

2009

The Lawyer's Role in a Contemporary Democracy, Foreword

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Recommended Citation

Bruce A. Green, *The Lawyer's Role in a Contemporary Democracy, Foreword*, 77 Fordham L. Rev. 1229 (2009).

Available at: <https://ir.lawnet.fordham.edu/flr/vol77/iss4/3>

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The Lawyer's Role in a Contemporary Democracy, Foreword

Cover Page Footnote

* This Symposium, held on September 17–18, 2008, was organized by Fordham University School of Law's Louis Stein Center for Law and Ethics and was cosponsored by Stanford Law School's Keck Center on Legal Ethics and the Legal Profession and the Fordham Law Review. A special thanks to the David Berg Foundation, without which this event would not have been possible. ** Louis Stein Professor of Law, Fordham University School of Law; Director, Louis Stein Center for Law and Ethics.

SYMPOSIUM

THE LAWYER'S ROLE IN A CONTEMPORARY DEMOCRACY*

FOREWORD

*Bruce A. Green***

In 2008, participants in a Symposium at Fordham Law School¹ were invited to discuss “the lawyer’s role in a contemporary democracy.” This book of the *Fordham Law Review* contains participants’ writings on this theme. It captures the richness of the Symposium and suggests possibilities for continuing and enlarging the discussion in the future.

The contributions are wide-ranging, owing to the theme’s breadth no less than the authors’ diverse perspectives. As Fred Zacharias observes,² the Symposium can be interpreted variously as “a call to discuss the nature of democracy itself,” to explore lawyers’ role in promoting freedoms associated with liberal democracies, or to consider lawyers’ contribution to law reform, “enhancing individual rights and open, representative government.”³ As Rakesh Anand notes, responses will also differ depending on whether or not one focuses on liberal democracies and, as did

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** Louis Stein Professor of Law, Fordham University School of Law; Director, Louis Stein Center for Law and Ethics.

1. The idea for originating a national and international dialogue on the lawyer’s role in a contemporary democracy arose out of conversations with my Fordham colleagues, Matthew Diller, Sheila Foster, Jennifer Gordon, Russell Pearce, and Ian Weinstein. Anu Sawkar, the *Fordham Law Review*’s Symposium Editor, and Jessi Tamayo, the Stein Center’s Associate Director, carried the laboring oar in the administration of the Symposium. I was joined in moderating discussions during the Symposium by Richard Abel, Matthew Diller, Howard Erichson, Toni Fine, Paolo Galizzi, Russell Pearce, Deborah Rhode, and Ian Weinstein. In addition to those contributing to this collection, Robert Gordon, Carrie Menkel-Meadow, and H. Kwasi Premph were among the principal presenters. My thanks to all!

2. Fred C. Zacharias, *True Confessions About the Role of Lawyers in a Democracy*, 77 *FORDHAM L. REV.* 1591 (2009); see also Rakesh K. Anand, *The Role of the Lawyer in the American Democracy*, 77 *FORDHAM L. REV.* 1611 (2009).

3. Zacharias, *supra* note 2, at 1591.

most participants, on the United States specifically.⁴ Likewise, responses will vary depending on what one considers to be the essential features and values of democracy—for example, whether the focus is on promoting the rule of law and strengthening democratic institutions, on enhancing citizens' participation in and access to institutions of governance, or on advancing particular political or social values.

This Foreword offers a brief introduction—much too brief to do justice to individual writings—endeavoring to suggest some unifying themes, relationships, and tensions in the various contributions to this collection. The Foreword then offers three stories to suggest the importance of continuing the conversation commenced in these pages and concludes with a few words of thanks.

I. PROMOTING THE RULE OF LAW

Promoting the rule of law, some of the writings suggest, may be the most obvious and fundamental role for lawyers in a democracy, but it is not necessarily such a simple one. Okechukwu Oko's eye-opening account of the Nigerian experience in particular describes how crucial yet difficult this role is in a fragile democracy. As his essay's introduction succinctly describes,

Because of their status, special skills, and training, lawyers have the opportunity and indeed the obligation to help attain the nation's political imperative of consolidating democracy. Unlike their colleagues in stable democracies, however, African lawyers face a phalanx of harsh realities and pragmatic constraints that severely limit their ability to deepen democracy, or even perform their traditional functions. Africa's distinctive problems include political instability, social disequilibrium, insecurity, corruption, ineffective and inefficient public institutions, a declining economy, and the lack of a democratic culture.⁵

After surveying the extraordinary challenges confronting Nigerian lawyers, Oko offers hope, identifying strategies by which Nigerian lawyers can promote government accountability, strengthen government institutions, revamp the legal system, combat judicial corruption, and, ultimately, deepen democracy, even under the most difficult social and political conditions.⁶

Do twenty-first-century American lawyers, practicing in an old and stable democracy, have anything comparable to offer? Or may they be satisfied functioning simply as "service providers" to their clients?⁷ American bar associations and government agencies have much to say about lawyers' role

4. Anand, *supra* note 2, at 1616.

5. Okechukwu Oko, *Lawyers in Fragile Democracies and the Challenges of Democratic Consolidation: The Nigerian Experience*, 77 *FORDHAM L. REV.* 1295, 1295–96 (2009).

6. *Id.* at 1322–23.

7. See Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers,"* 2008 *J. PROF. LAW.* 189.

in promoting developing democracies abroad.⁸ But participants in the Symposium perceived that being a lawyer in a democracy has implications for American lawyers, that the role of promoting the rule of law is among those that lawyers must consider, and that fulfilling this role is not always so simple, even if the problems American lawyers address are subtler and far less dire.

Three contributions to this collection focus particularly on how American lawyers promote the rule of law in their representation of entities, private or public. First, Colin Marks and Nancy Rapoport discuss the work of corporate lawyers, focusing on the concept of Corporate Social Responsibility,⁹ which the authors describe as incorporating a corporation's economic, legal, and ethical responsibilities.¹⁰ Their work examines the corporate lawyer's role in "safeguarding the corporate 'conscience'" by counseling corporate clients about how to balance these responsibilities.¹¹ They propose structural reform to promote corporate lawyers' ability to enhance corporations' ethical decision making—in particular, they advocate providing corporate lawyers greater access to powerful corporate officers and establishing incentives within the corporation to facilitate corporate lawyers' ability to advance an ethical code of conduct.¹²

Second, Brad Wendel looks at government lawyers and particularly those serving as counselors in the U.S. Justice Department's Office of Legal Counsel, whose interpretations of the law both limit and justify executive branch action.¹³ Wendel wades into the debate over how lawyers should arrive at their interpretations: May government legal advisors advance whatever nonfrivolous interpretations best accord with the sitting President's policy preferences—an approach that some might defend as the most democratically accountable and that others might oppose as improperly political or partisan? Or, at the other extreme, must government lawyers strive, like lower court judges, for neutrality, objectivity, and detachment, and adopt those legal interpretations that seem most consistent with judicial precedent? Wendel answers that the obligation of fidelity to the law dictates limits beyond those imposed on litigators—that government

8. See, e.g., Bruce A. Green & Russell G. Pearce, "Public Service Must Begin at Home": *The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. (forthcoming 2009) (Although a broad "discussion of the lawyer's role in a democracy . . . was historically prominent in the United States, today it takes place largely with respect to transitional and developing democracies, where our own bar ascribes to lawyers an important role in promoting and sustaining democratic legal and institutional reform"); Samuel J. Levine & Russell G. Pearce, *Rethinking the Legal Reform Agenda: Will Raising the Standards for Bar Admission Promote or Undermine Democracy, Human Rights, and Rule of Law?*, 77 FORDHAM L. REV. 1635 (2009).

9. Colin Marks & Nancy B. Rapoport, *The Corporate Lawyer's Role in a Contemporary Democracy*, 77 FORDHAM L. REV. 1269 (2009).

10. *Id.*

11. *Id.* at 1289.

12. *Id.* at 1289–92.

13. W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 FORDHAM L. REV. 1333 (2009).

lawyers cannot simply pursue the Chief Executive's preferences or, for that matter, their own sense of what best serves the public interest.¹⁴ But he does not advocate complete indifference to executive branch policy. Wendel argues that the government legal advisor's interpretation of the law calls for an exercise in legal craft, and that government lawyers may fairly be criticized when their interpretations fail to employ accepted principles of legal interpretation.¹⁵ In other words, government lawyers may not have to predict accurately what a court would ultimately say about the law, but they do have to make plausible use of the interpretive tools that courts employ and recognize as legitimate.

Third, drawing on the "New Governance" literature, Orly Lobel explores a challenge that both corporate and government lawyers face in promoting legal compliance.¹⁶ She begins by describing the trend toward institutional self-regulation and the development of cultures of regulatory compliance as the preferred means of promoting legal compliance within institutions. She underscores the importance of reporting misconduct internally, and at times publicly, as an aspect of institutional self-regulation.¹⁷ She then critiques judicial decisions that deny whistle-blower protection to in-house corporate and government lawyers, thereby favoring the interest in corporate and government lawyers' institutional loyalty.¹⁸ She argues that recent revisions to the American Bar Association's (ABA) Model Rules of Professional Conduct and to the securities laws provide greater support to in-house corporate lawyers "as gatekeepers of organizational ethical behavior" by providing a framework for internal reporting and, only in extreme cases, external reporting.¹⁹

II. PROMOTING ACCESS TO JUSTICE AND GOVERNMENT INSTITUTIONS

Other contributors emphasize a different role for lawyers in a democracy—namely, promoting public access to the law, the courts, and other government institutions. Of course, this role is served to a degree in any representation in which a lawyer advances a client's legal interests, and especially so when the lawyer respects the client's autonomy by accepting the client's direction or by letting the client's voice be heard. The focus by these contributors, however, was on providing access particularly to the poor, to racial or political minorities, and to other members of traditionally disenfranchised populations.

Martin Böhmer maintains that ensuring broad public access to the courts is at once intrinsic to the lawyer's role in a constitutional democracy and

14. *Id.* at 1335.

15. *Id.*

16. Orly Lobel, *Lawyer Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 *FORDHAM L. REV.* 1245 (2009).

17. *Id.* at 1245–46.

18. *Id.* at 1256, 1261–63.

19. *Id.* at 1265–67.

essential to justify lawyers' monopoly to practice in the courts.²⁰ Drawing on the writings of Carlos Nino, Böhmer conceives of the court as a forum for public political deliberation. Courts serve three essential functions: they play the crucial role of interpreting, developing, and applying the law in a manner that respects the will of the majority; they implement a constitution's countermajoritarian protections and processes; and they ensure that the language of the law adapts to changing societal developments in a manner that builds respectfully on a constitution's foundations, framework, and essential architecture. Lawyers play a critical role in facilitating these judicial functions, because courts cannot make optimal decisions unless they receive all of the best arguments. Lawyers serve as "rhetorical equalizers" by ensuring that all citizens' arguments are represented and that the arguments are presented in their optimal form.²¹ Lawyers also serve as "translators" of their clients' private interests into arguments calculated to persuade judges that favorable rulings will best serve the public interest. Among the implications are that lawyers have a pro bono obligation to ensure that all viewpoints and interests are represented in judicial proceedings; that lawyers must meet high educational standards to ensure their capability to find and make the best arguments; and that the profession must promote judicial independence and judicial integrity to ensure that courts function as intended.

Deborah Rhode focuses on pro bono work as an expression of American lawyers' role in a democracy.²² As she reminds us, the organized bar proffers that, as "a public citizen having special responsibility for the quality of justice," a lawyer has a professional obligation to provide unpaid services for the public good, and especially, to do so by providing legal services to low-income individuals who cannot otherwise secure them.²³ But Rhode identifies pragmatic considerations that undermine American lawyers' willingness and ability to fulfill this particular role.²⁴ She argues that current strategies for promoting pro bono work are misdirected: lawyers would be willing to do this work for the intrinsic rewards that come with acting ethically by doing good for those in need,²⁵ but lawyers often are encouraged to do this work for the extrinsic rewards, such as the opportunity for training and experience or to enhance their firm's reputation, with the result that the wrong cases are often accepted for the wrong reasons.²⁶ Rhode outlines a strategic approach for law firms to adopt

20. Martin Böhmer, *Equalizers and Translators: Lawyers' Ethics in a Constitutional Democracy*, 77 *FORDHAM L. REV.* 1363 (2009).

21. *Id.* at 1372–75.

22. Deborah L. Rhode, *Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 *FORDHAM L. REV.* 1435 (2009).

23. *Id.* at 1435 (quoting MODEL RULES OF PROF'L CONDUCT pmbl. (2007)) (internal quotation marks omitted).

24. *Id.* at 1442–46.

25. *Id.* at 1436–37.

26. *Id.* at 1441.

to promote the social impact and quality of pro bono work and the level of participation.²⁷

Carla Pratt discusses the lawyer's role in promoting public access to the courts and other institutions of governance, but with an emphasis on lawyers' personal identity.²⁸ Contributing to the growing literature on race-conscious models of lawyering, she explores black lawyers' special capacity to promote black citizens' participation in particular. She identifies and elaborates on three relevant roles for black lawyers: They may serve a representative function by personally participating in government institutions, thereby ensuring that black experiences and commitments are represented and promoting public confidence in the institution's representativeness.²⁹ They may serve an interpretive function by communicating between the black community and democratic institutions in terms that each understands and finds meaningful.³⁰ And they may serve a connective function through pro bono work that gives low-income black as well as nonblack citizens access to the courts.³¹

Ascanio Piomelli shows how a "distinctive vision of democracy" animates the work of one class of socially progressive lawyers whom he calls "democratic lawyers."³² He describes how these lawyers, construing democracy to encompass citizens' participation "in public deliberation and public action,"³³ work with low-income and working-class individuals and their representative organizations and coalitions "in struggles for dignity, survival, self-determination, and other basic human needs."³⁴ Piomelli argues that these lawyers' self-conception and inclusive, participatory manner of work differs from that of traditional legal aid lawyers and others who work with the same clientele.³⁵ Piomelli draws on John Dewey's conception of democracy as a way of life and offers a vision of lawyers' roles (at least for the lawyers who embrace this vision) as an alternative to client-centered lawyering and its underlying emphasis on individuality.³⁶

III. PROMOTING SOCIAL CHANGE AND POLITICAL VALUES

For Piomelli, the democratic lawyer's participatory approach is ultimately a means toward the goal of progressive social reform. Other contributions similarly envision the pursuit of social reform, or the advancement of particular moral, social, or political values, as a distinctive

27. *Id.* at 1446–52.

28. Carla D. Pratt, *Way to Represent: The Role of Black Lawyers in Contemporary American Democracy*, 77 FORDHAM L. REV. 1409 (2009).

29. *Id.* at 1414–20.

30. *Id.* at 1420–23.

31. *Id.* at 1424–32.

32. Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383, 1407–08 (2009).

33. *Id.* at 1390–91.

34. *Id.* at 1394.

35. *Id.* at 1385–86.

36. *Id.* at 1392 n.28, 1399–401.

function of lawyers in a democracy, whether deriving from lawyers' special capacities and opportunities or from their intrinsic political or professional obligations.

Jim Moliterno offers a vision of the lawyer's role in promoting a social agenda that differs from Piomelli's participatory conception.³⁷ Moliterno emphasizes lawyers' special capacity to serve as generals rather than foot soldiers in social change movements, progressive or otherwise. He describes how lawyers' legal training and ability especially equip them to lead social movements outside the context of the traditional courtroom advocacy role.³⁸ He offers the example of three lawyers—Mohandas Gandhi, Ralph Nader, and Phyllis Schlafly—who drew on legal skills and training, and on the lawyer's mind-set, to play this role.³⁹

Susan Carle goes further back in history to offer another account of how legal training enhances the capacity to advance social justice.⁴⁰ She tells the compelling story of T. Thomas Fortune, a Howard Law School-trained black journalist and public intellectual. Fortune's legal analyses in the penultimate decade of the nineteenth century both contributed to the intellectual groundwork for the modern civil rights movement and offered alternative legal strategies for achieving racial justice. Together, the contributions of Moliterno and Carle suggest a host of ways in which practicing lawyers and others with legal training may use their skills to advance social reform, including by devising strategies for judicial, legislative, or other legal reform, by identifying potential allies and alliances, and by developing persuasive rationales, evidence, and rhetoric to justify reform.

Three Brazilian legal academics, Flavia Portella Püschel, José Rodrigo Rodriguez, and Marta Rodriguez de Assis Machado, collaborate to offer a comparative and jurisprudential perspective on the interrelationship of lawyers, courts, and social change.⁴¹ They examine efforts to advance the civil rights of African-Brazilians through the adoption of antiracial criminal laws that have since come to be regarded as judicially underenforced. The coauthors conclude that the courts are not to blame for the laws' ineffectiveness and that the problem lies in the criminal codification of highly specific commands.⁴² The authors argue that less determinate legal norms would give judges more room to advance progressive social reform. They urge Brazilian lawyers, as an alternative legal strategy, to encourage

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

38. *Id.*

39. *Id.* at 1573–90.

40. Susan D. Carle, *Debunking the Myth of Civil Rights Liberalism: Visions of Racial Justice in the Thought of T. Thomas Fortune, 1880–1890*, 77 *FORDHAM L. REV.* 1479 (2009).

41. Marta Rodriguez de Assis Machado, Flavia Portella Püschel & José Rodrigo Rodriguez, *The Juridification of Social Demands and the Application of Statutes: An Analysis of the Legal Treatment of Antiracism Social Demands in Brazil*, 77 *FORDHAM L. REV.* 1535 (2009).

42. *Id.* at 1548–51.

courts to adopt socially progressive interpretations of less determinate laws⁴³—an approach typically identified more closely with common-law than with civil-law traditions.

Does a lawyer's special capacity and opportunity imply a special *obligation* to become an agent for social change? Fred Zacharias argues that progressive lawyering is for some lawyers but not necessarily all.⁴⁴ Looking back on his own work as a public interest lawyer before entering legal academia, he questions his earlier confidence in lawyers' role as "catalysts for progressive reforms in the legal and social structures of the nation."⁴⁵ He suggests that lawyers' orientation toward their clients' interests and objectives often leads lawyers to subvert rather than promote progressive political and social values, and he expresses skepticism as to whether lawyers' role in society obligates them to do otherwise.⁴⁶ Further, as a substantive matter, he maintains that the meaning of democracy and the content of democratic values are themselves up for grabs.⁴⁷ If lawyers are to promote democratic values, he argues, they can be expected to do so only as a matter of personal morality and choice, not as a matter of social or professional obligation.⁴⁸

Not entirely so, says Robin Barnes.⁴⁹ She joins in the view that American lawyers have special abilities and opportunities to promote social reform. But she suggests that lawyers also have an obligation to take advantage of their special capacity, at least when it comes to supporting democratic institutions and advancing distinctive democratic values as opposed to social and political values that might fairly be contested in a democracy. Thus, Barnes describes American lawyers as "our most effective advocates for the maintenance and progress of democratic institutions," and emphasizes their role in advancing two potentially endangered values that she regards as especially essential to the maintenance of democracy: judicial independence and academic freedom.⁵⁰ Her contribution suggests that, even in a stable democracy, democratic institutions can be threatened directly and indirectly, and that a legal profession dedicated to maintaining these institutions, and to supporting the conditions necessary to their effectiveness, may be best positioned, and therefore socially or professionally obligated, to respond.

43. *Id.* at 1553–55.

44. Zacharias, *supra* note 2, at 1602–03.

45. *Id.* at 1592.

46. *Id.* at 1591–92.

47. *Id.* at 1597.

48. *Id.* at 1609.

49. Robin D. Barnes, *Natural Legal Guardians of Judicial Independence and Academic Freedom*, 77 *FORDHAM L. REV.* 1453 (2009).

50. *Id.* at 1459.

IV. TENSIONS BETWEEN VARIOUS CONCEPTIONS OF THE LAWYER'S ROLE

At times, tensions may arise within and among different conceptions of the lawyer's role in a democracy. For example, the job of bolstering democratic institutions may sometimes conflict with the job of giving clients a voice in democratic institutions, especially when the client's aim is to tear those institutions down. Or the lawyer's work toward social or political reform may appear to undermine the lawyer's role of promoting the rule of existing law. Several contributions examine some of the possible complexities.

Samuel Levine and Russell Pearce collaborate on a work that suggests that, at least in some democracies, efforts to promote the rule of law by upgrading the quality of practicing lawyers may be antithetical to the ideal of the lawyer as a progressive social reformer.⁵¹ On one hand, the coauthors acknowledge, "[a] society that tempers commitment to majority rule with protection of rule of law, as well as individual and group rights, requires a vocation or vocations of lawyers to provide . . . expertise" in representing clients in the judicial process.⁵² The need for expertise explains the American bar's advocacy, in developing democracies as well as domestically, for demanding educational requirements to practice law.⁵³ But, the authors argue, the highly educated elite may identify excessively with the ruling class that controls institutions in need of reform. The interests of political and social reform may better be served by legal professionals (such as China's "barefoot lawyers" or South Africa's "paralegal advice officers") who have less education but greater independence and identification with politically disenfranchised classes.⁵⁴

A cultural theorist, Rakesh Anand examines the tension between American lawyers' role in promoting the rule of law and their role in promoting law reform and political and social change in line with their personal preferences.⁵⁵ Anand describes law's role in American public life as quasi-religious and envisions the American lawyer's role as the sustainment of public faith in the rule of law.⁵⁶ He argues that embracing the concept that ours is a government of laws, not men, means that lawyers, like judges, must conduct their work consistently with the impersonal nature of the law.⁵⁷ On this conception, he argues provocatively that American lawyers should ascribe no significance to their own moral, social, and political "values, commitments, and desires" and therefore should not promote their personal visions of social justice. This leads him to conclude that it is inappropriate for American lawyers to practice as "cause lawyers," to choose or reject clients on political or ideological grounds, or to engage

51. Levine & Pearce, *supra* note 8, at 1661–63.

52. *Id.* at 1637.

53. See Böhmer, *supra* note 20, at 1380.

54. Levine & Pearce, *supra* note 8, at 1660–62.

55. Anand, *supra* note 2, *passim*.

56. *Id.* at 1616–17, 1623–24.

57. *Id.* at 1625 & n.59 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

personally in controversial political or ideological issues.⁵⁸ Rather, he argues, their role is to lend their professional expertise to whoever retains them.⁵⁹

As a political theorist, on the other hand, Aziz Rana reaches a very different but no less provocative conclusion about the significance of lawyers' own political and social values to their professional work.⁶⁰ At least implicitly, his concern is with the tension between the lawyer's role in giving clients a voice in democratic institutions (and thus giving primacy to clients' personal autonomy) and the lawyer's interest in promoting his own reform agenda. Rana sees lawyers' professional independence as essential to a political tradition—associated with Abraham Lincoln and John Dewey, among others—that views democracy as “a collective exercise in continuous and extensive self-rule in all social institutions” and that conceives of “work as both a permanent education in citizenship and a central site for the everyday practice of moral reflection.”⁶¹ He offers his conception as an alternative to, and rejection of, both sides in an ongoing scholarly debate between those who ascribe to lawyers the “client-centered” role of promoting clients' autonomy (to the exclusion of lawyers' own values) and those who believe lawyers' advocacy on behalf of clients should be tempered by a commitment to justice and the social good.⁶² From the democratic function that Rana ascribes to lawyers, he derives a professional obligation both to make legal processes more accessible to the public and to “integrate a democratic ethos within particular representational contexts.”⁶³

Focusing on lawyers' advocacy role, Rebecca Roiphe provides a legal historian's perspective on the tension between the client-centered (or libertarian) and moral activist approaches.⁶⁴ She recognizes that beneath the surface of these competing advocacy norms are different conceptions of the lawyer's role in a democracy—on one hand, the idea that the role is to give clients a voice in the administration of justice, and on the other hand, the idea that the role is to promote and improve the administration of justice. But she is not so sanguine that these are reconcilable. She tells the story of Thomas Mooney, a labor leader and radical falsely convicted of setting off a bomb at a prowar rally in 1916, and of the decades-long efforts of a succession of lawyers to secure Mooney's release. As she describes, Mooney viewed “the courtroom [as] a battleground to confront the enemy, not a source of reasoned justice”—the enemy being American democracy.⁶⁵

58. *Id.* at 1629, 1630 n.80.

59. *Id.*

60. Aziz Rana, *Statesman or Scribe? Legal Independence and the Problem of Democratic Citizenship*, 77 *FORDHAM L. REV.* 1665 (2009).

61. *Id.* at 1670.

62. *Id.* at 1673.

63. *Id.* at 1672.

64. Rebecca Roiphe, *Lawyering at the Extremes: The Representation of Tom Mooney, 1916–1939*, 77 *FORDHAM L. REV.* 1731 (2009).

65. *Id.* at 1748.

Mooney's lawyers therefore had to grapple, in most of their experiences unhappily, with the tension between Mooney's desire to use the proceedings to express and promote the political objective of undermining democratic governance—an objective to which his lawyers were generally unsympathetic—and the aim of correcting the judicial process by securing justice for an individual who was wrongly convicted. Roiphe notes the obvious contemporary analogue in the experience of lawyers defending Guantánamo detainees.

Neta Ziv emphasizes a different side of the relationship between lawyering and democracy.⁶⁶ As much as lawyers may shape the development of democratic institutions, Ziv points out, democratic institutions may shape lawyers' practice. In particular, government agencies may influence how lawyers resolve the tension between promoting clients' private interests and serving competing public values. Ziv draws on Israel's experience since the mid-1980s, describing how the courts and other government institutions were previously respectful and highly protective of the bar's autonomy, but how since then the judiciary has pushed the bar toward a more public serving orientation, even at clients' expense. For example, she describes recent judicial doctrine expanding lawyers' liability to unrepresented third parties in ways that promote the public good at the expense of private clients' legal interests. The opinions make lawyers civilly liable in certain situations when they advance positions in transactional representations that, although arguably overreaching, are perfectly legal from the client's perspective, and thus consistent with both the rule of law and the client's interest in access to the law. Ziv also details the recent amendments to the Israel Bar Association Act by the Knesset, the Israeli legislature, that curtailed the bar's autonomy in disciplining and regulating lawyers.⁶⁷

V. DEVELOPING, ARTICULATING, AND ADVOCATING THE VISION OF A LAWYER'S ROLE IN A DEMOCRACY

In a contemporary democracy the relationship between lawyers and the law is reciprocal. Lawyers have the capacity (used, ideally, for the better) to influence the development of law, of democratic institutions, and of the social conditions necessary to those institutions' effectiveness. At the same time, lawyers are influenced by the law and legal institutions within which they function.⁶⁸ How lawyers conceptualize their own role within their

66. Neta Ziv, *Regulation of Israeli Lawyers: From Professional Autonomy to Multi-Institutional Regulation*, 77 *FORDHAM L. REV.* 1763 (2009).

67. *Id.* at 1782–88.

68. See, e.g., Levine & Pearce, *supra* note 8 (discussing how high admission standards for lawyers, together with the exclusion of nonlawyers from practicing law, may affect the extent to which the bar represents and advances the interests of the politically disenfranchised); Oko, *supra* note 5 (discussing the challenges of lawyering in Nigeria's fragile democracy); Ziv, *supra* note 66 (describing contemporary regulation of Israeli lawyers).

particular legal and political system and democratic tradition is therefore important to how they conduct themselves individually and collectively. The public conception of lawyers' role, which may differ from lawyers' self-conception, in turn, affects how courts or other institutions regulate lawyers. Thus, conceptions of the lawyer's democratic function are important. Lawyers have a collective interest in developing and articulating a vision of their role in a democracy and in advocating for that vision in order to influence government institutions (courts, legislatures, and executive officials alike) to respect lawyers' democratic function and leave space for lawyers to effectively fulfill it.

Here are three quick stories (out of many possible ones) to make the point. One story is old, the other two are very recent, and all three involve U.S. lawyers.

The first story is the subject of *In re Austin*,⁶⁹ a seminal 1835 decision on the courts' authority to regulate the bar. The case involved the disbarment of almost the entire Fayette County, Pennsylvania bar for sending and publishing correspondence that was critical of and, in the view of the Court of Common Pleas, disrespectful of the President of that court. Underlying the question of whether the court had lawful authority to impose this sanction was a question about the lawyer's role: as an "officer of the court," did a lawyer have a duty to refrain from public criticism that the lawyer may have intended to improve judicial decision making, but that seemed disrespectful to the court? The lower court perceived that lawyers' "office" implied an obligation of "good fidelity to the court,"⁷⁰ and that this obligation called for the "observance of that trust, courtesy, and respect, which is indispensable to the safe and orderly administration of justice."⁷¹ The court considered the bar's public criticism of the judge to be inconsistent with this role.

The Pennsylvania Supreme Court, however, emphasized the bar's role in protecting the public from government overreaching. It viewed lawyers' professional independence as intrinsic to this role, no doubt recognizing that the judiciary was sometimes among the government entities from which the public needed protection. "[T]o subject the members of the profession to removal at the pleasure of the court," Chief Justice John Bannister Gibson explained,

would leave them too small a share of the independence necessary to the duties they are called to perform to their clients and to the public. As a class, they are supposed to be, and in fact have always been, the vindicators of individual rights, and the fearless asserters of the principles of civil liberty; existing where alone they can exist, in a government not of parties or men, but of laws!⁷²

69. 5 Rawle 191 (Pa. 1835).

70. *Id.* at 200.

71. *Id.* at 199.

72. *Id.* at 203.

The legal profession's prescribed role did not mean that lawyers were entirely free from regulation, including judicial regulation. But it did imply limits on the courts' regulatory authority. Lawyers acting outside the context of a legal representation or a judicial proceeding were entitled to engage in the same lawful conduct, such as the publication of nonlibelous criticisms of the court, that other private citizens could undertake.

The second story, the subject of *People v. Jones*,⁷³ involved a newly minted criminal defense lawyer, Brian Jones, who was assigned to represent an indigent defendant the day before his scheduled trial date. Jones first met his new client and appeared in court the next morning. Rejecting Jones's application for a continuance to enable him to investigate the case and provide a competent defense, the trial judge threatened Jones with a criminal contempt prosecution if he did not start the trial several hours later. Jones refused, viewing his obligation to provide a meaningful defense as superior to his obligation to obey the court. Following a hearing, the trial judge held Jones in contempt. As in *Austin*, the lower court's sanction assumed a role for lawyers subservient to government institutions, and to the judiciary in particular. But also as in *Austin*, the appellate court, which overturned the sanction, gave primacy to lawyers' role in vindicating clients' rights. Indeed, the appellate court declared that it would have been contrary to the lawyer's professional obligation to "put his client's constitutional rights at risk by proceeding to trial unprepared," notwithstanding the trial court's order that he do so.⁷⁴

The last story, told in *Vinluan v. Doyle*,⁷⁵ concerns an immigration lawyer, Felix Vinluan, who was consulted by Filipino nurses working in New York nursing homes with chronically ill children. Their employment contract required them to make a three-year commitment, but the lawyer advised them that their employers had breached the terms of the contract and that they could quit their jobs before or after their shifts. When the nurses did so, the District Attorney charged them with endangering minors; further, he indicted Vinluan for conspiring with, and causing, the nurses to endanger minors. The prosecutor's charging decision evidently reflected a particular understanding of the lawyer's role in promoting the rule of law and giving clients access to its benefits. Presumably, as far as counseling clients about the criminal law was concerned, the prosecutor expected lawyers to urge clients to comply with the most constraining possible constructions.⁷⁶ The prosecutor invoked the blunt instrument of criminal

73. No. 2008-P-0018, 2008 WL 5428009 (Ohio Ct. App. Dec. 31, 2008).

74. *Id.* at *4. For an argument that courts should promote, rather than undermine, criminal defense lawyers' professional competence, see Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169 (2003).

75. No. 2008-02568, 2009 WL 93065 (N.Y. App. Div. Jan. 13, 2009).

76. *Cf.* Wendel, *supra* note 13 (arguing that government lawyers advising on the law were not obligated to predict judicial interpretations but did have to employ conventional interpretative principles); see also Bruce A. Green, *Taking Cues: Inferring Legality from Others' Conduct*, 75 FORDHAM L. REV. 1429 (2006).

law to advance his conception.⁷⁷ A successful prosecution would have implied that as a matter of professional role (and, if not, as a matter of self-preservation), lawyers would have to call on clients to stay comfortably within the ambiguous law's boundaries; otherwise, lawyers would risk going to prison.

The appellate court had a more solicitous view, however. It found that the nurses' conduct was constitutionally protected, and that the lawyer therefore gave legally correct advice, not encouragement to commit crimes as the prosecutor maintained. More importantly, however, the appellate court emphasized that the lawyer's conduct would have been lawful even if his advice turned out to be wrong. It flatly rejected the prosecutor's argument "that an attorney who advises a client to take an action that he or she, in good faith, believes to be legal, loses the protection of the First Amendment if his or her advice is later determined to be incorrect."⁷⁸ The court reasoned that

it would eviscerate the right to give and receive legal counsel with respect to potential criminal liability if an attorney could be charged with conspiracy and solicitation whenever a District Attorney disagreed with that advice. . . . A looming threat of criminal sanctions would deter attorneys from acquainting individuals with matters as vital as the breadth of their legal rights and the limits of those rights. Correspondingly, where counsel is restrained, so is the fundamental right of the citizenry, bound as it is by laws complex and unfamiliar, to receive the advice necessary for measured conduct.⁷⁹

The court thus took a different view of the lawyer's role in promoting the rule of law and providing public access to the law—one calling on lawyers to give independent advice about the law's meaning and, therefore, necessitating leeway for the lawyer to offer advice with which government institutions might disagree.

All three of these stories are about lawyers implementing visions of their role that were later contested by government institutions. In *Austin*, the local bar perceived that influencing or reforming government institutions—in that case, the judiciary—was a legitimate democratic function for lawyers. Brian Jones, as a criminal defense lawyer, sought to offer an indigent criminal defendant meaningful access to the protection of the law and legal processes. Felix Vinluan sought to do essentially the same for the immigrant nurses whom he represented by giving them independent advice about their contract rights. Powerful government institutions—two lower courts, and a public prosecutor—sought in turn to promote competing visions of lawyers' role. The stories all ended happily, in that appellate courts resolved the conflicts in a manner that left room for lawyers' more

77. For a discussion of the tension between certain criminal prosecutions of lawyers and the bar's conception of the lawyer's role, see Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327 (1998).

78. *Vinluan*, 2009 WL 93065, at *9.

79. *Id.*

capacious visions. But one can easily imagine any of the lawyers folding their tents before achieving vindication or the reviewing court adopting a less protective legal understanding.⁸⁰ So, besides illustrating that conceptions of the lawyer's role may be contested, and that the resolution of the contest matters, these stories are cautionary tales. They underscore the need for the legal profession, in the United States and abroad, to articulate and defend its conception of a lawyer's democratic function.⁸¹ This collection on "The Lawyer's Role in a Contemporary Democracy" should encourage and advance the necessary conversation.

* * *

Let me conclude with some words of appreciation. First, my thanks to all of the academics and practitioners who participated in the Fordham Symposium and especially to those who contributed to this collection. Each makes a singular contribution, and collectively they demonstrate the vibrancy of the idea that lawyers have a special role in the well-being of a contemporary democracy, even a stable and long-established one. Second, my thanks to the members of the *Fordham Law Review* staff and editorial board for their exceptional efforts in supporting the Symposium and producing this collection.

Finally, I am especially grateful to the *Law Review* for dedicating this collection to my friend Mary C. Daly,⁸² who served as Dean of the St. John's University School of Law for the four years prior to her untimely death in November 2008, and who before that was my Fordham colleague for many years and my partner in directing the Stein Center for Law and Ethics. For more than two decades, through her teaching, scholarship, and myriad professional and academic activities, Mary Daly worked tirelessly to advance lawyers' understandings regarding the legal profession's public role and responsibilities locally, nationally, and internationally. Before that, she served as a government lawyer in the U.S. Attorney's Office, where she headed the Civil Division. The editors could not have selected a more fitting book to dedicate to Dean Daly or a more deserving recipient of this honor.

80. See, e.g., Fla. Bar v. Rubin, 549 So. 2d 1000 (Fla. 1989) (sanctioning lawyer for refusing to comply with trial court's order to proceed with a criminal case and present the defendant's false testimony); *In re Westfall*, 808 S.W.2d 829 (Mo. 1991) (en banc) (sanctioning prosecutor for publicly criticizing trial judge's opinion); *People v. Stewart*, 656 N.Y.S.2d 210 (App. Div. 1997) (upholding criminal contempt prosecution of lawyer who, prior to appellate review, refused to comply with a trial court order requiring her to testify about information learned while representing a criminal defendant).

81. For reflections on the organized bar's role in promoting law reform, and the deliberative processes by which it reaches its positions, see Elizabeth Chambliss & Bruce A. Green, *Some Realism About Bar Associations*, 57 DEPAUL L. REV. 425 (2008).

82. See William Michael Treanor, *Dean Mary Daly: A Tribute*, 77 FORDHAM L. REV. 1221 (2009).

Notes & Observations