism of the administration as treason to be prosecuted and judged by him. This only encouraged the would-be martyr, Vallandigham, who pushed Burnside's brass buttons in a series of articles and speeches. Vallandigham outdid himself in an appearance at Mount Vernon, Knox County, Ohio, where he ridiculed Lincoln, Burnside, and Burnside's general Order No. 38. Burnside's agents were in the audience scribbling in their note pads. Burnside had Vallandigham arrested, tried, and convicted by a military tribunal. Judge H.H. Leavitt denied

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39 Id. at 175.
40 Id. at 175-77.
41 Like Dayton and Hamilton, Mount Vernon seems to have been a Vallandigham stronghold. See, e.g., SANDBURG, supra note 35, at 192-93. In support of this observation, Sandburg stated that:
   Near the town of Mount Vernon, Ohio, lived a farmer and his wife who believed that Vallandigham was telling the truth about the war, that Lincoln was a deceiver, a monster and a fiend perpetrating a needless war, the woman saying to her children, "Lincoln! how I loath that name between my lips! . . . To her Vallandigham was a hero and brave truth teller. Nothing Lincoln said reached her.
   Id.
42 Vallandigham did get some short-term gain from his "martyrdom." See, e.g., SANDBURG, supra note 25, at 165 ("'We consider Mr. Vallandigham now the most prominent candidate for the next Presidency,' said the Fort Wayne (Indiana) Sentinel, 'and we fully expect that in March, 1865, his shortsighted
Vallandigham's petition for a writ of habeas corpus. Lincoln was in an embarrassing bind but latched onto a suggestion that while imprisonment might play into Vallandigham's hands, exile might not. He ordered Secretary of War Stanton to exile Vallandigham to the Confederate States—"beyond the lines."43

Lincoln received a firestorm of criticism, but he did not back down. Arguing that the civil courts were inadequate to deal with the circumstances,44 Lincoln defined such arrests as "preventive [and not] vindictive . . . I think the time not unlikely to come . . . when I shall be blamed for having made too few arrests rather than too many."45 He posed the famous question: "Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of the wily agitator who induces him to desert?"46

Vallandigham was not really welcome in the South, and he soon left for Canada on a blockade runner. The editor of the Augusta Chronicle wrote: "We are glad that Vallandigham has gone . . . for his presence in the Confederacy was a source of perplexity to the Government, and general uneasiness to the people."47 The editor of the Richmond Sentinel opined "that the matter was managed . . . [in a way] most likely to frustrate Lincoln's amiable designs."48 Edward Everett Hale (grandnephew of Nathan Hale) wrote a short story in The Atlantic Monthly titled The Man Without a Country,49 which was inspired by Vallandigham's "travails."50 Some Midwestern Democrats insisted he return to Ohio or forfeit his political authority. After consulting

prosecutors will have the gratification of seeing him change his quarters from Fort Warren to more commodious and fitting ones in the White House.'").

43 See SANDBURG, supra note 25, at 163.
44 Sound familiar?
45 KLEMENT, supra note 2, at 182.
46 PHILIP B. KUNHARDT, JR., ET AL., LINCOLN: AN ILLUSTRATED BIOGRAPHY 210 (1992); KLEMENT supra note 2, at 183; SANDBURG, supra note 25, at 168.
47 KLEMENT, supra note 2, at 212.
48 Id.
other supporters, Vallandigham, nonetheless, decided to stay in Canada and renew his run for Governor of Ohio. He figured that if he won Lincoln would not dare challenge his triumphant return.

Even from Windsor, Vallandigham and his supporters waged a furious campaign. The Columbus, Ohio, *Crisis*, announced that Lincoln would have himself declared "Perpetual President," and the *Cincinnati Enquirer* declared that Lincoln's supporters were "mad fanatics . . . plotting against our liberties." As for the southern press, the *Richmond Examiner* reported a [presumably bogus] White House conversation in which Lincoln was reported as having said, "Do you think my term of office closes with these four years? No, sir; there will be a dispute in regard to the electoral vote, and I shall be President another term as God has directed!" Vallandigham's running mate, George Pugh, shouted out at a speech that when Vallandigham was elected Governor of Ohio, there would be "fifty thousand fully armed and equipped freemen of Ohio to receive their Governor-elect at the Canadian line and escort him to the State House to see that he takes the oath of office." But Vallandigham lost. Lincoln supposedly exclaimed, "Glory to God in the highest, Ohio has saved the Nation." What made all the difference were the Union victories at Gettysburg and Vicksburg. Later, when Vallandigham slipped back into the country, Lincoln followed Horace Greely's advice to ignore his return.

When he was not engaged in politics, Vallandigham pursued a successful legal career. This is where he picked up after the war. In his legal practice, he lost no chance to play a bit of politics by "align[ing] himself on the side of the common man ['Irish-Americans and German-Americans . . . Democrats'] against . . . the banker, the merchant, and the land speculator." Vallandigham's skills at the bar were considerable. We are told that he and his law partner, Daniel Haynes, "won nearly every

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51 Sandburg, *supra* note 25, at 449.  
52 Id.  
53 Id. at 450.  
54 Id. at 451.  
55 Klement, *supra* note 2, at 12.  
56 Id.
criminal case in which [they were] involved."\textsuperscript{57} Naturally, some complained that as a defense lawyer he gained freedom for many a guilty villain. But there was another side to his zeal too. He also took on private prosecutions. Although this was not considered improper per se, the ethic of the day frowned upon the practice. Consider the turn-of-the-century observations of legal ethicist George Warvelle:

\begin{quote}
[F]or many years [the employment of a private attorney to assist the state in the prosecution of a criminal case] was considered [contrary to] an ethical canon of the profession. This was always the case when the charge involved a capital crime. "Never take blood money," say the old writers, and if we are to credit the biographies of the ancient worthies they never did. In fact, the old Ciceronian idea seems at one time to have thoroughly pervaded the bar, and numerous admonitions have come down to us that where life or death is the issue, "it is always more honorable to defend than to prosecute."\textsuperscript{58}

It was thought that in the role of prosecutor, Vallandigham sometimes placed a higher value on personal triumph than on justice.\textsuperscript{59} For example, in one case "an eighty-one-year-old farmer . . . had [lost control of his] temper . . . and shot his son in an argument."\textsuperscript{60} Vallandigham pushed relentlessly for the death of this remorseful old man. His hanging was deemed a personal triumph for Vallandigham.\textsuperscript{61} Sad.

Vallandigham's last courtroom appearance was in the defense of Thomas McGehan,\textsuperscript{62} who had been charged with a murder that occurred in Hamilton, Butler County, Ohio.

\begin{footnotes}
\item[57] Id. at 308.
\item[58] GEORGE W. WARVELLE, ESSAYS IN LEGAL ETHICS 142-43 (1920) (footnote omitted).
\item[59] KLEMENT, supra note 2, at 308-09.
\item[60] Id. at 309.
\item[61] Id.
\item[62] I will refer from time to time to Thomas McGehan. Klement claims that McGehan misspelled his name "in an effort to hide his identity" as the author of this book. KLEMENT, supra note 2, at 309 n.28. Does this make any sense? Maybe. My stepdaughter's family came to America from Sicily. Their family name was something like Pescetelli (fishermen?). To blend in and become
\end{footnotes}
McGehan is sometimes described as a local Hamilton "rowdy," but that hardly seems adequate to describe his notoriety. A more accurate picture of McGehan is presented in *A History and Biographical Cyclopaedia of Butler County, Ohio*:

Thomas McGehan . . . was a native of Clermont County, and at the time of [the shooting of Thomas Myers] was about thirty-five years of age. He had been brought up as a shoemaker, but when about twenty-five had abandoned that occupation and became a politician, speculator, and man of no trade. In 1862 he was a special agent of police of the United States Government, and was afterwards city marshal of Hamilton. He was a bold, rough, and determined man, and early made enemies, being charged with counterfeiting and other crimes, but in no instance was the accusation substantiated, although generally believed. He became also interested in the whiskey frauds, and was employed by politicians on election days to aid them, as he well knew how to do. He had many friends, and was able to reward them and to punish those who were his enemies. 

It seems pretty clear that McGehan was a tough and interesting "character" who walked on both sides of the legal street. His autobiographical work, *A History of the Life and Trials of Thomas McGehan*, is quite amusing and tells us quite a lot American, they changed their name to Pistello and settled into a valley in East Tennessee. Clever, eh? Anyway, I am going to stick to the convention that his name was spelled McGehan, although you would think it more likely than not that he spelled it McGehean and that he ought to know how his name was spelled. This reminds me of the famous argument about how M'Naghten should be spelled. But you know all about that one.

63 *See, e.g.*, KLEMENT, *supra* note 2, at 309.

64 *See A History and Biographical Cyclopaedia of Butler County, Ohio, at* http://www.rootsweb.com/~ohbutler/cyc/262.htm (last visited Sept. 25, 2003) [hereinafter CYCLOPAEDIA OF BUTLER COUNTY, OHIO].

65 THOMAS MCGEHEAN, A HISTORY OF THE LIFE AND TRIALS OF THOMAS MCGEHEAN (1874). The picture of Vallandigham accidentally shooting himself, which I have included in this piece, is the front piece to the book. I actually managed to find a copy of this book and purchased it through an antiquarian book dealer in Cincinnati.
about his character. The work appears to be a postacquittal slap in the face of his accusers, whom he paints as low-life criminal conspirators. The first nineteen chapters of this short book vilify each and every one of his persecutors. He details all of their crimes and delicts, while attempting to cast himself in the role of the victim of a vicious conspiracy. It seems to me that his detailed knowledge of their misdeeds, in particular their operation of "The Notorious Whiskey Ring, of Southern Ohio," tends to show that he was probably in the thick of things criminal himself. He also includes a curious appendix to the work which lists all of the murders committed in Butler County from 1831 to 1873 (fifty-four is the count). His argument seems to have been that since he did not commit any of these murders, he did not commit this one either. His accusers tried to blame every crime in the county on him, falsely and maliciously. Of particular interest is McGehean's account of his first trial.

The murder for which he was charged occurred something like this. The prosecution, which was instigated by some of McGehean's long-time enemies, contended that McGehean and others had attacked Thomas S. Myers in an upstairs gaming room of the American Hotel in Hamilton, Ohio, on Christmas Eve, 1869. Myers was something of a tough guy and a scoundrel, but his family was powerful. Myers and others were playing cards when a group of men came in the room and attacked them with rocks and slung shots. It is clear that Jackson Garver, who later turned state's evidence against McGehean, grabbed and struggled with Myers. Shots were fired. Myers died of a gunshot wound in the side. There was conflicting evidence of whether McGehean was in the room at the time of the attack, but a case was constructed after the fact. It was clear he had arrived at the scene at some point and that Myers' bother, Joseph, would later claim that McGehean told him, "Tom's my meat, upstairs, dead." McGehean denied saying any such thing, and Joseph Myers had not testified to any such thing at the coroner's inquest. The prosecution would later claim that McGehean had a pistol in the pocket of his coat and had fired it though the coat pocket "California style," killing Myers. The

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66 This is a subtitle to the McGehean book.
67 See CYCLOPAEDIA OF BUTLER COUNTY, OHIO, supra note 64.
defense’s theory was that Garver attacked Myers with a rock or a slung shot and that in drawing out his pistol to repel the attack, Myers shot himself. Garver and Joseph Myers, like many of the "low life" who would be called by the prosecution, were open to serious impeachment. The first trial was the sort of "bunnies-out-of-the-hat" deal that one would expect.

Garver, in particular, was not the sharpest tack. In his memoir, McGehan claims the theory that he shot through his coat pocket was constructed by the less-than-ethical prosecutors and pumped into the pliable and vulnerable Garver. McGehan claimed, and had witnesses to back him up, that before he went to the American that night, he had been wearing a fur overcoat but had taken it off at another Hamilton establishment (Lingler’s saloon) and put on another—a light chinchilla-colored.\(^6\)

Before trial, a seemingly worried McGehan met with Garver and planted in Garver’s mind the following: Both he and Garver knew that McGehan had not shot Myers, but McGehan was worried because when he arrived at the American that night, a crowd of men rushed downstairs and ran into him. A pistol in his pocket had been accidentally discharged putting a hole in it. Then McGehan showed Garver, on Garver’s coat, where the hole would have been. A few days later, he also led Garver to believe that he burned the coat so that it could not be discovered and used against him. According to the memoir, the weak-minded Garver took all of this in. In the first trial, Garver would testify for the prosecution that he saw McGehan shoot Myers "California style" through his, McGehan’s, coat pocket. He explained where the hole in the coat pocket would have been. Vallandigham then produced the chinchilla coat, which other witnesses swore McGehan had been wearing, and forced the witness to admit that there was no such hole in it.\(^6\)

In general, Vallandigham and his cocounsel were given all the room they wanted on cross-examination. The rules were wide open by anyone’s standards. Arrests, indictments, and innuendo were all allowed, along with some questionable character evidence suggesting that Garver had been accused of shooting at others.

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\(^6\) My question is, why the change of coats?
\(^6\) McGhean, supra note 65, at 98-99, 101-02.
before (so he could have been the shooter this time, etc.). Vallandigham also impeached one witness, who swore he had seen McGeahan on the opposite side of the street, some sixty feet away and heard him make threats against Myers. Vallandigham pulled out an almanac, and Abe Lincoln style, 70 established that there was no moon that night at that time. In the second trial, the witness simply changed his testimony to say that he was fifteen feet away and saw McGeahan by the light of a shop window. In the third trial, the witness was subpoenaed but not called.71

One question that may have already occurred to the reader is whether Myers' clothing had any gunpowder or powder burns on it. One might suspect that it would, if Myers had accidentally shot himself while attempting to draw a pistol. Vallandigham's response was to produce an expert witness (even in these days, expert witnesses were always available), Dr. Egry, of Dayton, Ohio, who explained that:

[A] pistol of the modern kind, a Smith and Wesson, such as Myers had, may be held against the clothing of a person, when fired, and yet it does not follow that there must be powder marks. . . . He explained that in these kinds of pistols they use but a small quantity of powder, and that of the finest grains. The muzzle of the pistol is smaller than the breech, where it is loaded. The powder, consequently, is completely burnt up in the barrel while forcing the bullet out.72

The good doctor also produced a piece of cloth which had been shot through at a range of a quarter inch, which was not scorched or powder marked. It is not clear whether this testimony received any serious challenge, 73 but Vallandigham was not satisfied to leave the record in this state. He wanted to prove the point with a little more drama.

At this point, I must rely upon certain newspaper accounts collected by Vallandigham's brother. These accounts relate how

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70 For loads of historical trivia on the Lincoln "Almanac Trial," see Underwood, supra note 4.
71 MCGEHEAN, supra note 65, 122-23.
72 Id. at 145-46.
73 It sounds fishy to me.
Vallandigham's death by misadventure occurred not in the courtroom, but rather in the Lebanon House Hotel, where the jurors were also staying. The newspaper account reads as follows:

After taking supper, [Vallandigham] procured from the landlord of the hotel a bit of white muslin cloth, perhaps a foot square, for the purpose of testing to his own satisfaction the question as to whether a shot fired from a pistol in close proximity to it would or would not leave a mark of powder upon it. Having provided himself with this, and put his pistol in his pocket, he and Mr. Millikin and Mr. Hume [Vallandigham's cocounsel] went out together to the south edge of town beyond the residence of Governor McBurney. Arriving there, they were joined by Mr. McBurney, and the trio became a quartet.

The pistol which he took with him for this purpose [was] a new [five-shot Smith and Wesson] revolver [like Myers'] which he had purchased only a few days before coming to Lebanon.

Two shots were fired into the cloth, and all were satisfied with the result of the experiment, and started back to the hotel.

Mr. Millikin, ever cautious and thoughtful, said: "Val., there are three shots in your pistol yet. You had better discharge them."

"What for?" responded Mr. Vallandigham.
"To prevent any accident," replied the cautious attorney. "You might shoot yourself."
"No danger of that," replied Mr. Vallandigham. "I have carried and practised with pistols too long to be afraid to have a loaded one in my pocket."
"You had better be careful though," said Mr. Millikin.
"Never fear me," was the reply.

Arriving [back] at the [hotel] alone, Mr. Vallandigham was stopped on his way up stairs by the landlord, and a package that had been left for him in his absence placed in his hands. That parcel contained another revolver—a weapon that had been exhibited at the trial in Court, and was not only unloaded, but had had the chambers removed. Proceeding to his room, he unwrapped the parcel, and at the same time taking his own

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74 He was probably an insurance defense lawyer. You know the type—always spotting accidents before they happen.
weapon from his pocket, laid the two murderous instruments on the table, side by side.

A moment later, Mr. Scott Symmes, a young lawyer who ha[d] been connected with the prosecution of the case, passed the door.

"Symmes," said he, "Follett [a prosecution witness] is mistaken. A man could easily shoot himself as Myers was shot. Come in and I will show [you] how it's done."

Thus invited, Symmes entered the room; but a moment later, seeing Judge Pope coming up the stairs, excused himself on the ground that he was going to Hamilton in the morning, and wished to see the Judge before he left. He passed out, and a minute or so afterward Mr. McBurney came into the room. Mr. Vallandigham, still standing by the table on which the pistols lay, said: "I'll show you how Tom Myers shot himself. Follett's mistaken when he says it can't be done." Saying this he took up one of the murderous instruments in his hands, put it into his pantaloons pocket, and slowly drawing it out again, cocking it as he drew it forth, he attempted to place it in the exact position which he believed Myers' weapon to have assumed at the moment the fatal bullet was sped on its mission of death. The muzzle of the weapon still within the lappel of the pocket, he brought it to an angle of about forty-five degrees.

"There, that's the way Myers held it, only he was getting up, not standing erect." Saying this, he touched the trigger.

A sudden flash—the half suppressed sound of a shot—and Clement L. Vallandigham, with an expression of agony, exclaimed: "My God, I've shot myself!" and reeled toward the wall a wounded and dying man—wounded and dying by his own hands. 75

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75 VALLANDIGHAM, supra note 2, at 524-25. Do you believe these were his exact words? No expletives? Compare the "facts" of an early malpractice case involving experimentation, Slater v. Baker, 95 Eng. Rep. 860 (K.B. 1767). Surgeon Baker and his apothecary sidekick Stapleton wanted to try an experiment with a new piece of medical equipment described as "an heavy steel thing that had teeth," which was designed to reset broken bones. Id. at 861. Poor Slater had broken his leg, but it had begun to mend. Baker and Stapleton took Slater's leg and gave it a crack, rebreaking it, whereupon Slater supposedly exclaimed, "You have broke what nature had formed!" Id. Do you believe that these were his exact words? No expletives?
Vallandigham had taken up the wrong pistol. The empty and harmless one still lay on the table. As Vallandigham lay in agony, several of the counsel in the case and at least four of the jurors came in the room and took in what had transpired. The word rushed through the town. There was obviously something to Vallandigham's theory. Vallandigham died the next morning. According to one later-day critic, his death at his own hand came fifty years too late.\footnote{See ROBERT W. SCHILLING, YELLOW CREEK STORIES, Chapter XVII The Copperheads, at http://www.garlock-elliot.org/archive/YllwCrkSt/CHAPTER 17.htm (last visited Sept. 29, 2003). This is a colorful and vituperative piece having to do with the doings of the Knights of the Golden Circle as well as the futile raid into Ohio by Confederate General John Hunt Morgan of Lexington, Kentucky.}

I was unable to find any record of how the judge dealt with this situation or whether anyone checked for powder burns. All we know is that the trial went on and the jury deliberated for twenty-four hours—but hung! McGehan was retried in Dayton and convicted of second-degree murder, but the verdict was set aside
for jury misconduct and for insufficient evidence. In a third trial, McGehan was acquitted after a mere hour of jury deliberations.

I get a kick out of some of the florid, Victorian, Law Day type speeches given by Vallandigham’s admirers following his death. Because McGehan was discharged after the third trial, "Vallandigham’s friends were able to claim that he had saved McGehan’s life by sacrificing his own." And at a meeting of the Dayton Bar on June 20, 1871, Senator Thurman delivered a eulogy in which he opined that "no man that I ever knew, or ever heard of, lost his life in so dramatic and heroic an exercise of his profession."78

Let me get this straight. Vallandigham’s blunder (it was an accident—a screw up!), when passed through the professional self-promotional filter, becomes a model of the "giving of one’s all for the client?"

Since we are meeting as a group of persons who are interested in professional responsibility, we ought to consider this as a suggestion that in order to be zealous advocates, defense lawyers ought to be willing to shoot themselves if that’s what it takes to secure victory. Indeed, if the lawyer can win by shooting himself, then the lawyer should shoot himself; and if he should do so, then he must do so. No doubt this theme has already been exploited by the "talking head" defense lawyers that infest the cable channels these days. I must admit, that after watching some of these talking heads, I have almost come to believe that more such zealous advocacy might be desirable.

AFTERWARD

Whatever happened to Thomas McGehan? If he sold many copies of his book, which bears a copyright of 1874, he did not have much time to enjoy the royalties. After his discharge from custody he was more or less run out of Hamilton, and for some time he resided in Cincinnati. After a while he returned to Hamilton and opened a saloon. On Sunday, June 13, 1875, after a

77 Klement, supra note 2, at 312 n.37.
78 Vallandigham, supra note 2, at 548.
79 The only critters that are worse are the ubiquitous "former federal prosecutors."
day of drinking with friends, he returned to his saloon to "treat" his associates at his own establishment. As McGehan turned on the gas lights and stepped behind his bar, he was assassinated.

There was a vacant lot on the west side of the saloon and a window opened here directly behind the bar. This window was protected by ordinary closed shutters, with diamond-shaped apertures near the top for the admission of light. The shutters were closed and fastened; the distance from the ground to the openings in the top of the shutters was about eight feet.

Either before McGehean entered his saloon at midnight Sunday night, or immediately after the party had entered, a small spring wagon was dragged before this window, from which the assassin, resting his weapon on the diamond-shaped aperture in the shutter, was enabled to take a deliberate aim at his victim. He was distant from him scarcely six feet, and the weapon was discharged with such deadly effect that McGehean fell struck with eleven large buckshot. Three of these large buckshot severed the jugular vein in as many places, killing him almost instantly.  

Guns are dangerous things.

80 Cyclopaedia of Butler County, Ohio, supra note 64.