

ESSAY

THE RULE OF LAW IN ACTION: A DEFENSE OF ADVERSARY SYSTEM VALUES

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INTRODUCTION

*Legal Ethics and Human Dignity*¹ is that rare work that bridges legal theory and the study of the profession's ethical responsibilities.² The gap between the two subjects is surprising and unfortunate because, as David Luban so deftly shows, they are mutually enriching and share the same pressing concerns. By all rights, both fields should be transformed by his work.

As with so many of Luban's earlier projects, the core of the book is an exploration of the lawyer's role in the adversary system, although he places greater emphasis here on the lawyer's counseling function both before and in the absence of litigation.³ Luban also focuses on the ways that a lawyer's work affects human dignity.⁴ Even readers who remain unconvinced that human dignity can provide a new measure for the limits of professional obligation will profit from Luban's provocative inquiry.

This Essay takes up Luban's morally grounded critique of the adversary system values that shape the lawyer's role in American society. I argue that Luban's claims about human dignity, the legal thought of Lon Fuller,⁵ and professional failure (especially the role of lawyers in justifying torture for the Bush Administration)⁶ can all be re-interpreted by engaging his critique of the adversary system. I hope to show that the very violations of human dignity and ordinary morality

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¹ DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* (2007) [hereinafter LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*].

² Two notable exceptions are: WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* (1998), and David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990).

³ See, e.g., LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 1, at 4–6.

⁴ See DAVID LUBAN, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 1, at 65 [hereinafter LUBAN, *Upholders of Human Dignity*].

⁵ See DAVID LUBAN, *Natural Law as Professional Ethics: A Reading of Fuller*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 1, at 99 [hereinafter LUBAN, *Natural Law*].

⁶ See DAVID LUBAN, *The Torture Lawyers of Washington*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 1, at 162 [hereinafter LUBAN, *Torture Lawyers*].

that most concern Luban arise not from lawyers committed to traditional understandings of professional responsibility and the adversary system, but rather from lawyers who have deviated from those understandings.

I

OF ROLE MORALITY, ORDINARY MORALITY, AND THE SELF-CENTERED LAWYER

A. Luban's Critique of Role Morality

The book opens with a critique of role morality—the idea, much maligned by legal ethicists, that lawyers should receive some degree of immunity from the general requirements of conscience on account of their distinctive social role.⁷ Professional obligations can lead a lawyer into actions that are at least morally controversial, if not downright condemnable. We hold confidences even when doing so may harm third parties; we represent clients whose past, present, or future behavior may be socially harmful or reprehensible in the eyes of others; and we often employ tactics that can prevent decisions on the merits both in and out of the courtroom. Some of us go farther, counseling, aiding, or abetting clients' lawlessness. We seem to do these things, Luban contends, because we adhere too closely to a principle that has, for at least as long as anyone has kept track, defined the role of lawyering in America.⁸ The principle is that clients are entitled to diligent legal services irrespective of the moral worth of their ends.⁹

Even a cursory survey of the profession reveals that lawyers endorse this principle with varying degrees of enthusiasm and embody it with varying degrees of consistency. Moreover, the principle is only loosely incorporated into the standards of professional conduct propounded by state and national bar associations over the last century. Many lawyers are in fact *quite* choosy about the clients they represent;¹⁰ more than a few of us fail to act with anything approaching

⁷ See LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 1, at 9–11; DAVID LUBAN, *The Adversary System Excuse*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 1, at 19 [hereinafter LUBAN, *Adversary System Excuse*].

⁸ See LUBAN, *Adversary System Excuse*, *supra* note 7, at 20; see also CANONS OF PROFESSIONAL ETHICS CANON 15 (1908); GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF LAW* 26 (1854).

⁹ See sources cited *supra* note 8.

¹⁰ The dominant selective principle is, of course, a client's ability to pay. On the restricted universe of access left to those who cannot pay, see generally David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209 (2003) (describing the reasons for the decline in access to legal services for the poor, including a lack of funding). Conflict doctrines quite often lead lawyers to be overly choosy in the interests of not upsetting current clients. See Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 27–39 (2003) (discussing five scenarios in which conflicts of interest may arise); see also John Dzienkowski, *Positional Conflicts of Interest*,

diligence (let alone zeal) for our clients;¹¹ and the ABA Model Rules of Professional Conduct now expressly provide that, if a lawyer “fundamental[ly] disagree[s]” with or finds a client’s proposed actions “repugnant,” she may withdraw from the representation.¹² Conflict of interest rules have historically required the same result if any of a lawyer’s interests, feelings, or convictions would cloud her judgment or otherwise prevent her from diligently pursuing the client’s interests.¹³ Nevertheless, the professional ideal, the “dominant view,” as William Simon has called it, is still zealous advocacy.¹⁴

Luban begins his critique of the dominant view with the proposition that because zealous advocacy is morally controversial—because it requires actions that often conflict with what he calls “ordinary morality”¹⁵—it requires special justification.¹⁶ As he concisely states: “Unless zealous advocacy could be justified by relating it to some larger social good, the lawyer’s role would be morally impossible.”¹⁷ The “larger social good, we are told, is justice, and the adversary system is the best way of attaining it.”¹⁸ Luban suggests that the invocation of the adversary system and its virtues as an “institutional excuse” for morally suspect conduct by lawyers has become so deeply entrenched in legal culture as to lie beyond argument.¹⁹ For shady lawyers facing the charge that they lack moral scruples, and even for upstanding lawyers wary of the profession’s tenuous public standing, the link between lawyers’ role conduct and the social value of the adversary system has become “more like a presupposition accepted by all parties before the arguments begin.”²⁰

71 TEX. L. REV. 457, 463–69 (1993) (discussing different types of positional conflicts of interest).

¹¹ One need only briefly scan the criminal cases on ineffective assistance of counsel to get a feel for the vastness of the problem. *See, e.g.*, *Soffar v. Dretke*, 368 F.3d 441, 473–75 (5th Cir. 2004); *Anderson v. Johnson*, 338 F.3d 382, 392 (5th Cir. 2003); *Burdine v. Johnson*, 262 F.3d 336, 338–40 (5th Cir. 2001). On the civil side, lack of diligence and communication by lawyers remain among the most consistent and pervasive complaints of clients. *See, e.g.*, STATE BAR OF CALIFORNIA, 2006 REPORT ON THE STATE BAR OF CALIFORNIA DISCIPLINE SYSTEM 3 (2007), available at http://calbar.ca.gov/calbar/pdfs/reports/2006_Annual-Discipline-Report.pdf (listing “performance” and “duties to client” as the most common allegations in complaints raised against California lawyers). *See generally* ABA STANDING COMM. ON LAWYERS’ PROF’L LIAB., PROFILE OF LEGAL MALPRACTICE CLAIMS: 2000–2003 (2005) (categorizing and analyzing various types of malpractice claims).

¹² MODEL RULES OF PROF’L CONDUCT R. 1.16(b)(4) (2007). Rule 1.16(b) lists other grounds for voluntary withdrawal. *See id.* R. 1.16(b).

¹³ *See id.* R. 1.7.

¹⁴ *See* SIMON, *supra* note 2, at 7.

¹⁵ LUBAN, *Adversary System Excuse*, *supra* note 7, at 45; *see id.* at 58 (referring to “other morally relevant factors”).

¹⁶ *See id.* at 44–47.

¹⁷ *Id.* at 26.

¹⁸ *Id.*

¹⁹ *See id.*

²⁰ *Id.*

In pages that reveal why Luban is one of the most influential critics of lawyers' role morality, he then sets about interrogating "the adversary system excuse." Rather than reveal the truth underlying disputes, the adversary system permits, and even sometimes invites, obfuscation;²¹ rather than protect the substantive rights of participants, it encourages lawyers to press for advantages that exceed the entitlements of their clients and infringe upon the rights of their adversaries;²² rather than divide responsibility for adjudication in a self-correcting balance of roles played by judge, jury, and opposing advocates, the adversary system allows lawyers to manipulate the scales.²³

Nonconsequentialist arguments for the adversary system fare no better with Luban.²⁴ To begin with, there is nothing "intrinsically good" about the lawyer-client relationship.²⁵ Even if the autonomy and individuality of some clients stands to be enhanced legitimately by a lawyer's services, not all clients' needs are morally innocent or neutral.²⁶ Moreover, in many cases, achieving a client's ends may come at the expense of the autonomy and individuality of third parties.²⁷ Second, Americans have not, formally or otherwise, "consented" to the adversary system.²⁸ We have "over an extended period of time . . . incorporated the institution into our shared practices," but this only establishes its acceptability, not its moral worth or normative superiority.²⁹ Indeed, as Luban insists, "Few of our institutions are trusted less than adversary adjudication, precisely because it seems to license lawyers to trample the truth, and legal rights, and common morality."³⁰ Finally, Luban claims that the adversary system does not enjoy the sanction of an historical tradition deeply embedded in our culture.³¹ Its features have changed over time and, in his view, it cannot be listed among our indispensable social institutions.³²

This leaves only the bare fact that the adversary system "is there,"³³ and the well-informed supposition that replacing it altogether would be an immense task of uncertain cost and uncertain success. Thus, Luban concludes that if all that can be said for the

²¹ See *id.* at 32-40.

²² See *id.* at 42-43.

²³ See *id.* at 44-47.

²⁴ See *id.* at 47-55.

²⁵ See *id.* at 48-51.

²⁶ See *id.* at 48-49.

²⁷ See *id.*

²⁸ See *id.* at 51-52.

²⁹ *Id.* at 52.

³⁰ *Id.* at 53.

³¹ See *id.* at 53-55.

³² See *id.* at 53-55.

³³ *Id.* at 60.

adversary system is that it “seems to do as good a job as any,”³⁴ we can choose to stick with it, but it cannot save lawyers from censure for deviance from the standards of ordinary morality: “a social institution that can receive only a pragmatic justification is not capable of providing institutional excuses for immoral acts.”³⁵ At best, the distinctive professional obligations of lawyers enjoy a presumption of legitimacy, but that presumption should be readily displaced by evidence that a role act would be morally harmful.³⁶

The critique is powerful, alluring in its simplicity, and has set the foundation for a generation of legal ethics scholarship. Most promisingly, it appears to present a means not only of avoiding some of the social cost of zealous advocacy, but also of saving lawyers from the disaffection and alienation of living lives divided by tension between professional and personal morality.³⁷

But the critique raises as many questions as it answers. To begin with, Luban is least precise in discussing how the presumption in favor of professional obligations and its displacement by the standards of common morality are to operate in practice. This is exactly where one would most wish for precision, for something more like an engineer’s design specs than the architect’s inspiring sketch. The moral questions involved in lawyering are by definition practical. They are questions of praxis. Clients need to act in the world, and lawyers have to make decisions in aid (or restraint) of those actions. If the trap door that frees lawyers from morally controversial professional obligations is hard to find—if it is everywhere and nowhere—Luban’s presumption-displacement theory loses a good bit of its appeal.

Are lawyers to resolve even modest conflicts between role obligations and ordinary morality in favor of ordinary morality? At one point, Luban seems to say as much, arguing that only “*slight* moral wrongs” can be excused by claiming the role requires the acts that cause them.³⁸ “The adversary system,” he writes, “possesses only slight moral force, and thus appealing to it can excuse only slight moral wrongs.”³⁹ This is followed by the even stronger claim that “[a]nything else that is morally wrong for a nonlawyer to do on behalf of another person is morally wrong for a lawyer to do as well. The lawyer’s role carries no moral privileges and immunities.”⁴⁰

³⁴ *Id.* at 56.

³⁵ *Id.* at 57.

³⁶ *See id.* at 63.

³⁷ *See generally* DAVID LUBAN, *Integrity: Its Causes and Cures*, in LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 1, at 267 [hereinafter LUBAN, *Integrity*] (discussing the difficulties that lawyers encounter advocating for causes that they find morally disagreeable).

³⁸ *Id.* at 63 (emphasis added).

³⁹ *Id.*

⁴⁰ *Id.*

Or is the presumption in favor of role obligations only displaced when the role requires serious deviance from the standards of ordinary morality? At another point, Luban contends that:

The adversary system and the system of professional obligation it mandates are justified only in that, lacking a clearly superior alternative, they should not be replaced. This implies . . . a presumption in favor of professional obligation, but one that any *serious* and countervailing moral obligation rebuts. . . . When serious moral obligation conflicts with professional obligation, the lawyer must become a civil disobedient to professional rules.⁴¹

How serious? Whose view of seriousness counts? The lawyer's, the client's, the lawyer's guess about the views of third parties who would suffer the moral harm, the lawyer's guess about the views of the public at large?

On the one hand, if even modest deviance from the standards of ordinary morality is not excused, not much would be left to the principal-agent relationship between client and attorney. The lawyer would be required to betray the client often enough that clients would have an incentive, where possible, to exclude lawyers from critical decisions and to invest in other methods of obtaining knowledge about the law. Perhaps both would be desirable outcomes. Perhaps the profession would adapt. But it seems plain that this amounts to something more than a presumption-displacement approach. It represents the dissolution of the distinctive social role that lawyers play. The pragmatic justification for the adversary system Luban accepts, weak as it is, would seem to demand more insulation for the role.

On the other hand, if only grave deviance displaces the presumption in favor of a lawyer acting as a zealous advocate, Luban's argument is not really an argument against professional obligation as the lawyering role is currently defined. Lawyers wary of morally questionable clients are free to turn them away and avoid the risk of getting embroiled in work of doubtful social value.⁴² (Though the fact that many lawyers do *not* turn these clients away may suggest more of an underlying consistency between lawyers' role obligations and the demands of ordinary morality than Luban acknowledges; there may be quite a bit more consistency than Luban thinks.)⁴³ Along the same lines, it is difficult to imagine juries imposing malpractice liability against lawyers who act against their clients' interests when doing so

⁴¹ *Id.* (emphasis added).

⁴² See *supra* note 12 and accompanying text. The exception is, of course, if a judge orders the lawyer to take the case. See MODEL RULES OF PROF'L CONDUCT R. 6.2 (2007).

⁴³ To be sure, many lawyers take dubious cases for the attractive fee involved. But that only restates the question about the valence of ordinary morality under conditions of value pluralism. Perhaps ordinary morality is more oriented around wealth-maximizing behavior than Luban believes. I take these issues up in the ensuing sections.

prevents genuinely grave moral harm to third parties and society at large.⁴⁴

B. Information Asymmetry and Value Pluralism

More significantly, Luban does not suggest how lawyers should act when the moral costs of their role acts are unclear, ambiguous, contestable, or unknowable. Perhaps he thinks the most common professional failures are easy cases. But I suspect the easy cases, even if we hear about them more frequently and take them up more often both for pedagogic purposes in the classroom and for analytic purposes in print, are not the most common.⁴⁵ The daily fare of lawyering, the seemingly banal cases that make lawyering terrifying,

⁴⁴ In most states, the standard of liability for criminal lawyers requires the clients to establish their factual innocence. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53 cmt. d (2000). In civil cases, lawyers will often have grounds to argue that their refusal to serve a client was in the client's best interest, not just the interest of third parties or the public. For a statement of the exception for reasonable good faith errors in judgment, see *Hodges v. Carter*, 80 S.E.2d 144, 146 (N.C. 1954). An example can be drawn from the following contracts case discussed in Samuel Williston's autobiography:

In a well-known passage from his autobiography, Samuel Williston described an incident from practice involving a financial dispute. As counsel for the defendant, Williston had carefully reviewed his client's correspondence with the plaintiff. Opposing counsel had made no inquiries concerning certain letters relevant to the controversy, and no one mentioned them at trial. The court ruled in favor of the defendant and gave an oral explanation of its reasoning that Williston describes as follows: "In the course of his remarks the Chief Justice stated as one reason for his decision a supposed fact which I knew to be unfounded. I had in front of me a letter that showed his error. Though I have no doubt of the propriety of my behavior in keeping silent, I was somewhat uncomfortable at the time. . . . The lawyer must decide when he takes a case whether it is a suitable one for him to undertake and after this decision is made, he is not justified in turning against his client by exposing injurious evidence entrusted to him. If that evidence was unknown to him when he took the case, he may sometimes withdraw from it, but while he is engaged as counsel he is not only not obligated to disclose unfavorable evidence, but it is a violation of his duty to his client if he does so.

DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 442-43 (2d ed. 1998) (quoting SAMUEL WILLISTON, LIFE AND LAW 271-72 (1940)). Williston did not turn the letter over. See *id.* at 477. But he states his role obligation too categorically (assuming the letter was not privileged). Even if he had decided to turn the letter over voluntarily before trial, he might still have argued that the decision was in the client's interests if he reasonably believed that his adversary would properly request it or discover it by other means. Withholding unfavorable evidence that has not (yet) been properly requested by an adversary is consistent with professional obligations but always risky. The question of liability, in any event, is not absolute, but rather contingent on what a reasonably knowledgeable, competent, and prudent lawyer would do. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) & cmt. 2 (noting a lawyer's discretion with respect to the technical means used to meet the client's ends); *id.* R. 1.3 cmt. 1 ("A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52.

⁴⁵ See *infra* Part II.C.

fascinating, and ethically salient work, tends to involve moral costs of uncertain or contested dimensions.⁴⁶

This is so for at least two reasons. First, morally relevant information adequate to displace professional obligations will often elude even the most upstanding, inquisitive lawyer. There are inevitable information asymmetries between agents and the principals they serve; between principals who are attempting to collaborate; and certainly between principals who have become adversaries. Diligent lawyers work to overcome these asymmetries, at least with respect to legally relevant facts. Indeed, lawyers are specialists in gathering and assessing facts.⁴⁷

But even the most diligent lawyers know that their advice and advocacy will almost never be based on anything approaching complete knowledge. They know too that their moral evaluations of a client or case may be confounded by subsequent revelations.⁴⁸ Indeed, there is often a large difference between what lawyers believe, recall, or assume and events as they have occurred or will subsequently play out. We are paid to make sound judgments in a universe defined by asymmetric and incomplete information, not one defined by parity and completeness. And although competence demands that we attend to the moral valence of the legal actions we take for our clients (an obligation that requires keen sensitivity to the moral consequences our actions will have for others⁴⁹), we properly forebear when it comes to actually resolving doubtful moral questions for our clients.

An example of the sort of morally complex universe lawyers frequently confront may be useful. Beginning in 1997, several high-ranking officers at Chiquita Brands International arranged for the company to make “protection payments” to both left- and right-wing paramilitary groups in Columbia to prevent harm to banana workers at its most profitable subsidiary.⁵⁰ Over the course of the next seven

⁴⁶ This is obviously an empirical question, and I confess that I am unprepared to answer it in empirical terms. What follows should therefore be read as arguing that there is good reason to believe that the question is open.

⁴⁷ See MODEL RULES OF PROF'L CONDUCT R. 1.3; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 cmt. c. I address the problem of lawyers who take the route of deliberate ignorance and lawyers who take advantage of information asymmetries below. See *infra* notes 56–59 and accompanying text.

⁴⁸ Simon's purposivist account of the law offers a particularly compelling argument against drawing any deep distinction between moral and legal information. See SIMON, *supra* note 2, at 50 (“The moral basis for the lawyer's decisions are the same principles that underlie and legitimate legal judgments generally.”). Even taking this argument at face value, law is still (perhaps inevitably) underinclusive, so the universe of morally relevant facts remains broader than the universe of legally relevant information.

⁴⁹ See MODEL RULES OF PROF'L CONDUCT R. 2.1.

⁵⁰ The Chiquita-Hills facts are drawn from the following newspaper stories: *Chiquita Settles Case on Payments to Rebel Groups*, N.Y. TIMES, Mar. 15, 2007, at C13; Neil A. Lewis, *Inquiry Threatens Ex-Leader of Securities Agency*, N.Y. TIMES, Aug. 16, 2007, at A19; Neil A.

years, protection payments totaling approximately \$1.7 million were made to one right-wing group, the United Self-Defense Forces of Colombia.⁵¹ In 2001, the United States designated the United Self-Defense Forces of Colombia as a terrorist organization.⁵² That same year, Chiquita went through a bankruptcy.⁵³

As part of the transition out of bankruptcy, the company added Roderick M. Hills to its board of directors in April 2002.⁵⁴ Hills is a corporate attorney who served as White House counsel to President Gerald Ford, taught at Harvard Law School and the Yale School of Management, and is reputed to have helped lead government efforts to “clean up the problem of corporations’ paying bribes overseas” during his tenure with the SEC in the mid-1970s.⁵⁵

Hills claims that when he first learned about Chiquita’s protection payments, they were described by company officials as payments to security contractors.⁵⁶ When the truth became clear to him in early 2003, he objected, knowing full well that the payments were illegal.⁵⁷ The company’s outside counsel also “strongly recommended” that the payments end immediately.⁵⁸ Stopping the payments, however, would have jeopardized the safety of its subsidiary’s employees in Colombia.⁵⁹ Hills advised the company to reveal the payments to the Department of Justice in the hope, one suspects, of helping the company avoid punishment and find a solution short of cutting off payments.

Beginning in April 2003, meetings took place between Hills, other Chiquita officials, and Michael Chertoff, then head of the Department of Justice’s criminal division.⁶⁰ All the while, Chiquita continued making protection payments.⁶¹

The government has since claimed that Chertoff told Chiquita in the first meeting that the payments were illegal and had to stop immediately.⁶² The company, which was investigated, prosecuted, and

Lewis, *No Charges for Chiquita Executives*, N.Y. TIMES, Sept. 13, 2007, at A21; *Victims of Colombian Conflict Sue Chiquita Brands*, N.Y. TIMES, Nov. 15, 2007, <http://www.nytimes.com/2007/11/15/business/worldbusiness/15chiquita.html>. As I discuss below, there are many facts about the story we may never learn.

⁵¹ *Chiquita Settles Case on Payments to Rebel Groups*, *supra* note 50, at C13.

⁵² *Id.*

⁵³ Lewis, *Inquiry Threatens Ex-Leader of Securities Agency*, *supra* note 50, at A19.

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *Id.*

⁵⁹ *See Victims of Colombian Conflict Sue Chiquita Brands*, *supra* note 50. Company officials insisted that the company “had no choice to pay protection money to groups that had threatened to turn death squads loose on its banana plantations and employees.” *Id.*

⁶⁰ *See Lewis, Inquiry Threatens Ex-Leader of Securities Agency*, *supra* note 50, at A19.

⁶¹ *See id.* The payments continued until the company left Columbia in 2004. *See id.*

⁶² *See id.*

fined \$25 million dollars for making the protection payments, insists that Mr. Chertoff was “more equivocal,” and had indicated that he “understood the sensitivity of the situation and would get back to the Chiquita officials.”⁶³

The matter remained live until last fall because the Department of Justice kept its investigation open, threatening to prosecute Hills and other Chiquita officials whom the government believed were responsible for the company’s decision to continue making payments after the first meeting with Chertoff.⁶⁴ According to defense lawyers for these company officials,

the company engaged in regular discussions with Justice Department officials about using the payments as an opportunity to provide intelligence to the government about [the right-wing organization]. Those discussions, the lawyers contend, were crucial in convincing the company that the U.S. government was prepared to tolerate the continuation of the payments.⁶⁵

Hills’ lawyer said his client “led Chiquita’s prompt and voluntary disclosure of these payments to the Department of Justice and had a reasonable basis to believe that Chiquita could maintain the status quo while the department considered the complicated issues at stake.”⁶⁶

We may never know what Hills and other Chiquita officials knew about the matter. Although a civil suit seeking \$7.86 billion has been filed in federal court against the company on behalf of victims of the United Self-Defense Forces of Columbia,⁶⁷ the government has decided it will not seek criminal charges against Hills or any of the top executives at Chiquita (quite probably to protect the government lawyers who attended the meetings, and especially Chertoff, from testifying at any trial).⁶⁸ Still, one doubts that Hills could have learned all the morally relevant facts about the protection payments his company was making. The problem appears not to be that Hills buried his head in the sand or that he used confidentiality to hide misconduct from prosecutors. On the contrary, he appears to have diligently inquired into the matter and then advised the company to confess.

The problem is instead that the morally relevant facts are bewilderingly complex. Even a provisional answer would have required extensive scholarly and first-hand investigation.⁶⁹ Is it worse to stop the

⁶³ *Id.*

⁶⁴ See Lewis, *No Charges for Chiquita Executives*, *supra* note 50, at A21.

⁶⁵ Lewis, *Inquiry Threatens Ex-Leader of Securities Agency*, *supra* note 50, at A19.

⁶⁶ *Id.* (quoting Brian M. Heberlig).

⁶⁷ See *Victims of Colombian Conflict Sue Chiquita Brands*, *supra* note 50.

⁶⁸ See Lewis, *No Charges for Chiquita Executives*, *supra* note 50, at A21; Lewis, *Inquiry Threatens Ex-Leader of Securities Agency*, *supra* note 50, at A19.

⁶⁹ A preliminary query suggests that the company has a long, and, to say the very least, morally controversial history in Columbia and other Latin American countries, particularly

payments and risk grievous harm to the local workers, or is it worse to continue the payments and risk empowering a dangerous paramilitary organization and enflaming already desperate and violent conditions in the country? Does the company's presence have an overall stabilizing or destabilizing effect on the country? Will young people who might otherwise be forcibly recruited into these paramilitary organizations have some other choice if foreign companies like Chiquita have a presence in the country?

The law, on the other hand, was quite clear. The payments were illegal. Or at least the law was clear until the meetings with Chertoff took place. Assuming that the company's version of the meetings with the government is accurate, and that Chertoff was at least open to allowing the payments to continue in the hopes of gaining intelligence on the paramilitary group, the Department of Justice muddied the legal waters in its exercise of prosecutorial discretion. Put bluntly, it was the lawyers charged with the vague injunction to do justice, not the lawyers charged with serving their client within the bounds of the law, who seem to have gone astray.

If one assumes instead that the government's account is accurate, Hills and the Chiquita officials took a terrible risk by continuing to make payments. Was that choice an act of morally brave civil disobedience (to protect the local workers) or an act of foolishly profit-centered lawlessness (to eek out as much profit from the Colombia operations before shutting down and pulling out)? Won't the answer depend not just on who is asked (a point I come to below) but how much is possible to know about the moral contours of the decision when the decision had to be made?

regarding the treatment of its workers. See *Protection and Money: U.S. Companies, Their Employees, and Violence in Columbia: Joint Hearing Before the Subcomms. on Int'l Orgs., Human Rights and Oversight & the W. Hemisphere of the H. Comm. on Foreign Affairs*, 110th Cong. (2007) (collecting congressional testimony about fruit companies' payments to South American guerilla groups); DAN KOEPEL, BANANA: THE FATE OF THE FRUIT THAT CHANGED THE WORLD 84–95, 218–27 (2008) (describing the often violent history of banana-producing companies' responses to labor disruptions); GEOFF SIMONS, COLUMBIA: A BRUTAL HISTORY 46–47 (2004); Philippe Bourgois, *One Hundred Years of United Fruit Company Letters*, in BANANA WARS: POWER, PRODUCTION, AND HISTORY IN THE AMERICAS, at 103 (Steve Striffler & Mark Moberg eds. 2003) (collecting internal United Fruit Company documents describing company practices between 1914 and 1970); Margelo Bucheli, *United Fruit Company In Latin America*, in BANANA WARS: POWER, PRODUCTION, AND HISTORY IN THE AMERICAS, *supra*, at 80 (using United Fruit's financial data to explore the company's responses to political developments between 1945 and 1970); Cynthia A. Watson, *Political Violence in Columbia: Another Argentina?*, 12 THIRD WORLD Q. 25 (1990) (describing history and organization of Colombian right- and left-wing guerilla and paramilitary groups).

In any event, most of Luban's examples are of another kind entirely—lawyers who either deliberately avoid guilty knowledge,⁷⁰ or lawyers who act against plain facts showing the dire moral consequences of their actions.⁷¹ In an example of graymail, Luban reports that Richard Helms “lied to a Senate committee about American involvement in the overthrow of the Allende government in Chile.”⁷² Helms was prosecuted for felony perjury but Edward Bennett Williams forced the government to offer a mere misdemeanor plea by “argu[ing] that national security information was relevant to Helms’ defense and must be turned over . . . thereby confronting the government with the unpleasant choice of dropping the action or making public classified and presumably vital information.”⁷³ In a second example of graymail, Luban discusses companies seeking approval of mergers that were controversial under antitrust law.⁷⁴ Lawyers for the companies got the Federal Trade Commission to back away from blocking the mergers by threatening to close down operations and dismiss employees.⁷⁵ “‘Of course, the mere announcement of the threat to close the plant generates enormous political pressure on the prosecutor not to go forward.’ . . . [T]he firms played a nice game of chicken: closing down by stages, they laid off a few workers each day until the FTC cried uncle.”⁷⁶

In both examples, Luban presents the morally relevant facts as clear-cut. The framing of the first example encourages the reader to assume that Helms is guilty; the perjury is presented as an act intended to conceal the U.S. government’s role in the rise of military dictator General Augusto Pinochet,⁷⁷ and Williams’ threat to seek national security information at trial is presented as a mere tactic with no relevance to the merits of Helms’ defense.⁷⁸ The graymail thus appears to save Helms at the expense of public knowledge about anti-democratic foreign policy maneuvers.⁷⁹ The framing of the second example asks the reader to assume not only that the contemplated mergers were plainly illegal (the FTC’s case, we are told, “looked par-

⁷⁰ See generally DAVID LUBAN, *Contrived Ignorance*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 1, at 209 [hereinafter LUBAN, *Contrived Ignorance*] (describing situations where lawyers tried to maintain deliberate ignorance).

⁷¹ See LUBAN, *Adversary System Excuse*, *supra* note 7, at 24 (“[T]he zealous advocate is supposed to press the client’s interests to the limit of the legal, regardless of the ‘torments or destruction’ this wreaks on others.”).

⁷² *Id.* at 21.

⁷³ *Id.*

⁷⁴ See *id.* at 22.

⁷⁵ See *id.*

⁷⁶ *Id.*

⁷⁷ See *id.* at 21.

⁷⁸ See *id.*

⁷⁹ See *id.*

ticularly good and none of the usual defenses appeared to work”⁸⁰), but also that they were against the public interest and that they would not have resulted in job losses and plant closures once complete. All of these things may be true, but the factual contours of hard cases are rarely so clear-cut. When information problems are simplified in this way, the presumption-displacement approach looks rather promising.⁸¹ But when serious information problems are present, its appeal is harder to see.

The second reason to think that conflicts between professional obligations and the standards of ordinary morality are typically difficult to resolve is the extent of value pluralism in American society. The United States is one of the most heterogeneous countries in the world, and Americans have frequently virulent differences of opinion on the content of ordinary morality. As a result, American law has always been as much a site of contestation as a vehicle for the vindication and enforcement of seemingly well-settled public values. Even in run of the mill, non-constitutional cases, the moral valence of available legal positions is almost always plural. The propriety of using covenants not to compete or boilerplate forum-selection clauses is as open to debate as the propriety of putting the Ten Commandments in a public square.⁸² And as long as Americans take their pluralism as a fact to celebrate rather than a problem to be overcome, concepts like “ordinary morality” offer only mirage-like comfort.⁸³

⁸⁰ *Id.* at 22.

⁸¹ For other examples framed by Luban in this way, see *id.* at 23–24 (discussing the Lake Pleasant case in which lawyers for a criminal defendant “were told by their client . . . of two murders he committed, found and photographed the bodies but kept the information to themselves for half a year—this despite the fact that the father of one of the victims, knowing that [one of the lawyers] was representing an accused murderer, personally pleaded with him to tell him if he knew anything about his daughter”); *id.* at 25 (discussing discovery and conflict of interest rules as if they are used only or primarily “to delay trial or impose added expense on the other side”); *id.* at 25–26 (discussing a statute of limitations example that assumes the defense defeats a “just debt”); *id.* at 34 (discussing trial tactics for cross-examination and interrupting the closing argument of opposing counsel under the assumption that the witness is truthful and that such tactics have the purpose and effect of preventing the truth from coming out rather than correcting distortion of the truth).

⁸² I offer the private law examples because, in each, the lawyer will have a pre-litigation counseling role and an adversarial role once the client is sued. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (enforcement of a forum selection clause); *Application Group, Inc. v. Hunter Group, Inc.*, 72 Cal. Rptr. 2d 73, 84–85 & n.14 (1998) (enforcing CAL. BUS. & PROF. CODE § 16600 (West 1995) to strike down a covenant not to compete, while discussing contrary rules in other states).

⁸³ See LUBAN, *Adversary System Excuse*, *supra* note 7, at 44–45. Luban concedes in his response that morality may not be completely shared, that it “is complicated,” and that when we try to specify norms, behavior quickly outstrips them, so that “every new level of norms calls for another to respond to imperfect compliance.” David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 CORNELL L. REV. 1437, 1442, 1443 (2008) [hereinafter Luban, *Response*]. He nevertheless tries to rescue the concept of common morality by suggesting that the problem of pluralism—or, as he frames it, moral indeterminacy—

evaporates once the lawyer exercises her judgment to make a decision about the moral propriety of her conduct. See *id.* at 1445 (“At the point you decide . . . the indeterminacy of ordinary morality is no longer an issue, and to insist that ordinary morality offers only ‘mirage-like comfort’ errs in two ways: first, because your moral code is no mirage, and second, because in this case it is almost surely no comfort.”). The argument assumes the very question at issue: whether, in the face of moral indeterminacy, the lawyer should defer to the client’s moral judgment when the client’s position is lawful and the lawyer has conveyed her views. The exercise of individual moral judgment is possible (and of course desirable), but in order to trump the client’s judgment, *in matters to do with the client*, lawyers should be confident that their individual judgments derive from genuinely common values rather than merely parochial values, self-interest, self-delusion, or mere fallibility. Luban concedes that clients may suffer from “cognitive distortions,” *id.* at 1449, regarding moral consequences, but he seems too reluctant to acknowledge that lawyers are at least as prone to such lapses as their clients or that in a principal–agent relationship, the client’s (lawful) choice should prevail.

In a pluralistic society, we should also be suspicious of arguments for “common morality” that have a clearly identifiable political tilt. Luban’s are decidedly left liberal. To give but one example, in his register wealth-maximizing behavior is the plainly amoral threat against which common moral principles are identified and affirmed. Lawyers should be more restrained in civil litigation, which is primarily to do with money judgments, than in criminal litigation, which is to do with a defendant’s liberty, see Luban, *Adversary System Excuse*, *supra* note 7, at 30–31, 60; individuals, but not corporations, are entitled to the attorney-client privilege, see Luban, *Upholders of Human Dignity*, *supra* note 4, at 87 (“Because, in my view, the rationale for lawyer confidentiality and the attorney-client privilege is to protect the human dignity of the client, it should apply only when the client is a flesh-and-blood person.”); and, most revealingly, wealth maximization does not, in his view, qualify as a moral principle, see, e.g., Luban, *Response*, *supra*, at 1449 (arguing that where greed is the motive, such as in the Dalkon Shield case, “the disagreement between the scrupulous lawyer and the less scrupulous client is *not* a consequence of moral pluralism”). For others, wealth maximization is a predominant moral principle in so far as it offers a proxy for utility. To insist, as I do, that common morality can offer only mirage-like comfort is not to deny the possibility of moral judgment but to warn that under conditions of pluralism the concept of common morality itself plays an ideological role. We cannot solve our worries about the ideology of advocacy with an ideology of common morality.

Luban also seems overly confident that, even if we disagree about the good, “when it comes to the great evils, people are nearly unanimous.” Luban, *Response*, *supra*, at 1447. If torture is one of the great evils regarding which people are nearly unanimous, Luban has some work to do to account for Congress’s recent endorsement of harsh interrogation methods, let alone popular acquiescence to the current administration’s practices. See *infra* Conclusion (discussing the torture memos and the Military Commissions Act of 2006). Do those who support harsh interrogation measures suffer from “cognitive distortion”? I think the better explanation is that torture is an overdetermined term precisely because it signifies an evil the contours of which provoke fundamental disagreements. We can all say we are against “torture” without adding much at all to the question of what to do in specific cases. If the debate about the legitimacy of waterboarding proves anything, it’s that we can all condemn torture without reaching anything near consensus on whether waterboarding is torture, or if it is, whether it is nevertheless justifiably used in certain contexts. Litigation in the adversary system takes up fundamental disagreements not just about the good life, but the condemnable.

As for Luban’s worry in his response that I elsewhere accuse moral activists like him “of adopting an outlandishly Emersonian view of the self,” Luban, *Response*, *supra*, at 1440, I can only urge readers to review the essay he cites and draw their own conclusions about what animates moral activist critics of the legal profession and the broader American tradition of anti-institutional moral reform. See Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1941–43 (2008).

There is, to put the point more plainly, a rather intimate (if not essential) relationship between our pluralism, our latent libertarianism,⁸⁴ and the morally humble role that lawyers play in the adversary system.⁸⁵ The adversary system and the role obligations it imposes on lawyers establish a highly decentralized process of self-governance. The law is not self-executing, but neither is it dependent upon having the resources to win the indulgence of preoccupied legislators, securing the consensus and cooperative intervention of a class of elites, or state intervention.⁸⁶

Instead, citizens and their lawyers decide whether and to what extent their rights will be protected, extended, or modified. They decide how much energy to spend searching for the smoking gun that will prove their case, how to proceed without it, or, if they are defendants, whether to turn it over. They also decide whether to settle or press for public resolution.⁸⁷ Though he and Lon Fuller expect more from law's "internal morality" than I do, Luban's pair of chapters expanding on Fuller's legal thought powerfully substantiates this decentralized account of law. The lawyer and her citizen-client, not appellate judges and legislators, are the true protagonists, the most immediate lawmakers.⁸⁸

At almost every stage (before, during, and after litigation), outcomes may turn not so much on what actually happened as on how much energy (and resources) litigants are willing to spend to press their claims. Neither truth nor the protection of substantive rights could possibly be the primary goal of a system so designed. Both are in fact quite often sacrificed on the altar of party control.⁸⁹ Rather,

⁸⁴ By this I mean our atypically strong skepticism of state authority and aversion to state subsidized bureaucratic institutions, as compared with other modern democracies.

⁸⁵ I say humble rather than neutral or amoral because professional standards do not require, or even endorse, moral indifference. See MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007). On the relationship between the adversary system and a weak state, see ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 6–16 (2001). I address the relationship between value pluralism and legal ethics at greater length in Spaulding, *supra* note 10.

⁸⁶ These assertions are more true of civil than of criminal litigation. The emphasis on civil litigation is intentional, since Luban seems most skeptical of zealous advocacy in the civil sphere. See LUBAN, *Adversary System Excuse*, *supra* note 7, at 28–32.

⁸⁷ This, in any event, is the ideal represented by the dominant view of the lawyer's role. There are of course instances when the lawyer must remonstrate with the client or withdraw. See MODEL RULES OF PROF'L CONDUCT R. 1.16(a). Additionally, there are instances in which the lawyer may forebear from using certain tactics. See *id.* R. 1.2. And, to be sure, access to counsel is rarely free.

⁸⁸ LUBAN, *Natural Law*, *supra* note 5, at 99; DAVID LUBAN, *A Different Nightmare and a Different Dream*, in LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 1, at 131 [hereinafter LUBAN, *Nightmare and Dream*].

⁸⁹ See Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1215 (2005) ("Our current adversarial approach . . . can be much more easily justified as vindicating an interest in

decentralization emphasizes the agency, and hence the accountability, of the citizen-client in the production of law, as well as the indeterminacy and instability of the law's intersection with public values.⁹⁰ It does so not only by permitting the definition and enforcement of rights to turn in the first instance on party effort, but also by providing for decision by the verdict of juries, a radically decentralized adjudicative technique.

The point is not (merely) that we respect the autonomy, or, more grandly, as Luban suggests in another provocative chapter, the human dignity of the citizen,⁹¹ but that we disagree about the constitutive features of human dignity. And because we disagree, we need fora in which to determine (situationally and provisionally) which values are sufficiently constitutive to enjoy the force of law. To substitute the conscience of lawyers for their clients' would be a significant and, I believe, unwelcome step away from democratic decentralization in the direction of control by a group of elites. Professional obligation would be replaced, not by any ordinary morality, but by the morality of lawyers. I find that prospect chilling, just as chilling as I find the exercise of unfettered discretion and moral activism by prosecutors, the one group of lawyers that professional standards enjoin to do "justice" rather than just diligently pursue the interests of private clients.⁹²

Luban acknowledges the problem of legal indeterminacy and gestures at its relationship to value pluralism.⁹³ But he claims that while pluralism can explain (if not justify) zealous advocacy in the presentation of purely legal arguments, it provides no help when it comes to the adversarial presentation of facts.⁹⁴ "It makes sense," he argues, "to assign each advocate the task of arguing one side's interpretation of

having the litigants control the litigation than it can on truth-seeking grounds."); *id.* at 1223 ("English justice as a whole was marked from the outset by a characteristically English decision not to develop a large, state-controlled and state-funded bureaucracy—a decision that may turn, at a deep historical and cultural level, on the same ideology of self-governance that underlay the development of the rhetoric of the common law as bastion of ancient liberty.").

⁹⁰ See Kessler, *supra* note 89, at 1213–14 (discussing the significance of party control in the Anglo-American concept of due process).

⁹¹ See LUBAN, *Upholders of Human Dignity*, *supra* note 4.

⁹² On the abuse of prosecutorial discretion, see *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1520 (1988) ("Statistical studies indicate that prosecutors are more likely to pursue full prosecution, file more severe charges, and seek more stringent penalties in cases involving minority defendants than in cases involving nonminority defendants."). On the prosecutor's "justice"-oriented role obligations, see MODEL RULES OF PROF'L CONDUCT R. 3.8, cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.").

⁹³ See LUBAN, *Adversary System Excuse*, *supra* note 7, at 34–35.

⁹⁴ See *id.*

the law as forcefully as possible, and doing everything possible to undermine the adversary's arguments. With no facts to hide and everything out in the open, only the arguments and counter-arguments remain."⁹⁵ Judges can thus see all the possible contours of the decisions they face.⁹⁶

Revealingly, Luban concedes in a footnote that adversarial advocacy of the purely legal, appellate style, may actually be "the form that justice takes in our world of plural, conflicting values."⁹⁷ And even with respect to the representation of facts, he later argues that lawyers uphold human dignity "by giving the client voice and sparing the client the humiliation of being silenced and ignored."⁹⁸ Doing this requires constructing a sympathetic and compelling narrative for the client from available facts. But none of this, for Luban, licenses a lawyer to construct a narrative that is false, deliberately deceptive, or misleading; to employ techniques that forestall the revelation of material facts; or to prevent negotiation or adjudication on the merits.⁹⁹

I earlier emphasized that lawyers are experts at gathering and analyzing facts.¹⁰⁰ Luban's concern is their ability to "hid[e]" facts, exploit information asymmetries, and "avoid[] open argument."¹⁰¹ What Luban has in mind is not simple perjury or obstruction of justice, but the more subtle adversarial tactics that lawyers can use to distort facts and deter or abort litigation. Some of these tactics are plainly illegal.¹⁰² Others are of doubtful utility—they may turn a decision maker in favor of the client, but they may also backfire miserably.¹⁰³ In either case, a lawyer is unlikely to be held liable for refusing to use them.¹⁰⁴ That leaves the narrower universe of techniques that are legally permissible, morally controversial, and of near certain utility.

A lot of energy could be spent, probably with neither side being convinced of the contrary, debating whether it should be the lawyer's job to refuse to employ these techniques or the job of those who find them morally suspect to change the law. The point I want to empha-

⁹⁵ *Id.* at 34.

⁹⁶ *See id.* at 34–35.

⁹⁷ *See id.* at 35 n.44 (citing STUART HAMPSHIRE, *JUSTICE IS CONFLICT* (2001); STUART HAMPSHIRE, *INNOCENCE AND EXPERIENCE* (1990)).

⁹⁸ LUBAN, *Upholders of Human Dignity*, *supra* note 4, at 72.

⁹⁹ *See* LUBAN, *Adversary System Excuse*, *supra* note 7, at 34–36 (discussing the drawbacks of the adversary system).

¹⁰⁰ *See supra* text accompanying note 47.

¹⁰¹ LUBAN, *Upholders of Human Dignity*, *supra* note 7, at 35 n.44.

¹⁰² And they are punishable under Rule 11 and the contempt power of the courts. *See* 18 U.S.C. § 401 (2000); FED. R. CIV. P. 11.

¹⁰³ *See, e.g.*, DAVID BERG, *THE TRIAL LAWYER: WHAT IT TAKES TO WIN* 9 (2003) (discussing the risks of abusive discovery tactics).

¹⁰⁴ *See* MODEL RULES OF PROF'L CONDUCT R. 8.4 (2007) (defining professional misconduct).

size here is the framework of Luban's discussion of factual distortion, which, for anyone who is not an objectivist, will seem somewhat insensitive to the problems inherent in the social representation of facts.

The cultural and legal root of adversary advocacy is the jury trial, not equity proceedings before a judge.¹⁰⁵ And as any trial lawyer is quick to confirm, passion and perception have as much to do with jury verdicts as reason. One can catalogue the errors and injustices this produces; an exercise that would present rich utilitarian questions about the social utility of jury trials. But the right to a jury trial is embedded in the Seventh Amendment to the Federal Constitution and every state constitution.¹⁰⁶ The right is constitutionalized because the Framers distrusted judges—they distrusted decision makers beholden to a sovereign, even their new, democratically accountable sovereigns.¹⁰⁷ They chose instead to give adjudicative authority to a decentralized, and always potentially radical, democratic body.¹⁰⁸

Many of the techniques for managing the reproduction and social representation of facts at trial (and, derivatively, before trial) are concessions to the role of passion and perception in the fact-finding function of juries. We don't put the witness behind a screen, we don't have paper trials, we protect the secrecy and autonomy of jury deliberations, and we use burdens of proof rather than absolute standards because we recognize that evidence will almost never be conclusive (indeed, that it will almost always be open to competing interpretations). Judges instruct juries, and a Byzantine set of evidentiary rules determine what counts as proof,¹⁰⁹ but we do not do any number of things that might anesthetize fact finding from the influence of passion and perception.

There is a long, tired jurisprudential story about how reason, in the form of dispassionate fact assessment and legal principle as enunciated by appellate judges, operates to check the sway of passion and perception. I am not unsympathetic to that story, the desire for rational decision on the merits that animates it, or some of the judge-centric rules that support it. But the more persuasive account is synthetic, refusing the Manichean dichotomy on which the "law as reason" story relies, recognizing the constitutional thumb on the scale in favor of juries, and conceding that passion and perception are at least partly instrumental features of the adversary system. Purely rational decision of the kind that Dworkin's Hercules,¹¹⁰ Posner's homo

¹⁰⁵ See *infra* Part III.

¹⁰⁶ See U.S. CONST. amend. VII.

¹⁰⁷ See *Galloway v. United States*, 319 U.S. 372, 397–98 (1943) (Black, J., dissenting).

¹⁰⁸ See *id.* (explaining the reasons behind the adoption of the Seventh Amendment).

¹⁰⁹ See, e.g., FED. R. EVID. 802 (defining the rule on "hearsay").

¹¹⁰ See RONALD DWORKIN, *LAW'S EMPIRE* 239–40 (1986) (describing an ideal judge who always rules correctly); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105–30 (1977) (same).

economicus,¹¹¹ and Langdell's formalist promise¹¹² would be undesirable because they are inhuman and always potentially tyrannical. A democratic legal process in a pluralistic society (a process committed to the meaningful participation of citizens in the production of law) profits by inviting, indeed forcing, the citizen-juror and citizen-client to confront the play of passion, prejudice, and reason.¹¹³ The play really is the thing.

For over two decades I have known an experienced, well-respected trial lawyer who has spent much of his career representing defendants in personal injury and product liability litigation. He teaches at a national trial school, is a leader of his local bar association, and lawyers on both sides of the aisle praise his professionalism and integrity. In talking about his work, he is perfectly frank about the fact that when he represents a deep pocket, one of the first things he does on the morning of trial is replace his fancy wristwatch with a Timex and pull a Men's Warehouse suit out of the closet. Jury pools in his county, as in many counties, run from low income to lower middle class, and he doesn't want their first (or for that matter, their continuing) impression of him to be that he makes a lot of money. If the jury thinks he makes a lot of money, he worries that they'll readily conclude his clients are even richer, and therefore perfectly capable of cutting a check for the suffering of the plaintiff sitting at the next table over.

I have seen him at trial. He has a way of slowly reaching up to slide his large, thick-rimmed glasses slightly down his nose and staring over the tops of the rims that makes a person feel like a dastardly liar or fool. Witnesses quail. Even when they don't, the look is his signal to the jury that something is amiss with the witness's answer, the one just given or the one about to come. There are more moves like this than one could list because the list is as broad as the spectrum of communicative acts.

Law and evidentiary facts be damned. Neither the attire nor the look is a particularly nefarious tactic, but how should one assess their propriety? Is the attire a subtle attempt to manipulate the jury's view of the facts? Is it merely an attempt to correct for the assumed bias of the jury? Or is it a concession to the authority, and, as it may happen, class consciousness of the jury? Though the latter view is personally more compelling, the more important point is that, no matter what

¹¹¹ Posner describes "homo economicus," or "economic man," as "a person whose behavior is completely determined by incentives; his rationality is no different from that of a pigeon or a rat." RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 382 (1990).

¹¹² See Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1983) (describing Langdell's attempts to shape the study of law into a scientific inquiry).

¹¹³ This is where Fuller's account of the internal morality of law, see *supra* notes 87-88 and accompanying text, is incomplete.

trial lawyers wear in front of the jury, they are making a choice about social representation that jurors may take (or at least our current trial procedures do not prevent them from taking) into account. As long as we don't require identical uniforms for all the players, there is no neutral choice about what to wear in front of the jury. The same goes for my friend's look over his glasses. As long as a witness is responding to live questions, the behavior of the questioner is in play.

There is probably a spectrum of client attire, running from things like Paul Robert Cohen's infamous jacket emblazoned with "fuck the draft" to monotone business attire.¹¹⁴ The spectrum is broad indeed—we worry, at a constitutional level, about whether criminal defendants can be forced to appear before juries in jail jumpsuits.¹¹⁵ Even if the spectrum for counsel is significantly narrower, the permutations along the way from arguably neutral to plainly distorting are maddeningly subtle. There is no way to avoid playing to the jury—it happens as soon as the lawyer steps in front of the jury box. It even happens when the lawyer makes every effort to play it straight. Other examples could be enumerated, but the point is clear: the decision a jury makes is inextricably cultural—grounded in passion, perception, and factual uncertainty.¹¹⁶

¹¹⁴ See *Cohen v. California*, 403 U.S. 15, 16 (1971). Cohen, it should be noted, was arrested in the corridor outside the municipal court, not in a courtroom during a jury trial. See *id.*

¹¹⁵ See *Estelle v. Williams*, 425 U.S. 501, 512 (1976) (“[T]he State cannot, consistent with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes . . .”).

¹¹⁶ There are a variety of other techniques lawyers may use to influence a trial's ultimate outcome that have nothing to do with the merits of their clients' position. These include abortive pre-trial tactics like motions to dismiss on technical grounds (e.g., pleading defects, jurisdictional defects, defects in service, etc.), most of which have to be filed before discovery. See FED. R. CIV. P. 12(b) (requiring that the defense make certain motions before pleading). Indeed, some of these defenses are waived if they are not invoked up front. See FED. R. CIV. P. 12(g)(2), (h)(1). But that means they will often have to be invoked well before counsel knows much about the factual and legal, let alone moral, merits of a case. Rule 4, just to take one example, requires service of process according to a specific set of methods. See FED. R. CIV. P. 4. The courts have held that parties must strictly comply with those methods, even dismissing suits in which the parties did not dispute that alternative methods used by a plaintiff gave the defendant actual notice. See, e.g., *Mid-Continent Wood Prods. v. Harris*, 936 F.2d 297, 300–01 (7th Cir. 1991) (“[A] liberal construction of the rules of service of process ‘cannot be utilized as a substitute for the plain legal requirement as to the manner in which service of process may be had.’ . . . [A]ctual knowledge of the existence of a lawsuit is insufficient to confer personal jurisdiction over a defendant in the absence of valid service of process.”) (quoting *United States v. Mollenhauer Labs., Inc.*, 267 F.2d 260, 262 (7th Cir. 1959)). Proper service of process is a step along the way to ensuring that the parties have a meaningful hearing on the merits by ensuring that each side is aware of the pendency of their rights before the court, but it quite regularly operates to defeat decision on the merits. Luban acknowledges that “law is inherently double-edged,” LUBAN, *Adversary System Excuse*, *supra* note 7, at 25, but this does not affect the rather wooden way in which he frames proper and improper use of technical, procedural rules.

A similar dynamic is present, at varying degrees of intensity, with respect to every document a lawyer produces believing that it may become public.¹¹⁷ Hence all the hours we spend pouring over our own language, even after we have settled the legal issues in our minds.

C. Self-Centered Lawyers and the Root of Professional Failure

I also fail to see why the moral accountability of *the citizen-client* is not sufficient for those concerned with the moral consequences of lawyers' vicarious action for the clients they represent. The lawyer sells legal cover, no more, no less. The line between moral and legal cover is perhaps not obvious in all cases, but it would surely become more blurry, not less, with the displacement of existing professional

¹¹⁷ Again privileging the "law as reason" narrative, Luban mistakes the story I relate about the trial lawyer above for a claim that we should consider "every bias a form of reason." Luban, *Response*, *supra* note 83, at 123–24. He objects that

[t]he fact that a lawyer can get a jury to like him—to take a rather innocent example of playing on jurors' biases—is not, under any conceivable description, a method of demonstrating reasonable doubt. If jurors acquit the rapist because his lawyer is lovable, the outcome has nothing to do with either justice or the defendant's human dignity. It would be impossible to regulate such behavior, but that doesn't make it ethical.

Id. at 1459–60. A lawyer takes an unnecessary and possibly unprofessional risk in assuming jurors will find reasonable doubt even if they dislike or distrust the lawyer, but I raise the difficulty of designing a "neutral" system for the representation and adjudication of social facts for two other reasons.

First, the goals of our system are not simply justice and human dignity, but democratic accountability and participation. Indeed, the choice among these goals is weighted rather heavily (by the federal and state constitutions) in favor of the factor Luban ignores—democracy—so much so that we should reject an account of justice that does not include democratic accountability and participation as essential components. *See infra* Part II. Trial by jury invariably privileges the participatory rights of jurors, litigants, and their counsel. Jurors (and therefore the law) will be influenced by their views of counsel, even when counsel works scrupulously not to pander. To recognize the democratic attributes of the adversary system is not to advocate license to pander, much less to say that rational decision and dignity are irrelevant; it is simply to acknowledge our longstanding institutional commitments and the respects in which they complicate the claim that strictly rational argument is the only desirable and ethical path to decision "on the merits." Put most strongly, justice is democracy, not just reason, and the merits are not strictly separable from the complexities associated with the representation of facts. Of course, the line between appropriate sensitivity to the jury and pandering to bias is not obvious. But it is precisely for this reason that the adversary system permits decentralized decisions to be made (for the most part between lawyer and client) about how to present a case to a jury, subject to judicially enforced limitations.

Second, the salient question is not whether bias is inevitable, but whether the kinds of bias and distortion that arise in trial by jury are worse than the kinds of bias and distortion that arise in any alternative institutional forms of adjudication. I am open to institutional reforms that would be equally democratic, equally consistent with our pluralism, but for reasons I have suggested above, our current system and the role obligations it places on lawyers should enjoy more of a presumption of legitimacy than Luban allows. Finally, I am at pains to note that Luban again springloads both the ethical and epistemic issue in his response by asking his readers to assume the defendant is "the rapist," *see* Luban, *Response*, *supra* note 83, at 1459, meaning a person unquestionably guilty of a heinous crime, not someone potentially innocent, or culpable of only a lesser charge.

norms. Even so, Luban worries that the accountability of clients is too often lost in the “responsibility games”¹¹⁸ they play with their lawyers.¹¹⁹ The client who would otherwise have moral reservations may release those inhibitions when the lawyer explains the legal cover. The lawyer, in turn, may feel free to offer questionable legal cover either because the lawyer has no moral scruples, or, following the dictates of professional obligation, the lawyer simply assumes that any moral concerns are for the client to sort out. More troublingly, a client’s ends may gradually become shaped by the lawyer’s cynical acid.¹²⁰

It is certainly conceivable that this happens, and in those instances (when the agent essentially arrogates the authority of the principal) the lawyer should be held to account. However, this does not fully explain the categories of professional misconduct that Luban focuses on. It would be reductive and unreasonable to conclude that Ken Lay and Andrew Fastow, the Big Tobacco executives, or the Bush Administration officials who ordered the torture of detainees, are any less *morally* accountable because lawyers offered opinions of doubtful legal merit purporting to sanction the conduct.¹²¹ It seems equally reductive and unreasonable to believe it was the subtle influence of these opinions that formed the conceptual keystone in the minds of these clients regarding the propriety of these acts.

The more persuasive argument, and the one that Luban would probably insist upon, is that better lawyers might have prevented or at least objected to the conduct.¹²² And so they might have. But is it really zealous advocacy, an overly *client*-centered role orientation, that explains the failure of the lawyers’ seeming indifference to moral (and, as it happens, legal) consequences that were both dire and obvious? Or is it that the lawyers who went astray in these contexts substituted their *own* interests and ambitions for the clients’? Was the problem responsibility games or interest games? At least with the fi-

¹¹⁸ LUBAN, *Nightmare and Dream*, *supra* note 88, at 155.

¹¹⁹ See *id.* at 157–58 (describing the advisory role of lawyers and attendant moral implications); LUBAN, *Torture Lawyers*, *supra* note 6, at 200–01 (discussing attorneys’ reassurances that their clients’ desired conduct is legal).

¹²⁰ LUBAN, *Nightmare and Dream*, *supra* note 88, at 159 (citing William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones’s Case*, 50 MD. L. REV. 213 (1991); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099 (1994)).

¹²¹ See LUBAN, *Torture Lawyers*, *supra* note 6, at 201; LUBAN, *Upholders of Human Dignity*, *supra* note 4, at 87.

¹²² See LUBAN, *Torture Lawyers*, *supra* note 6, at 203, 205 (discussing the obligation of impartiality in the counseling role and criticizing torture lawyers for facilitating “a legal train wreck”); cf. LUBAN, *Upholders of Human Dignity*, *supra* note 4, at 87 (advocating for the abolition of the attorney-client privilege in the context of organizational clients).

nancial accounting scandals, we confront a category of fairly easy cases in which self-interest is the better explanation.

It is challenging, too challenging I think, to describe the lawyers for Anderson Consulting and Enron as having genuinely served their clients' interests when their advice, for which they were lavishly compensated, led to the destruction of their clients.¹²³ It is equally difficult to see how morally controversial conduct can be chalked up to genuine client service when the client is not even consulted about whether the lawyer should engage in the conduct. Put differently, I simply distrust the motives of lawyers who blindly assume the client wants a dreadful thing done, reflexively do it in the client's name, and then afterward either claim to have been personally torn about it—crying all the way to the bank—or too proudly lay it all on their scrupulous adherence to professional duty.

Self-centered lawyering may masquerade as genuine client-centered lawyering (particularly for lawyers who have gone astray and would say anything to avoid admitting that they were acting for self-serving reasons), but the two are altogether different. Here Luban's parting salvo that "one less ideology is . . . one less excuse,"¹²⁴ seems particularly apt. Society should reject post hoc rationalizations for misconduct arising from self-centered lawyering and should be wary of ex ante rationalizations from repeat offenders. But if self-centered lawyering is the root of this sort of professional failure, the source of what Luban quite properly describes as adversarial "overkill,"¹²⁵ the solution is to reinforce the norms of genuine client-centered lawyering, not to water down or dissolve the role.

II

THE ROOTS OF ADVERSARY ADVOCACY

As the earlier discussion of the jury trial suggests, I believe Luban is too quick to dismiss the historical and cultural pedigree of the adversary system.¹²⁶ He puts the case against that pedigree in the following terms:

[T]here is no constant tradition: common law constantly modifies the adversary system. Indeed, the adversary advocate is a recent in-

¹²³ See *infra* text accompanying notes 187–94 (discussing the torture lawyers); see also LUBAN, *Torture Lawyers*, *supra* note 6, at 201; cf. LUBAN, *Upholders of Human Dignity*, *supra* note 4, at 87–88 (arguing that it took too long for the misconduct to surface in the tobacco cases). See generally Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J.L. BUS. & FIN. 9 (2002), reprinted in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS, at 625 (Nancy B. Rapoport & Bala G. Dharan eds., 2004) (describing the conduct of lawyers involved in the demise of Enron).

¹²⁴ LUBAN, *Adversary System Excuse*, *supra* note 7, at 64.

¹²⁵ *Id.* at 43.

¹²⁶ See *supra* notes 105–16 and accompanying text.

vention within that changing tradition. In England, criminal defense lawyers were not permitted to address the courts until 1836; in the United States, criminal defendants were not guaranteed counsel until 1963. Civil litigants still have no guarantee of counsel, even in quasi-criminal matters such as a state's attempt to take a child from its parent. Moreover, it is simply false that the "neutral partisanship" norm governs every aspect of litigation. Ethics codes and case law insist that public prosecutors should seek justice, not victory. . . . All in all, it's hard to see the adversary system as "a clause in the great primaevial contract."¹²⁷

This understates the case in several respects. To begin with, Luban emphasizes the history of suits at equity in his argument that the common law has "constantly modifie[d]" the adversary system.¹²⁸ Flexible equity procedures certainly influenced the work of the Advisory Committee in its initial design of the Federal Rules of Civil Procedure adopted in 1938.¹²⁹ They exercised influence at the state level even earlier in reform measures dating as far back as the Field Code of the mid-nineteenth century.¹³⁰ But equity originated as a mere supplement to litigation at common law and therefore makes a poor yardstick for measuring the historical development of adversary advocacy.¹³¹ Indeed, equity was originally the grace of the king, dispensed by his officers—a system far afield in both institutional design and practice from common-law adjudication.¹³² Even when equity formalized into adjudication, it was dispensed by courts of separate jurisdiction until the merger of law and equity well into the nineteenth century in most states¹³³ and in 1938 in federal court practice.¹³⁴ Given its development from the exercise of sovereign discretion, it is not surprising that equity reflected inquisitorial features in eighteenth- and nineteenth-century American and English

¹²⁷ LUBAN, *Adversary System Excuse*, *supra* note 7, at 54–55 (quoting EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 110 (Anchor Books 1973) (1791)).

¹²⁸ *See id.*

¹²⁹ *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1149 (1982) (discussing incorporation of equity rules in the Federal Rules of Civil Procedure); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922–26 (1987).

¹³⁰ *See* Subrin, *supra* note 129, at 925.

¹³¹ *See id.* at 932.

¹³² *See* F.W. MAITLAND, *EQUITY: ALSO, THE FORMS OF ACTION AT COMMON LAW* 1–11 (A.H. Chaytor & W.J. Whittaker eds., 1913); JOSEPH STORY, *1 COMMENTARIES ON EQUITY JURISPRUDENCE* §§ 38–58, at 42–64 (W.H. Lyon, Jr. ed., Little, Brown, and Co. 14th ed. 1918) (1835).

¹³³ *See* Subrin, *supra* note 129, at 931–39.

¹³⁴ *See* FED. R. CIV. P. 1.

practice.¹³⁵ That fact takes nothing away from the adversarial features of adjudication at common law.¹³⁶

Moreover, it is not at all clear that equity practice itself is or was dominated by non-adversarial features. Kessler's fine article, a source to which Luban refers,¹³⁷ recovers an important and too long forgotten strand of inquisitorial influence within equity practice.¹³⁸ However, that influence developed against a larger adversarial framework.¹³⁹ Charles Dickens' satire of litigation waste and adversarial excess in *Bleak House*, the infamous case of Jarndyce and Jarndyce, was in the chancery courts, not the common-law courts. "Suffer any wrong that can be done you rather than come here," would perhaps have applied with equal force to the common-law courts, but it is no compliment to either system.¹⁴⁰

Even after the Federal Rules of Civil Procedure were adopted, discovery practice (the most significant equity feature included by the Advisory Committee in the new rules¹⁴¹) was heavily influenced by adversary system values. Any hope of truly non-adversarial, open-handed discovery was dashed by the Supreme Court quite early on in *Hickman v. Taylor*.¹⁴² The case reads like an ode to zealous advocacy, treating the adversary system as precisely the sort of institution that has become "a clause in the great primaevial contract."¹⁴³ The case formally recognized work-product protection to insulate a lawyer's fact gathering, legal research, and analysis from disclosure to an adversary.¹⁴⁴

The bench and bar had been anxious and uncertain about how broad a shift the discovery rules demanded. Some assumed that the requirement to turn over evidence before trial meant the end of adversary advocacy. As one of the amicus briefs in the case asserted in its opening pages, "The federal rules of civil procedure pertaining to dis-

¹³⁵ See Amalia D. Kessler, *supra* note 89 1206–09.

¹³⁶ For a comprehensive account of common law origins, see THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 671–707 (5th ed. 1956).

¹³⁷ See LUBAN, *Upholders of Human Dignity*, *supra* note 4, at 41 n.60 (citing Kessler, *supra* note 89).

¹³⁸ See Kessler, *supra* note 89, at 1206–09.

¹³⁹ Kessler concedes as much. See *id.* at 1198 n.79, 1225.

¹⁴⁰ See CHARLES DICKENS, *BLEAK HOUSE* 3 (Oxford Univ. Press 1996) (1853). For early American complaints about the cost, delay, and confusion of adversary advocacy, see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 147 (1985) (referring to *Bleak House*); *id.* at 144–52; WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE IN MASSACHUSETTS SOCIETY, 1760–1830*, at 69–78 (1975).

¹⁴¹ On the history of the adoption of the Federal Rules of Civil Procedure and the influence of equity, see FED. R. CIV. P. 26–45 advisory committee's notes and see generally Burbank, *supra* note 129; Subrin, *supra* note 129.

¹⁴² 329 U.S. 495 (1947) (recognizing work product protection for a lawyer's notes of witness interviews taken shortly after a tugboat accident).

¹⁴³ LUBAN, *Adversary System Excuse*, *supra* note 7, at 54 (quoting BURKE, *supra* note 127, at 110).

¹⁴⁴ See *Hickman*, 329 U.S. at 511–14.

covery admittedly were written with a view toward eliminating the adversary system.”¹⁴⁵ Others contended, and the Supreme Court agreed, that nothing about the rules’ endorsement of “[m]utual knowledge of all the relevant facts gathered by both parties”¹⁴⁶ undermined “the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients’ interests.”¹⁴⁷ If work product materials had to be handed over, the Court admonished, the adversary system would collapse:

[M]uch of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness, and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.¹⁴⁸

Justice Jackson’s famous concurring opinion was more pointed. Against Hickman’s assertion that “the Rules were to do away with the old situation where a law suit developed into ‘a battle of wits between counsel,’” Jackson retorted that “a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its function either without wits or on wits borrowed from the adversary.”¹⁴⁹ Any other rule, he insisted “would . . . put trials on a level even lower than a ‘battle of wits’” since lawyers would quickly be converted into witnesses against their clients.¹⁵⁰

The difference between law and equity is salient for another reason Luban does not discuss. At equity, trial was before the chancellor.¹⁵¹ By contrast, the right to jury trial, with all the adversary features jury trials imply, traditionally attached to actions at common law.¹⁵² So hostile were early Americans to the judiciary that juries held the power to decide questions of law, not just questions of fact.¹⁵³ Judges could instruct, but not in the sense we use the term today—

¹⁴⁵ Petition and Brief of the United Railroad Workers of America, C.I.O., for Leave to File the Same, Amicus Curiae at 2, *Hickman*, 329 U.S. 495 (No. 885).

¹⁴⁶ *Hickman*, 329 U.S. at 508.

¹⁴⁷ *Id.* at 511.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 516 (Jackson, J., concurring).

¹⁵⁰ *Id.*

¹⁵¹ See DAN B. DOBBS, *LAW OF REMEDIES* § 2.6(1), at 149 (2d ed. 1993) (“Equity courts did not grant jury trials; law courts did.”).

¹⁵² See *id.*

¹⁵³ See *Galloway v. United States*, 319 U.S. 372, 399 (1943) (Black, J., dissenting).

instructions were guidance to the jury, no more.¹⁵⁴ Upon noticing error, the judge could grant a new trial, but a new trial was just that, a chance for another jury to hear the case. Supplementary relief (upon a showing that one's remedy at law was inadequate) could of course be sought by resort to the chancery.¹⁵⁵ But given the uniquely important role of the lawyer in pleading, particularly special pleading, and in trial before juries, we should look for the roots of adversary advocacy in the history of common-law adjudication, not equity practice. That history suggests a core of deeply embedded practices and social understandings.¹⁵⁶

Luban also gives an incomplete account of the right to counsel and its place in the history and doctrine of constitutional due process. He notes that criminal defense lawyers "were not permitted to address the courts" in England until 1836 and were not "guaranteed" to defendants in the United States until the 1963 case of *Gideon v. Wainwright*.¹⁵⁷ Civil litigants, he adds, "have no guarantee of counsel" even in such serious matters as the termination of parental rights.¹⁵⁸ "Guarantee" is a somewhat opaque term here. At least in the United States, there is no question that parties in both criminal and civil cases have a constitutional right to counsel under the Due Process Clause and the First Amendment (and in criminal cases, under the Sixth Amendment).¹⁵⁹ The cases to which Luban refers involve not the basic right to counsel, but whether the state is constitutionally obliged to *subsidize* counsel for litigants who cannot afford it.¹⁶⁰ That question involves not so much the government's endorsement of the adversary

¹⁵⁴ See *id.* at 402 ("Where there is no evidence tending to prove a particular fact, the court[s] are bound so to instruct the jury, when requested; but they cannot legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have.") (quoting *Greenleaf v. Birth*, 34 U.S. (9 Pet.) 292, 299 (1835)).

¹⁵⁵ See *supra* notes 131–34 and accompanying text. The jury-trial/bench-trial distinction holds today in federal court notwithstanding the merger of law and equity because the Seventh Amendment "preserve[s]" the right to jury trial "[i]n suits at common law." See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 n.16 (1959) (quoting U.S. CONST. amend. VII).

¹⁵⁶ See FRIEDMAN, *supra* note 140, at 144–52, 391–411; JEAN V. MATTHEWS, RUFUS CHOATE: THE LAW AND CIVIC VIRTUE 153–60 (1980); NELSON, *supra* note 140, at 69–78; Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 *FORDHAM L. REV.* 1397, 1450–54 (2003).

¹⁵⁷ See LUBAN, *Adversary System Excuse*, *supra* note 7, at 54 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

¹⁵⁸ See *id.* at 54–55 (citing *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981)).

¹⁵⁹ See U.S. CONST. amends. I, V, VI, XIV.

¹⁶⁰ Cf. *Lassiter*, 452 U.S. at 26–27 ("[T]he Court's precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to *appointed* counsel only when, if he loses, he may be deprived of his physical liberty.").

system as the distribution of legal services within a regime that already takes the right to counsel as relatively uncontroversial.

It is also worth noting that in *Lassiter v. Department of Social Services*, the case that Luban properly cites as setting the outer limit of the constitutionally subsidized right to counsel in areas of state action in which confinement is not at issue, the Court went out of its way to note that thirty-three states had already adopted provisions securing counsel in actions to terminate parental rights.¹⁶¹ So the guarantee was present, just not as a federal constitutional mandate.¹⁶² In any event, the case has been criticized heavily, and quite correctly, for failing to recognize that publicly subsidized counsel is as important to the legitimacy of certain civil proceedings as it is in cases where freedom from state confinement is at issue.¹⁶³

There are, to be sure, explicitly non-adversarial settings in which the Court has expressed misgivings about introducing counsel out of (quite often misplaced) deference to competing government interests.¹⁶⁴ One of the clearest examples is *Walters v. National Association of Radiation Survivors*,¹⁶⁵ in which then-Justice Rehnquist wrote for a majority that refused to raise a Civil War era \$10 cap on attorneys' fees for veterans seeking disability benefits.¹⁶⁶ Rehnquist justified the refusal on the ground that the statutory scheme for claiming veterans' benefits is expressly designed to be non-adversarial.¹⁶⁷ He claimed that the panel hearing the veteran's claim should conduct the process with "informality and solicitude for the claimant," giving the veteran the benefit of evidentiary presumptions, applying no statute of limitations, and denying *res judicata* effect to prior claims.¹⁶⁸

He added that raising the fee cap and bringing lawyers in would not only reduce the recovery of successful claimants, but would invite

¹⁶¹ *Id.* at 34.

¹⁶² *See id.*

¹⁶³ *See id.* at 46 (Blackmun, J., dissenting) ("Faced with a formal accusatory adjudication, with an adversary—the State—that commands great investigative and prosecutorial resources, with standards that involve ill-defined notions of fault and adequate parenting, and with the inevitable tendency of a court to apply subjective values or to defer to the State's 'expertise,' the defendant parent plainly is outstripped if he or she is without the assistance of 'the guiding hand of counsel.' When the parent is indigent, lacking in education, and easily intimidated by figures of authority, the imbalance may well become insuperable.") (quoting *In re Gault*, 387 U.S. 1, 36 (1967)) (citations omitted). *See generally* Elizabeth G. Thornburg, *The Story of Lassiter: The Importance of Counsel in an Adversary System*, in *CIVIL PROCEDURE STORIES* 489, 522–26 (Kevin M. Clermont ed., 2004) (describing the significance of the *Lassiter* decision and citing literature critical of the decision).

¹⁶⁴ *See, e.g., infra* note 169 and accompanying text.

¹⁶⁵ 473 U.S. 305 (1985).

¹⁶⁶ *See id.* at 307.

¹⁶⁷ *See id.* at 309–11.

¹⁶⁸ *See id.*

misplaced adversarialism.¹⁶⁹ Quoting Judge Friendly, Rehnquist suggested that “[u]nder our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client’s cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty.”¹⁷⁰ If veterans show up with lawyers, the government might feel obliged to do the same, and “the result may be to turn what may have been a short conference leading to an amicable result into a protracted controversy.”¹⁷¹

Even here, however, the Court’s attempted exclusion of counsel was both controversial and fleeting. As Justice Stevens wrote in dissent,

If the Government, in the guise of a paternalistic interest in protecting the citizen from his own improvidence, can deny him access to independent counsel of his choice, it can change the character of our free society. Even though a dispute with the sovereign may only involve property rights, or as in this case a statutory entitlement, the citizen’s right of access to the independent, private bar is itself an aspect of liberty that is of critical importance in our democracy.¹⁷²

Responding three years later to extensive testimony by injured veterans whose claims were denied because they lacked the representation of counsel, Congress reversed the Court by removing the fee cap.¹⁷³

More broadly, perennial reforms to adversarial practice, the “constant modifications” I believe Luban has in mind, occur within a constitutional framework of due process that is attentive not just to enhancing the truth-finding function of adjudication and the vindication of substantive legal rights, but also to the right of the parties to meaningful participation, the demands of efficiency, and, most significantly for present purposes, the weight of past practice. Due process,

¹⁶⁹ See *id.* at 326 (“Thus, even apart from the frustration of Congress’ principal goal of wanting the veteran to get the entirety of the award, the destruction of the fee limitation would bid fair to complicate a proceeding which Congress wished to keep as simple as possible. It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation.”).

¹⁷⁰ *Id.* at 325 (quoting Henry J. Friendly, “Some Kind of Hearing,” 123 U. PA. L. REV. 1267, 1288 (1975)).

¹⁷¹ *Id.* (quoting Friendly, *supra* note 170, at 1288).

¹⁷² *Id.* at 370–71 (Stevens, J., dissenting). According to Stevens, the right to counsel is too fundamental to be subject to balancing against other interests. He wrote: “The fundamental error in the Court’s analysis is its assumption that the individual’s right to employ counsel of his choice in a contest with his sovereign is a kind of second-class interest that can be assigned a material value and balanced on a utilitarian scale of costs and benefits.” *Id.* at 368–69.

¹⁷³ See Veterans’ Judicial Review Act of 1988, Pub. L. No. 100-687, § 4063, 102 Stat. 4105, 4116 (codified as amended at 38 U.S.C. § 7263 (2000)). On the congressional testimony, see S. REP. NO. 100-418 (1988).

in the eyes of the Court, is itself a historical principle, a commitment to and reflection of the inherent legitimacy of longstanding practice.¹⁷⁴ This can be seen most powerfully in cases dealing with the right to notice,¹⁷⁵ personal jurisdiction,¹⁷⁶ and the right to counsel for enemy combatants.¹⁷⁷ As Justice Scalia has insisted, where due process is concerned, “its validation is its pedigree.”¹⁷⁸

It is nonetheless true that jury trials are an exceptional event in modern practice. Managerial judging and settlement before trial are now the norm. For reasons too legion to belabor here, these are facts to lament to the extent that they reflect the gradual arrogation of power by judges at the expense of the democratic function of juries.¹⁷⁹ Certain aspects of the overall trend strike me as raising profound constitutional questions.¹⁸⁰ In any event, the trend has neither diminished the influence of zealous advocacy nor the importance of access to counsel. Parties hotly contest discovery and pre-trial practice at least in part because everyone knows that reaching a jury depends on the success of fact-gathering and procedural maneuvers. If one fails at this stage, the case will not go to trial, and if one succeeds, particularly by discovering dispositive evidence, a jury typically will be unnecessary because the other side will settle or lose at summary judgment.¹⁸¹

¹⁷⁴ See *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 24–25 (1981) (“Applying the Due Process Clause is . . . an uncertain enterprise which must discover what ‘fundamental fairness’ consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.”).

¹⁷⁵ See, e.g., *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (requiring notice in proceedings to settle a trust).

¹⁷⁶ See, e.g., *Burnham v. Superior Court*, 495 U.S. 604, 621 (1990) (emphasizing that “traditional notions of fair play and substantial justice” guide the due process inquiry).

¹⁷⁷ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (requiring hearings for detained enemy combatants).

¹⁷⁸ *Burnham*, 495 U.S. at 621; see *Hamdi*, 542 U.S. at 554–79 (Scalia, J., dissenting) (making a historical argument against constitutional balancing).

¹⁷⁹ The trend dates at least as far back as the conservative movement of Whigs in the 1830s and 40s. Whig lawyers launched a public relations campaign to forestall Jacksonian democratic populism by, among other things, positioning elite lawyers, and especially judges, as a heroic high priesthood—as guardians of the republic. See *THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR 176–90* (Perry Miller ed. 1969); Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001, 2029–39 (2005).

¹⁸⁰ See, e.g., Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007) (arguing that the Supreme Court has never decided the constitutionality of summary judgment and that summary judgment violates traditional English common law notions embodied in the Seventh Amendment).

¹⁸¹ The trial lawyer I mentioned above, see *supra* p. 1395, has become well enough known for his trial skills that when a case comes close to trial he is sometimes retained exclusively for a settlement conference. Once the other side realizes they will face him at trial, rather than a mere “litigator” who has never tried a case to verdict, they often settle. This is but one example of the derivative effect to which I earlier referred of the jury-trial right on cases never tried. See *supra* note 116.

Perhaps most importantly, even if Luban is right that “[f]ew of our institutions are trusted less than adversary adjudication”¹⁸²—a proposition I think is open to doubt¹⁸³—it remains as true today as when Alexis de Tocqueville first said it that adversary system values permeate our culture and are so deeply embedded as to constitute a dominant conceptual and discursive frame. This is Tocqueville’s summation:

The influence of legal habits extends beyond the precise limits [of the legal profession and courts]. Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings. As most public men are, or have been, legal practitioners, they introduce the customs and technicalities of their profession into the management of public affairs. The jury extends this habit to all classes. The language of the law thus becomes, in some measure, a vulgar tongue¹⁸⁴

Trials were a principal form of popular entertainment in the nineteenth century.¹⁸⁵ They remain so today. We have not only obsessive news coverage of major trials and legal scandals, court TV, and fictional lawyer shows; we have everything from *The People’s Court* to *Animal Court*.¹⁸⁶

There may be a layer of public mistrust; undoubtedly there are layers of frustration and (justified) resentment as well. But there are also deep layers of reliance and desire bound up in the social imagination of adversary advocacy. The relationship is of course vexed, but in just the way most of our sentiments about our fundamental institutional commitments are. None of this is to say that the adversary system or the role lawyers play in it should be immune from reform, any more than our other fundamental institutional commitments are or should be. It is just to say that even a pragmatic justification of the adversary system (under conditions of pluralism, and given its long history and cultural function) carries enough weight to enjoy a rela-

¹⁸² LUBAN, *Adversary System Excuse*, *supra* note 7, at 53.

¹⁸³ Which institutions are more trusted? The press? The ballot box? The police? The pulpit? Public education? Health care? The financial markets?

¹⁸⁴ ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 357–58 (Henry Reeve trans., University Press 3d ed. 1863) (1850)

¹⁸⁵ See FRIEDMAN, *supra* note 140, at 309, 575–76.

¹⁸⁶ On the interpenetration of adversary system values and cultural discourse, see ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 217–45 (2000); PATRICIA EWICK & SUSAN S. SIBLEY, *THE COMMON PLACE OF LAW* (1998); RICHARD K. SHERWIN, *WHEN LAW GOES POP* (2000); LUBAN, *Nightmare and Dream*, *supra* note 88, at 146 n.42 (“[T]he Supreme Court’s *Miranda* decision has plainly entered popular consciousness, and virtually anyone who watches television knows that police have to read suspects their rights when they arrest them.”).

tively strong presumption of validity. If the adversary system enjoys this substantial (not weak, not bulletproof) justification, lawyers' professional role acts do too.

CONCLUSION: THE TORTURE LAWYERS

I believe this modest, historically grounded defense of the adversary system avoids the weaknesses of the romantic, plainly ideological, "[d]istant angels sing[ing]"¹⁸⁷ version that the profession has so often offered and that Luban rightly rejects. Moreover, the core attributes of the defense suggested here—information asymmetry, value pluralism, the distinction between self-centered lawyering and genuinely client-centered lawyering, and the validation of tradition—offer important insights into Luban's provocative chapter about the torture memos and the lawyers who wrote them.¹⁸⁸ The chapter is well argued and clearly demonstrates both the professional error of the lawyers who offered opinions attempting to justify torture of the Bush Administration's detainees—the "torture lawyers," as Luban calls them—and the profound moral and social costs of their error. The work of these lawyers and the executive-branch actions they attempted to justify has diminished our standing in the world and has made us less safe.

What I would add to Luban's analysis lies at a point of intersection with his equally provocative chapters re-imagining legal theory as an inquiry into lawyers' work rather than styles of adjudication.¹⁸⁹ In these two chapters he argues compellingly that lawyers are responsible for the production of law; that our work with clients produces law well before, and quite often in the absence or distant shadow of any adjudication, regulation, or legislation; and that legal theory is all the poorer for missing this perspective by focusing, to the point of blind obsession, on the legal reasoning of appellate judges.

Here is the rub. The production of law is precisely the project in which the torture lawyers believed they were engaged. Unfortunately, and notwithstanding all the public obloquy and righteous indignation, they have at least partly succeeded—not just via unilateral executive action, but with the help of Congress.¹⁹⁰ It is too easy to say that the torture lawyers were overly subservient to their client, that the

¹⁸⁷ LUBAN, *Adversary System Excuse*, *supra* note 7, at 27.

¹⁸⁸ See LUBAN, *Torture Lawyers*, *supra* note 6.

¹⁸⁹ See LUBAN, *Natural Law*, *supra* note 6; LUBAN, *Nightmare and Dream*, *supra* note 88.

¹⁹⁰ See LUBAN, *Torture Lawyers*, *supra* note 6, at 204 ("[The Military Commissions Act of 2006] (the worst piece of legislation I can recall from my lifetime) was clearly inspired by the style of legal thinking perfected by the torture lawyers. In effect, the torture lawyers helped to define a 'new normal,' without which the Military Commissions Act would not exist."). I no more celebrate their success than Luban does, but the change in law to a new status quo cannot be ignored.

problem was their entrenchment in a role that required them to banish conscience and all sense of legal limitations.¹⁹¹ Make no mistake, these lawyers were complicit in the lawlessness of the executive officers they served. But the evidence—particularly their extensive backgrounds in conservative legal, political, and academic circles—suggests that they were complicit in the way cause lawyers frequently are. That is, it appears that they were motivated not by anything like a professional standard of moral neutrality with respect to client ends, but rather by deep personal and ideological commitment to the ends of the Bush Administration (supplemented, no doubt, by some degree of self-interest in the form of ambition for higher office).¹⁹²

Like the executive officers they served, the professional records of these lawyers reflect sympathy toward, then formal legal endorsement of, the President's agenda (i.e., general hostility to international law, *qua* law; believing in the constitutionality of nearly absolute presidential powers in time of war; asserting that our engagement with al Qaeda is *sui generis* under the laws of war; and asserting the legitimacy of employing extraordinary measures against detainees who have been formalistically defined out of the rights of citizens and prisoners of war).¹⁹³ To the extent that existing law conflicted with that agenda, the torture lawyers seemed all too comfortable with stretching the law to the breaking point to reshape it in conformity with the normative universe they and the President wish to inhabit. Thus, their professional errors—their legal misjudgments—strike me as more likely the product of closely held ideological commitments than the standard professional obligation of morally humble client service.

Put differently, while it is tempting to view the work of the torture lawyers as the nadir of zealous advocacy, the final proof that professional standards are morally bankrupt and that lawyers must attend to

¹⁹¹ See LUBAN, *Torture Lawyers*, *supra* note 6, at 163–64 & n.5 (taking at face value John Yoo's claim that he was not "offering morally motivated advice").

¹⁹² On the ambition for higher office, see *id.* at 201 (citing Bybee's appointment to the U.S. Court of Appeals for the Ninth Circuit).

¹⁹³ On their positions and activities before entering the Department of Justice, see, for example, John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673 (2000); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996); John C. Yoo, *The First Claim: The Burr Trial, United States v. Nixon, and Presidential Power*, 83 MINN. L. REV. 1435 (1999); John C. Yoo, *UN War Powers, US War Powers*, 1 CHI. J. INT'L LAW 355 (2000). Luban concedes that "even before 9/11," the agenda of the Administration "had preoccupied Yoo, Cheney, and Addington." See LUBAN, *Torture Lawyers*, *supra* note 6, at 172 n.28, 174. On their positions since entering service at the Department of Justice, see JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007) (describing the views of Vice President Dick Cheney and his counsel from 2001–2005, David Addington); *THE TORTURE DEBATE IN AMERICA* (Karen J. Greenberg ed., 2006); *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

the moral consequences of their role acts,¹⁹⁴ I think the more accurate, if discomfiting, view is that their work reveals the cost of endorsing moral activism in the professional role. Disinterested client service would have produced more balanced legal assessments.¹⁹⁵ Those assessments might not have restrained executive officers as determined as those in the Bush Administration, but they would have made clear the novel, legally tenuous nature of that action. That, and not moral heroism in the name of human dignity, is what should be expected of the lawyer in the first instance. Genuinely client-centered lawyering requires courage enough and delivers enough restraint.

More generally, I believe matters might have been and still stand to be improved by greater emphasis on adversary system values in this context, not less. Part of the reason the conduct occurred in the first instance, and much of the reason it persists, is that it is shrouded in secrecy. Adversary adjudication in the form of access to counsel, habeas review, meaningful rights for detainees to participate in adjudication of their status (e.g., notice of charges, access to evidence, confrontation of witnesses, etc.), and open trials, would make possible the kind of public review that can confer far more legitimacy on state action than falsely reassuring tales of dark conspiracies averted. What makes the Bush Administration's program of enemy combatant detention so troubling is precisely that it reflects the worst kind of inquisitorial excess (right down to confessions extracted by torture) along with all the fears and temptations that form of secret, unilateral state action plays upon and invites.

The Administration is deeply embedded in its own strategy of "graymail" to avoid meaningful review of its actions in this arena, contending that openness of almost any kind jeopardizes national security and that detainees will invariably subvert due process rights to serve the ends of terrorism. And so the elephant in the room, the gravity of any real threat, becomes all the more opaque, and our liberties all the more ethereal. The answer, it seems to me, is to steadfastly insist upon due process of law as we know it and as the Constitution secures

¹⁹⁴ See LUBAN, *Torture Lawyers*, *supra* note 6, at 192–204 (arguing that the legal positions in the torture memos are frivolous and formalistic advocacy briefs thinly disguised as disinterested advisory opinions and that they constitute a threat to human dignity).

¹⁹⁵ In a footnote, Luban concedes that a "lawyer who okays unlawful conduct by the client has also harmed the client, and therefore been a bad fiduciary of the client." *Id.* at 201 n.121. But he attempts to cleave this from the role morality debate by insisting that breach of fiduciary duty (breach of the client-centered ethic) is "both as a matter of law and morality . . . a distinct ethical violation from becoming the client's accomplice." *Id.* It is a distinct violation, but if the breach of fiduciary duty is precisely what leads to complicity in the client's illicit conduct, the rules that enforce fiduciary duties to the client are the proper object of focus.

it.¹⁹⁶ After all, to suggest that the law may be used against itself is a truly empty argument. At least in a society committed to the adversary system, that is one of its regular and most important functions.

¹⁹⁶ I stridently disagree with those who contend that resort to the courts is optional as well as those who contend that the courts are not institutionally competent to handle terrorism related cases. See, e.g., John Farmer, Op-Ed, *A Terror Threat in the Courts*, N.Y. TIMES, Jan. 13, 2008, § 4, at 14 (“A closer look at the Padilla case and other terrorism prosecutions reveals . . . that the continued reliance on our criminal justice system as the main domestic weapon in the struggle against terrorism fails on two counts: it threatens not only to leave our nation unprotected but also to corrupt the foundations of the criminal law itself.”).

