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Law and Lawyers in the U.S.: The Hero-Villain Dichotomy

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Chapter 17

LAW AND LAWYERS IN THE U.S.: THE HERO-VILLAIN DICHOTOMY

Judith A. McMorrow*

ABSTRACT

Lawyers in U.S. culture are often presented in either an extremely positive or extremely negative light. Although popular culture exaggerates and oversimplifies the 'good v. bad' dynamic of lawyers, this dichotomy provides important insights into the role attorneys play in the U.S. legal system, the boundaries of legal ethics, and the extent to which the U.S. legal system is relied upon to address our society's great moral and social dilemmas. *This draft essay will be included in a reader on U.S. Law prepared by Fulbright law professors for Chinese law students (John Nagel & Glenn Shive eds.)*

INTRODUCTION

Lawyers play a prominent role in American life, and this is reflected in pop culture.¹ Movies, television shows and novels portray lawyers in dramatic settings, with images that range from powerful and inspiring to mean and evil.² Negative portrayals are reflected in lawyer jokes. Question: "How can you tell when a lawyer is lying?" Answer: "His lips are moving." Lawyers are criticized for lacking ethics, being for sale to the highest bidder and willing to do anything to advance the interests of the client ("hyper-adversarialism").³ Positive and powerful

* Professor of Law, Boston College Law School. My thanks to Gail Hupper and R. Michael Cassidy for their comments on an earlier draft, and to Andrew Bender (BC Law '11) and Jessica Pisano (BC Law '12) for their excellent research assistance. This work was made possible by the generous financial support of the Boston College Law School Fund.

¹ See, e.g., Stephanie Francis Ward, *The 25 Greatest Legal TV Shows*, ABA JOURNAL, August 2009, p. 34.

² See generally Carrie Menkel-Meadow, *Can They Do That? Legal Ethics in Popular Culture: Of Characters and Acts*, 48 UCLA L. REV. 1305 (2001); Christine Alice Corcos, "We Don't Want Advantages": *The Woman lawyer Hero and Her Quest for power in Popular Culture*, 53 SYRACUSE L. REV. 1225 (2003); Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CALIF. L. REV. 379 (1987).

³ Roger C. Cramton, *Furthering Justice By Improving the Adversary System and Making Lawyers More Accountable*, 70 FORDHAM L. REV. 1599, 1604 (2002). See also Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999);

images also appear throughout our public life and culture. For example, 26 U.S. presidents have been lawyers.⁴ According to the American Bar Association, 53% of the U.S. senators hold law degrees, and 36% of the House of Representatives.⁵ Lawyers play a strong role in social movements, such as civil rights, as both leaders and implementers of the legal-social strategy for change.⁶ Lawyers serve as a voice for the poor and vulnerable (when lawyers are available).⁷ A person in trouble in U.S. society quickly turns to a lawyer for assistance. U.S. pop culture portrays these contradictory images, with the lawyer sometimes the hero, other times the villain, and everything in between. How can we account for these contradictory images, this hero/villain dichotomy? The answer lies both in the role of law in American society and the adversary system. Indeed lawyers are all of these things – and more.

A. THE ROLE OF LAW IN AMERICAN SOCIETY

1. *American Society looks to law to settle many disputes*

Although it is tempting to speak about what “Americans” think, as if there is one monolithic view, the United States is a pluralistic society with a wide range of social, cultural and religious perspectives.⁸ While true that there are some dominant strains, the U.S. is largely a land of immigrants, built on a vision of individual freedom.⁹ Even when assimilated through multiple generations, regional cultures shape the experience of people in particular geographic areas and subcultures. Within an area you might have people of multiple religious backgrounds,

⁴ DAVID SCOTT CLARK, *ENCYCLOPEDIA OF LAW AND SOCIETY* 1143 (Sage 2008) (as of 2007, 25 U.S. lawyer presidents; with the election of Barack Obama, the number comes to 26).

⁵ <http://www.abanet.org/yld/chooselaw/trivia.shtml>

⁶ James E. Moliterno, *The Lawyer as Catalyst of Social Change*, 77 *FORDHAM L. REV.* 1559 (2009).

⁷ See generally Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 *LOY. L.A. L. REV.* 691 (2006).

⁸ See generally Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 *MINN. L. REV.* 389 (2005); W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 *WASH. U. L.Q.* 113 (2000); Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralistic Society*, 63 *GEO. WASH. L. REV.* 984 (1995).

⁹ Marcia S. Krieger, *A Twenty-First Century Ethos for the Legal Profession: Why Bother?*, 86 *DENV. L. REV.* 865 (2009).

or no religious belief system at all. Some people may place higher value on stability, others on relationships, yet others on profit maximization. Where do people go to settle differences when they arise? In some cultures people are likely to turn to religious leaders or local political leaders. In the U.S., people are more likely to turn to law as the place to mediate and settle differences.¹⁰ American culture contains a cherished belief that law will be a place where individuals will have an opportunity to present their point of view and receive a fair hearing. In fact, individuals often are disappointed because of the gap between the theory and the fact of law. Poor parties may have unequal access to attorneys and the legal system.¹¹ Real cases can be long, expensive and emotionally exhausting. But enough disputes are settled through legal processes that the public in general identifies law as a place to turn to settle differences. And legal norms may encourage individuals to settle their disputes without having to go through the full legal proceedings. The “shadow of the law” is everywhere.¹²

The structure of the U.S. political system also makes law the likely place to settle social issues. With a federalist system that provides for two vibrant legal systems (federal and state), and separation of powers within each system (executive, legislative and judicial), many important social questions work their way through these political systems. The U.S. legal system identifies the courts as the final interpreter of what the Constitution means, so that any issue with constitutional dimensions will likely be decided by the courts, with many important issues resolved in the U.S. Supreme Court. French political commentator Alexis d’Toqueville observed in his 19th century commentary on U.S. law that there are few political questions in the U.S. that do not become, sooner or later, a judicial question.¹³ While perhaps an exaggeration, d’Toqueville was fundamentally correct that many important social and political issues

¹⁰ See W. Bradley Wendel, *Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection*, 34 HOFSTRA L. REV. 987 (2006); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005).

¹¹ Robert Rubinson, *A Theory of Access to Justice*, 29 J. Legal Prof. 89 (2004).

¹² See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Edward L. Rubin, *The Nonjudicial Life of Contract, Beyond the Shadow of the Law*, 90 NW. U.L. REV. 107, 110-12 (1995).

¹³ Alexis de Tocqueville, *DEMOCRACY IN AMERICA* (1835).

eventually find their way into the courts, either as constitutional questions or as interpretations of legislative or administrative initiatives.¹⁴

These two aspects of American life – we look to law to resolve differences and many important social and political questions also become legal questions – means that law is the site for resolving both ordinary questions and some of the most important and dramatic questions of our society. Law is not the *only* place where these issues arise and may be resolved, but it is a common forum for resolution of the legal dimensions of issues.¹⁵

2. The U.S. has a Lot of Law

We expect a great deal of law, so it is not surprising that there are detailed laws and legal rules on a wide range of subjects. Our federalist system means that law can be created by both the federal and state governments. And within each sphere, you have a legislative, executive and judicial branch. With so many political units with the power to make law, and with our use of law to settle differences, it is not surprising that the U.S. has *a lot* of law. The expansion of liability for personal injuries during the industrial revolution, economic regulation during and after the great depression, the growth of rights and civil liberties, and the increasing habits of regulation all have resulted in a rapid expansion of U.S. law during the 20th century.¹⁶

Statutory and administrative law has grown at a faster pace than the common law.¹⁷ Legislative and administrative rules often have both broad standards and detailed requirements that are interpreted and implemented by executive agencies and the courts. For example, the Employee Retirement Income Security Act of 1974 (ERISA) is made up of nearly 450 pages containing three subchapters, thirteen subtitles and well over 100 sections within those subtitles.¹⁸ The Department of Labor was authorized to issue regulations to interpret this act and continues to

¹⁴ Mark A. Graber, *Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited*, 21 CONST. COMMENTARY 485 (2004) (questioning the accuracy of Tocqueville's expansive statement).

¹⁵ See generally Lawrence M. Friedman, *AMERICAN LAW IN THE 20TH CENTURY* (2002).

¹⁶ Lawrence M. Friedman, *A HISTORY OF AMERICAN LAW* 516-537 (2005).

¹⁷ Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545 (2007).

¹⁸ Employee Retirement Income Security Act of 1974, 29 U.S.C. ch. 18.

promulgate final rules, offer new proposals and issue advisory opinions on specific inquiries.¹⁹ And the courts have issued thousands of opinions that address ERISA in some form.

This huge volume of law typically operates in the background, so that many individuals are not aware of the legal dimensions of their activities. If you were reading this article while sitting in a classroom of a public university in the U.S., you would not probably consider that legal standards that shaped the classroom around you. The Americans With Disabilities Act changed doorways to make them more accessible for those with physical disabilities, building codes determined the electrical, plumbing and carpentry standards, fire codes determined how doors open and other safety factors, labor laws apply to workers who built the building and those who clean the classroom, workers' compensation governs if a worker (including a professor) were hurt on the job, and non-discrimination statutes and common law rules from both the federal and state government prevent discrimination based on certain factors (race, sex, religion, age, etc.). Legal standards might have affected institutional choices, such as requiring a sexual harassment policy to prevent sexual harassment of employees. And the list goes on. Law is a thousand little pricks, mostly unnoticed unless the legal issue applies directly to the individual or business.²⁰

3. The courts play a vibrant role in making law

The common law power means that courts have the power, within specific subject-matters, to determine the legal rules.²¹ Legal rules on subjects such as contracts, torts and property are grounded in state common law.²² The rules are established based on the disputes that litigants bring to court. Even though the U.S. has 50 state court systems, plus territories, with the power to make legal rules, common economic and social circumstances have resulted in a fair amount of uniformity. For example, every first year American law student can say with confidence

¹⁹ 29 C.F.R. Ch. 25.

²⁰ This description came from a presentation of a Shanghai businessman at the August 2008 orientation for new Fulbright professors to China.

²¹ Edward H. Levi, *AN INTRODUCTION TO LEGAL REASONING* (1948).

²² James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CAL. L. REV. 1812 (2000). *See also* Lawrence M. Friedman, *AMERICAN LAW IN THE 20TH CENTURY* 597 (2002) (“state law also still controls most of the law of torts, contracts and commercial law, domestic relations, and criminal law”).

that a contract consists of an offer, acceptance and consideration. This is true no matter what state law is used. There is sufficient common features in these legal rules that a national bar exam will test the common law subjects of torts, contracts, property and criminal law.²³ New social circumstances may require jurisdictions to modify, clarify or even change the legal rules. For example, it was well settled law that an offer is accepted when placed in the mail. With the rise of electronic communication courts would typically be the place to determine whether an acceptance is valid if delivered to an email account but not opened. A court's decision would set the legal rule not only for the case it was deciding, but also serve as precedent for similar future cases from the same jurisdiction in courts at the same level or lower.

Precedent is a way to constrain this judicial power.²⁴ Precedent means that courts are required to look to rules established in prior similar cases in the controlling jurisdiction and to explain how the new case fits into the growing body of law on a particular subject.²⁵ A court may deviate from precedent, but is expected to explain why. Readers from other legal traditions are often amazed at the length and detail of U.S. legal decisions. Published cases typically provide a painstaking analysis of prior cases so that the reader can understand, and sometimes later challenge, the court's analysis. Precedent also increases the transparency of the legal process.²⁶

The spirit of the common law pervades the entire judicial enterprise.²⁷ Courts look to facts of concrete cases to frame the decision.²⁸

²³ The multistate section of the bar examination will also test the federal law subjects of constitutional law, criminal procedure and evidence. See <http://www.ncbex.org>.

²⁴ See generally Stephen B. Burbank, *Judicial Accountability to the Past, Present, and Future: Precedent, Politics and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19 (2005).

²⁵ For a fascinating discussion of the role of precedent, see *Anastasoff v. United States*, 223 F.3d 898 (8th Cir.), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (holding unconstitutional a court rule that designates opinions as “unpublished”) and *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (defending practice of unpublished opinions). For a broader discussion of precedent outside the law, see Frederick Schauer, 39 STAN. L. REV. 571 (1987).

²⁶ Not every legal issue results in a written opinion. For a rich discussion of the role of the written opinion, see Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 98 GEO. L. J. 1283 (2008).

²⁷ See generally Paul Lund, *The Decline of Federal Common Law*, 76 B.U.L. REV. 895 (1996).

In this process, courts closely examining precedent.²⁹ These practices help implement important legal values of fairness and stability.³⁰ The theory is to have equal treatment under the law, without regard to the power of the individuals or the state. (Again, we appreciate that too often we have a gap between the theory and the practice.) One way the courts promote equality is to treat “like cases alike.”³¹ This requires courts to engage in a painstaking analysis of the facts to identify what cases are alike, and then provide an analysis of what legal rules should apply to the case at hand and other similar cases.³² This spirit of the common law pervades all cases, although the analytical process may be slightly different if the court is interpreting the constitution, a statute, an administrative regulation or prior judicial decisions.³³

This system of precedent requires lawyers to play an active role in identifying the relevant legal questions, finding relevant legal precedent, and arguing why and how the precedent leads to a favorable result for the lawyer’s client. This is a lot of work and requires skill in legal reasoning,

²⁸ Federal courts are constitutionally required to only consider actual cases or controversies. For a critical view of this case-based method of lawmaking, see Frederick Schauer, *Do Cases Make Bad Law*, 73 U. CHI. L. REV. 883 (2006).

²⁹ There is a rich body of recent literature on the role of precedent in constitutional adjudication. See generally Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C.L.REV. 1279 (2008);

³⁰ Earl Maltz, *The Nature of Precedent*, 66 N.C.L. REV. 367, 368-372, 393 (1988) (discussing certainty, reliance, equality, efficiency, and the appearance of justice and avoidance of arbitrary decision making as justifications for precedent; notes that “the doctrine of stare decisis is a complex, multifaceted phenomenon whose diverse components reflect a variety of values”).

³¹ *But see* David Lyons, *Formal Justice and Judicial Precedent*, 38 VAND. L. REV. 495 (1985).

³² For more insights on precedent see Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011 (2003) (exploring due process limits on rigid application of stare decisis); Thomas Healy, *Stare Decisis As a Constitutional Requirement*, 104 W.VA. L. REV. 43 (2001).

³³ See generally David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929 (2008); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009) (precedent in constitutional interpretation); Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511 (2009);

research, analysis and writing. Not surprisingly, these are key features of a U.S. legal education.³⁴

B. THE ROLE OF THE ADVERSARY SYSTEM

This essay has established that (1) we look to law to settle differences, both ordinary questions and important social and political concerns, (2) we have a lot of law in the U.S., and (3) the court's role in creating and implementing law is based on a system of precedent. But we began this discussion with the role of lawyers: Why does popular culture portray lawyers in such contradictory fashions – the hero/villain dichotomy? With these foundation ideas in mind, we can understand this dichotomy by examining our adversary system.³⁵ The adversary system envisions that we will come closest to the truth if each side is provided an opportunity to present his or her best case, with a neutral decision-maker examining the best facts and analysis of each side. That neutral decision-maker may be the jury or the judge. The rules of decision (law) are provided by the judge, either through statutes, administrative regulations or the common law.

As noted above, both ordinary disputes and many important social and political issues eventually become judicial questions. And “the American litigation system stands at one extreme of the adversarial spectrum in the degree to which the conduct of civil litigation is entrusted to private parties and their lawyers.”³⁶ The lawyer, under the direction of the client, decides whether and where to bring the case and is responsible for developing facts to prove the case. The defense counsel builds the evidence for the defendant. Both sides actively search and analyze the law for favorable precedent. The judge is the neutral, the dispassionate observer, involved to be sure the actors follow the rules and to determine what law applies. A more modern vision of the judge is as manager, becoming more involved in the pretrial activities to ensure smooth case

³⁴ See generally William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) (Report of The Carnegie Foundation for the Advancement of Teaching: Preparation for the Professions, known as the Carnegie Report.)

³⁵ Analyses of the adversary system and the lawyer's role in this system abound. Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 *CORNELL L. REV.* 1377 (2008) (critiquing David Luban, *LEGAL ETHICS AND HUMAN DIGNITY* (2007)); Deborah L. Rhode, *Legal Ethics in an Adversary System: The Persistent Questions*, 34 *HOFSTRA L. REV.* 641 (2006).

³⁶ Arthur T. von Mehren & Peter L. Murray, *LAW IN THE UNITED STATES* 166 (2d ed. 2007).

preparation and encourage settlement.³⁷ This adversarial approach, of course, is no accident. It reflects U.S. cultural values of “liberty, egalitarianism, individualism, populism, and laissez-faire.”³⁸

With this foundation, we can now better understand the hero/villain dichotomy in the public portrayal of lawyers. Since law is everywhere in U.S. society and it addresses some of the most important dramatic and social issues, lawyers are similarly everywhere to assist in the presentation of the competing points of view. Martin Luther King, Jr. had a lawyer; and the City of Birmingham that prosecuted him for marching without a permit had a lawyer.³⁹ The U.S. government has lawyers prosecuting detainees accused of participating in the September 11th attacks, and the defendants who have been charged have lawyers defending them, albeit under some highly questionable constraints.⁴⁰ Victims of major financial scandals have lawyers to recover monies that were lost; companies and individuals accused of the same wrongdoing have lawyers defending them. These major social issues of our times have lawyers on both sides. It is not surprising that “lawyers have come to be considered one bellwether of American morality.”⁴¹

It is much too simple to say that we can sort out villains and heroes by deciding in advance who is the “good guy” and the “bad guy.” The adversary system, with all its flaws, is a *process* for seeking the truth.⁴² We cannot know the facts until each side has had an opportunity to develop the facts from competing points of view. We often cannot know who is right or wrong until we have had a full review. And even if we have a strong inclination – for example, a strong belief that it is wrong to prevent children from going to their local school simply because of the

³⁷ Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

³⁸ Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM. J. COMP. L. 277, 281 (2002), quoting SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* 33 (1996).

³⁹ *Walker v. City of Birmingham*, 388 U.S. 307 (1967). See generally David Benjamin Oppenheimer, *Martin Luther King, Walker v. City of Birmingham, and the Letter from Birmingham Jail*, 26 U.C. DAVIS L. REV. 791 (1993).

⁴⁰ See generally Mark Denbeaux & Christa Boyd-Nafstad, *The Attorney-Client Relationship in Guantanamo Bay*, 30 FORDHAM INT’L L.J. 491 (2007).

⁴¹ Menkel-Meadow, 48 U.C.L.A. L.REV. at 1308.

⁴² Carrie Menkel-Meadow, *The Trouble With the Adversary System in a Postmodern, Multicultural World*, 38 WM & MARY L. REV. 5 (1996).

color of their skin – there is tremendous social value to have a full evaluation of the facts and law so that the legal pronouncement can speak strongly based on facts that are found by a neutral person or persons, not simply what might be perceived as the truth.

Representing criminal defendants offers even stronger basis to rely on a process of careful analysis before assuming that a person is guilty of a crime. The U.S. constitution reflects a deep concern about the abuse of government power. As a result, criminal defendants are presumed innocent, and have the right to counsel, and a trial by a jury.⁴³ A lawyer who represents a criminal defendant is playing a critical role in assuring that the state is not abusing its power and is acting consistent with these constitutional and statutory guarantees. When lawyers are asked, “How can you represent that murderer,” the answer is at least two-pronged. First, how do we know if a person is guilty, and of *what*, unless we have a calm and impartial examination of the facts? Passion and public anger can often sweep in those who are tangential to an event, and declare them guilty of horrible acts. Second, we have constitutional values that we hold dear, and requiring the state to act consistent with those values protects everyone.⁴⁴ The lawyer’s adversarial role in representing a criminal defendant is fundamentally a political role that checks government abuse, for history demonstrates that “[t]he more outrageous the alleged crime, the greater may be the state’s temptation to ignore rights, and so the greater the need for the defense lawyer’s special knowledge.”⁴⁵

Of course, some of the most interesting media portrayals of lawyers involve a tension between law and justice.⁴⁶ In telling the story, we (the omniscient audience) know in advance who is the good guy or the bad guy, so we feel the tension between a careful legal process and a just result. But real life rarely provides such clarity. And righteousness is both

⁴³ Although not found directly in the Constitution, the Supreme Court has described the presumption of innocence is “that bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law.’” In re Winship, 397 U.S. 358, 362 (1970), quoting Coffin v. United States, 156 U.S. 432, 453 (1895). The 6th Amendment to the United States Constitution provides for both the right to counsel and a trial by jury.

⁴⁴ Abbe Smith, *The Case For Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (2000).

⁴⁵ Stephen Gillers, *Can a Good Lawyer Be a Bad Person*, 2 J. INST. FOR STUDY OF LEGAL ETHICS 131, 146 (1999).

⁴⁶ Menkel-Meadow, 48 U.C.L.A. L. Rev. at 1324.

a strength and a danger, for we know how easy it is to be caught up in a frenzy of anger that can distort our judgment.⁴⁷

Because there is so much law, lawyers are needed to help multiple perspectives present their points of view. It sometimes seems as if lawyers are everywhere, presenting all points of view. The United States has 1.1 million lawyers for a population of 305 million.⁴⁸ Over two-thirds of lawyers work in law firms, offering services to businesses and individuals. The remaining lawyers work for the government, or represent the poor in civil and criminal matters, or serve as judges, professors, and in a range of other activities.⁴⁹ Litigation represents only part of the lawyer's work, but appears often in popular media because the litigation setting has more opportunity for drama than the business practice. Corporate, tax and related transactional work have played a larger role in legal practice over the last 30 years.⁵⁰

We can now better understand the hero/villain dichotomy. Lawyers often note that they are the voice of the client. For the adversary system to work, each side needs to have its point of view presented. The Model Rules of Professional Conduct provide strong imagery:

History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.⁵¹

⁴⁷ David Luban, *Integrity: Its Causes and Cures*, 72 *FORDHAM L. REV.* 279 (2003).

⁴⁸ In 2009, the American Bar Association's Market Research Department reported 1,180,386 active attorneys in the United States.
http://www.abanet.org/marketresearch/2009_NATL_LAWYER_by_State.pdf

⁴⁹ *See generally* Richard L. Abel, *AMERICAN LAWYERS* (1989)

⁵⁰ Much of this transactional work occurs outside the adversary setting, which raises interesting questions about how to justify the lawyer's role in those settings. This is, alas, a subject beyond the scope of this essay.

⁵¹ EC 2-27. The Model Code recognized the danger of this conceptualization, and the principle of zealous advocacy, when coupled with non-accountability, could lead to a conclusion that lawyers must always speak the words that will be in the client's best interests. The Model Code envisioned limits: the obligation of loyalty "implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of his client." Ethical Consideration 7-17. The language of this passage does not require that putting aside personal feelings is limited to instances of represented

If lawyers serve an important social role in representing unpopular clients, it is only logical that lawyers should not be seen as evil or bad for providing representation to unpopular points of view. Indeed, many times we should treat those lawyers as courageous heroes. The principle of non-accountability urges that lawyers should not be legally, professionally or morally accountable for the means used or the ends achieved.⁵² There is one important caveat to this idea; the lawyer's conduct must be within the bounds of the law.⁵³

While lawyers might embrace this idea of non-accountability, the general public often does confuse the lawyer with the views being expressed. This confusion is understandable. Despite the powerful value of representing unpopular clients, lawyers have considerable freedom of who to accept or reject as a client.⁵⁴ Many of the most vibrant examples of U.S. lawyers are "cause lawyers," who choose to practice in a certain area because the lawyer has chosen to use his or her talents to advance a particular social cause.⁵⁵ Some lawyers choose to work for gun control, others to protect the freedom to purchase guns. Some lawyers work to promote access to abortion, others work to make abortion illegal. Because some lawyers do embrace the goals of the client, it is easy to see why the public and popular media sometimes confuses the message with the messenger. And the reality of human communication further complicates

"the defenseless or the oppressed," but the notes to the Model Code indicate that some states envision this as applying in those circumstances.

⁵² David Luban, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 12 (1988) (the "standard conception of American legal ethics: A principle of partisanship requires that the lawyer "must, within the established constraints on professional behavior, maximize the likelihood that the client's objectives will be attained"). While acting as a zealous advocate, many lawyers, and the official professional codes, assert either directly or indirectly that lawyers are "neither legally, professionally, nor morally accountable for the means used or the ends achieved." *Id.* at 7. *See also* Karl Llewellyn, *THE BRAMBLE BUSH* (1930). Philosophers may have a different way to unpack the notion of responsibility and accountability. *See generally* Philip Pettit, *Responsibility Incorporated*, 117 *ETHICS* 171 (2007).

⁵³ *See generally* Model Rule of Professional Conduct 8.4; Model Code of Professional Responsibility Canon 7.

⁵⁴ Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy (Book Review)*, 90 *COLUM. L. REV.* 116 (1990).

⁵⁵ *See, e.g.*, Deborah J. Cantrell, *A Short History of Poverty Lawyers in the United States*, 5 *LOY. J. PUB. INT. L.* 11 (2003).

the issue. When words come out of the lawyer's mouth, it looks like the lawyer personally believes those words.

Some of the negative (“villain”) portrayals of lawyers come when lawyers are willing to break the rules and engage in illegal or unethical conduct. And some of the most interesting dilemmas occur when the lawyer may be asked to stretch, bend or violate a rule for a good cause. These moral dilemmas are not unique to lawyers, but tend to be the subject of ethics in a range of settings. Lawyers perhaps have more than their fare share of these ethical issues because, as noted above, the great political and moral disputes of our time evolve quickly into legal questions and because law addresses life and death issues. The fact that law and lawyers face deep moral questions is not a sign of weakness in either the law or lawyers, but a sign that we have asked these legal institutions and individuals to play this social role. It is true that law is often not up to the task of addressing all the major moral issues of our time. We can ask too much of law. But that is a different subject for a different essay!

This essay began with the idea that the lawyer's role reflects something even stronger than just the voice for heroes and villains of this world. Lawyers play an important part of the legitimization of the U.S. legal system “by serving as bridges between the state and its citizens and as buffers between competing citizens.”⁵⁶ Lawyers are the agents who make our legal system come to life and give it structure and strength. When lawyers fail in their role, they also become agents that drain the legal system of its vitality and credibility.

C. LEGAL ETHICS

We cannot have a full picture of the hero/villain dichotomy without discussing legal ethics. Just as common-law judges have tremendous power that needs to be constrained by precedent, lawyers also are given power in our legal system to present the views of others. We constrain a lawyer's power through both general laws and through a code of conduct, which is often characterized as “legal ethics.” Lawyers are licensed by individual states, and all states have rules of professional conduct that govern the lawyer's behavior. Most are modeled to a greater or lesser extent on the ABA Model Rules of Professional Conduct. The Model Rules identify the multiple roles of the lawyer as “a representative of clients, an officer of the legal system and a public citizen having special

⁵⁶ Daniel Markovits, 116 Yale L.J. Pocket Part 272, 275.

responsibility for the quality of justice.”⁵⁷ Such a broad statement, of course, begs for clarification when these roles come in conflict. The Rules of Professional Conduct are not seamless or even fully coherent, but they represent an effort to balance these competing duties.

Three dominant values of American legal ethics are the duty to represent the client zealously within the bounds of the law, the duty to avoid conflicts of interest and the duty to maintain confidentiality.⁵⁸ These duties have been the subject of media portrayals that provide the basis to characterize the lawyer as a hero, or villain, or something in between. Some lawyers clearly go over the limits and are subject to civil or criminal sanctions. These are the easiest cases to identify the lawyer as the villain (or at least wrong). Lawyers who push the limits of the law are often seen as overzealous, but this is much less clear, for one can argue strongly that the lawyer’s role includes the duty to explore the limits of the law.

The duty to avoid conflicts of interest flows from the fiduciary obligation that lawyers owe clients. As such, this duty is not as often portrayed in the media. In the daily practice, however, conflict issues are by far the most common and omni-present concern of lawyers.⁵⁹

Confidentiality involves a social trade-off, where the legal system allows for a confidential relationship between lawyer and client for the purpose of encouraging communication.⁶⁰ Full communication, it is hoped, will result in better legal assistance because clients will be encouraged to reveal the facts, and lawyers will be able to provide advice that will result in fuller compliance with the law. There is no doubt that in some dramatic cases the lawyer’s duty of confidentiality has significant costs. Again, these social tradeoffs become the basis of dramatic questions, both in real life and in media portrayals.

These three core duties – to provide zealous representation, avoid conflicts and maintain confidentiality – are central to the lawyer’s role and are reflected in the rules of professional conduct. “Legal ethics” is a phrase that draws on something deeper and more meaningful than merely

⁵⁷ ABA MODEL RULES OF PROFESSIONAL CONDUCT, Preamble: A Lawyer’s Responsibilities (2008).

⁵⁸ See generally CHARLES WOLFRAM, MODERN LEGAL ETHICS (1986).

⁵⁹ See generally Susan P. Shapiro, TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE (2002).

⁶⁰ See generally CHARLES WOLFRAM, MODERN LEGAL ETHICS §6.1 *et seq.* (1986)

positive law and compliance with rules. Ethics raises questions of personal integrity and role morality. Once again we can see how the lawyer's role often involves not just questions of what is the correct standard of behavior, but how the lawyer's conduct reflects on his or her personal character or integrity. When talking about character and integrity, we can see how easy it is to move from good, technical lawyer to "hero" or "villain."

CONCLUSION

We now understand how easy it is to portray lawyers as heroes or villains, but a reader might fairly ask, "Okay, which description is the more accurate?" The answer, of course, is that there is truth in both descriptions. Lawyers have the same range of strengths and frailties as all human beings. While we hope that lawyers will be better and stronger than others, perhaps that is too much to ask. On average, I would posit, lawyers do a pretty good job of fulfilling the social role we have given them. But the social responsibility we give to lawyers requires that we are constantly vigilant in our self-examination to be sure that we focus on the important positive social role we play. We should look toward the hero side to keep our eye on the goal, and be willing to engage in thoughtful reflection to keep from moving down the spectrum toward wrongdoing.

We as lawyers must also be keenly aware that we are social actors, empowered to bring our legal system to life. With this power comes a responsibility to acknowledge the failures in our legal system and work to improve it. Lawyers play a role in our contemporary democracy by promoting the rule of law, social change, and political values and promoting access to justice and governmental institutions.⁶¹ We can always do better in implementing our role in our democracy.

⁶¹ Fordham Law Review has an excellent symposium issue with more than 19 articles devoted to this topic. 77 FORDHAM L. REV. 1229 (2009).