"If you want to take dough from a murderer for helping him beat the rap you must be admitted to the bar. . . ."
-Rex Stout¹

"[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty, he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, although it may be his unhappy fate to involve his country in confusion."
-Lord Brougham²

"A lawyer is and must be the ultimate advocate. He speaks for and in the interest of his client. He seizes every fair advantage available to his client. And when his client is on the ropes, the lawyer, standing alone if need be, is that one person who, in the interest of his client, skillfully defies the state, the opposing litigant, or whoever threatens. The lawyer is prepared to stand against the forces of hell though others see that as his client's just dessert. He assures all adversaries, in the vernacular of the streets, 'You may get my client but you've got to come through me first.'"
-Thornton v. Breland³

¹ A.A. and Ethel Yossem Professor of Law and Assistant Director of the Center for Health Policy and Ethics, Creighton University, California at 24th St., Omaha, NE, 68178. J.D., Harvard Law School, 1977; M.Div., Yale Divinity School, 1989. The author wishes to acknowledge with thanks the support of a Creighton University School of Law Faculty Research Fellowship, 1990. The author also wishes to thank Dean Lawrence Raful and Professor Ronald R. Volkmer of the Creighton University School of Law, and Professor John Hollwitz of the Creighton University College of Arts and Sciences, Department of Communication Studies, for their advice and suggestions.


³ Thornton v. Breland, 441 So. 2d 1348, 1350 (Miss. 1983).
“Killing men is my specialty. I look at it as a business proposition, and I think I have a corner on the market.”

-Hired gun Tom Horn

Our lives are shaped by metaphor. “Our ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature.” Metaphor thus plays a central role in structuring what we perceive and experience. If we conceptualize God as Father, for example, we will encounter and experience the transcendent in our lives differently than if our dominant metaphor for God is Mother or Lover or Friend. Likewise, it makes a difference if we conceive of argumentation as a form of warfare or as a form of dance. The ARGUMENT IS WAR metaphor is dominant in our culture; in a culture where argument was viewed as dance, the participants would be performers and the goal of the “argument” would be an aesthetically pleasing performance. In short, metaphor not only helps organize and structure reality, it “creates realities for us, especially social realities. A metaphor may thus be a guide for future action.”

Milner Ball has examined the importance of metaphor in the

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5. G. Lakoff & M. Johnson, Metaphors We Live By 3 (1980). Following Lakoff & Johnson, I use the term metaphor in the broad sense of “understanding and experiencing one kind of thing in terms of another.” Id. at 5.
6. Id. at 5.
8. G. Lakoff & M. Johnson, supra note 5, at 4-5.
9. The ARGUMENT IS WAR metaphor is expressed in various ways in our everyday language. Lakoff & Johnson give a number of examples. We say, “Your claims are indefensible.” “He attacked every weak point in my argument.” “His criticisms were right on target.” “I demolished his argument.” “I've never won an argument with him.” For these and other examples, see G. Lakoff & M. Johnson, supra note 5. These expressions shape our actions.

It is important to see that we don't just talk about arguments in terms of war. We can actually win or lose arguments. We see the person we are arguing with as an opponent. We attack his positions and we defend our own. We gain and lose ground. We plan and use strategies. If we find a position indefensible, we can abandon it and take a new line of attack. Many of the things we do in arguing are partially structured by the concept of war. Though there is no physical battle, there is a verbal battle, and the structure of an argument — attack, defense, counterattack, etc. — reflect this. It is in this sense that the ARGUMENT IS WAR metaphor is one that we live by in this culture; it structures the actions we perform in arguing.

Id. at 4.
10. Id. at 5.

In such a culture, people would view arguments differently, experience them differently, carry them out differently, and talk about them differently. But we would probably not view them as arguing at all: they would simply be doing something different. It would seem strange even to call what they were doing “arguing.”

Id.
11. Id. at 156. See also supra note 9.
Professor Ball reminds us that metaphors not only shape reality, they conceal and distort reality as well. No one metaphor can capture adequately the whole of reality. All metaphors are in a sense "inappropriate, partial, and inadequate." Argumentation is like war in some ways, but not others. The law is an ass, or at least appears so to many, but we fervently hope that it is something more as well.

A problem arises, then, whenever a metaphor becomes dominant or controlling, because it serves to obscure part of the reality it reveals. A ruling metaphor comes to be seen as "the truth, the whole truth, and nothing but the truth." It becomes reified and serves to exclude other metaphors that also capture a facet of reality. As Ball notes, "For this reason, an adequate conceptual system requires alternate, even conflicting, metaphors for a single subject, and our daily living requires shifts of metaphors for fullness of thought and action."

Among the metaphors that shape how lawyers view themselves, and are viewed by others, none exercises a more powerful hold than the metaphor of the hired gun. From the first day of law school, in class and out, in what is said and left unsaid, prospective lawyers are trained to see themselves as the hired guns of clients. They learn quickly that they must be ready to argue any side of any issue. Their personal values and beliefs are to play no role in how they do their job. They owe their clients uncompromising loyalty. If they have moral qualms about a client, or about the means needed to achieve a client's goals, then they should refuse to take the case. But once they take a case they are in, all the way in, and the client has the right to expect them to do everything possible to win the case, subject only to the constraints of the law and the codes of the legal profession.

They and their skills are for hire, and once hired those skills are to be used solely and unreservedly to obtain what the client wants. The lawyer as hired gun: Have briefcase will travel.

Similarly, outsiders often conceive of lawyers in terms of the

18. M. BALL, supra note 13, at 22.
19. This view is presented most forcefully and persuasively in M. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS (1990). Freedman argues that a lawyer has the right to accept or reject clients for any reason. "Once the lawyer has chosen to accept responsibility to represent a client, however, the zealousness of that representation cannot be tempered by the lawyer's moral judgments of the client or the client's cause." Id. at 50.
hired gun metaphor. Critics of lawyers and of the adversary system attack lawyers as hired guns who put the interests of clients ahead of the common good, and who are willing to do everything in their power to defend the guilty and frustrate justice by resorting to legal "technicalities."

Yet defenders of the profession resort to the same metaphor to express the benefits of unfettered advocacy. Though everyone may hate you, though the awesome power of the state may be arrayed against you, one person stands with you, one person fights for you heedless of the personal costs — your champion, your gunslinger, your lawyer.

In this essay I examine the metaphor of the hired gun to learn why and how it exerts such pervasive influence upon the legal profession, to explore whether the image comports with the reality of what lawyers do, and to point out some of the moral costs incurred by lawyers whose professional lives are governed by the metaphor. While I do not argue that the metaphor is completely false, I do insist that it is incomplete and inadequate, that it represents a half-truth "masquerading as the whole truth." Hence the metaphor is in need of supplementation or replacement by other metaphors that better capture the reality of lawyering without engendering such moral difficulties for lawyers.

In Part I, I sketch in broad strokes the image of the hired gun as it comes down to us in countless dime novels and Hollywood Westerns. In Part II, I discuss how law students are shaped by hired gun imagery while in school. In Part III, I show how the metaphor of the hired gun underlies the codes of professional responsibility that govern lawyers, and indicate some of the ways the metaphor does and does not reflect the everyday world of legal practice. In Part IV, I examine some of the ways the hired gun metaphor distorts the moral world and moral vision of lawyers, and present some suggestions about how the metaphor might be supplemented by other metaphors.

PART I

Before we can examine the influence of the hired gun metaphor on the legal profession in the United States, we need to have some sense of the content of the metaphor itself. This is not as easy as it may seem. The image of the hired gun is open-ended and ill-defined. Indeed, it is this elasticity that helps to explain the curious fact that both those who castigate the legal profession and those who defend it can appeal to the same metaphor. Nevertheless, most of us have a

20. M. Ball, supra note 13, at 22.
rough picture of the hired gun from television (Paladin in Have Gun Will Travel), novels (Shane, among others), and movies (the spaghetti westerns of Clint Eastwood are particularly striking). That shared sense of the image is what I wish to present here briefly.

The hired gun is, quite literally, a gun for hire. The hired gun is someone who defines himself at work (the use of the masculine gender is integral to the image) by what he can do with a gun. He is not for sale; his gun is. His gun is his tool, and like a good technician or craftsman, he makes his livelihood by servicing clients, doing his job and moving on.

His services are for sale, but to whom? Here we confront the ambiguity of the metaphor. Usually we think of the hired gun as a man in black, on the side of evil, hired to harass the innocent settlers or drive them off their land. In the mythology of the West, the hired gun is the hired executioner. He is interested only in money. His services are available to the highest bidder, which usually means the wealthy, the greedy, the wicked.

There is some truth behind the myth. In the late 1800s, hired guns were often employed by Western cattlemen to fight sheepherders or homesteaders. Often they were hired because, in contrast to ordinary cowboys, they had no compunctions about killing.

For the most part, these hirelings were nameless, faceless individuals who sought no notoriety and left little trace as they went about their lethal labors. Once they received their blood money, they just rode over the horizon, never to be seen again. They regarded their trade as a way of earning a day's pay — and they found no lack of employers.

In some cases, however, hired guns were employed as "cattle detectives" to fight rustlers. The hired guns were well paid and vi-

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21. It may well be that female attorneys are less governed by the hired gun metaphor than male attorneys. There is some support for this in R. Jack & D. Jack, Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers (1990). The book is an application to the legal profession of Carol Gilligan's pioneering work on gender-linked differences in moral development and reasoning. See C. Gilligan, In Another Voice (1982). In general, Jack and Jack find that male lawyers emphasize legal rights and rules more than do female lawyers, while female lawyers give more attention to notions of care and community. Likewise, they find that male lawyers are more likely to resolve moral dilemmas by bracketing their personal moral values and envisioning themselves solely as the zealous partisans of their clients. Such a vision of the lawyer's role is strongly allied to and in fact draws much of its strength from the hired gun metaphor, as I will show in Part III, infra. In Part IV, infra, I will return to the question of whether the influx of females into the law profession might, over time, contribute to a relaxation of the grip of the hired gun metaphor.


23. Id.

24. Id. at 199.
cious, but their opponents were often little better. These hired guns "were neither outlaws nor lawmen, though many had pursued both careers in the past. In their role as vigilantes, they usually operated not so much in defiance of the law as simply beyond its reach." They had a job to do and they did it. Here the image of the hired gun is more neutral.

The hired gun can also be viewed positively. Not all hired guns work for greedy ranchers or wealthy bankers. Sometimes a hired gun is drawn to help those in distress, to be their champion against the powerful forces of injustice. Not too often, to be sure, for a hired gun usually works for money, and money is in short supply among the weak and vulnerable. In these few cases the currency of exchange need not be money. It may be something intangible, like kind words or respect or a hot meal.

A good example of this is Jack Schaefer's Shane. The stranger Shane is befriended by the Starrett family, who offer him food and a job as a farmer. They respect his need for silence, and do not pry him with questions about his mysterious past. While Shane is with them, ties of friendship and love are forged. When the Starretts and their neighbors are harassed by the rapacious cattleman who has vowed to drive them off their land, and who has hired his own gunslinger to do the job, Shane puts on his gun and goes to face the forces of evil. If you want to drive off the farmers, you must first face Shane. And in the cause of the weak Shane kills the hired gun of the cattleman.

Is Shane a hired gun? Not if we mean a gunslinger whose services are available to the highest bidder. Yes, if we expand the image to include the gunfighter who has been "bought" by friendship, and whose services are available for the good and the decent, and on the side of justice.

Thus, while the metaphor of the hired gun is predominantly negative, and most hired guns are little better than hired killers, there is enough flexibility in the image to encompass the rare case of the hired gun who wears a white hat and champions the virtuous against the unjust. This point needs to be stressed in order to make sense out of the enthusiasm with which the legal profession has adopted the metaphor.

Central to the hired gun metaphor is what I will call "detached partisanship." Certainly the hired gun is the partisan of the client. He gets the job done. He uses his fist and, if necessary, his gun. He accepts no restrictions on the means to be employed to do his job.

25. Id. at 198.
The lawyer as hired gun operates "not so much in defiance of the law as simply beyond its reach." 27 There are few if any limits to his partisanship.

But there is always a distance between the client and the hired gun. In the mythology of the West, the hired gun is detached and reserved. His past is obscure. He rarely initiates conversation, and shares little about himself. His clients buy his gun, not his intimacy. The deepest part of his being, his soul or self, is untouched by the work he does. One of the reasons Shane is comfortable with the Starretts is that they understand and respect his need for detachment. When Shane departs at the end of the book, he passes into legend, and the local people begin to spin tall-tales about him, but the truth about his life remains a mystery.

So the hired gun is a partisan, but not a friend or intimate of his employer. He remains aloof and detached. This detachment has another facet to it. The hired gun is detached from moral judgment. He passes no judgment on the ends of his client or the means needed to achieve them. He is an "amoral technician." 28 Moral scrutiny comes in only at the outset, in his initial choice of clients, and rarely then, for usually the hired gun sells his services to the highest bidder. After he is hired, moral concerns or scruples are bracketed. To put it another way, the hired gun does not use his own moral values and beliefs (his personal morality, we might call it) as a check upon the desires of his client. He identifies completely with getting the job done.

Thus the hired gun compartmentalizes his life. In the language of the philosopher, he engages in "role-differentiated behavior." 29 Much that he does runs afoul of ordinary notions of good and bad, right and wrong. It may even run afoul of his own personal morality, but all this becomes irrelevant once he has undertaken to do a job. If pushed to justify his conduct, he resorts to the language of role: "It was my job." "I just did what I had to." "That's what I get paid to do." Like Tom Horn, he can say, "Killing men is my speciality. I look at it as a business proposition, and I think I have a corner on the market." 30

There is much more to say about the hired gun. The image is far richer than this brief sketch can hope to show. But what we have seen is sufficient to serve as a foundation for our examination of the legal profession. As we shall see, the hired gun image captures much

27. THE GUNSLINGERS, supra note 22, at 198.
29. Id. at 3-4.
of the traditional American vision of lawyering. The lawyer is a hired
gun who fights his duels to the death not in the corral but in the
courtroom.

PART II

In an important article, Roger Cramton has dissected what he
calls the "ordinary religion" of the law school, the fundamental intellec-
tual framework that is rarely articulated but that underlies the
work of teachers and students, the implicit and often unconscious
values that shape the world of the law school.31

Cramton has characterized the essential elements of the ordinary
religion — we might better call it the reigning orthodoxy — as skep-
ticism; instrumentalism; a tough-minded and analytical attitude to-
wards law and the attorney's role; and a faith that reason and
democratic procedures can make the world a better place.32 As a
consequence of these shared values that permeate the law school, law
students learn to see themselves as detached partisans or hired
guns.33 They are taught that the job of the lawyer is to represent cli-
ents zealously, not to seek justice. Law professors typically take great
glee in disabusing students of the notion that law has something to
do with justice. Two stories recounted by law professor Thomas Shaf-
fer make this point.34

The first is a legendary tale that law teachers tell. Whether it
ever happened in fact is far less important than its retelling, for it
has become part of the mythology that shapes legal education and
thereby shapes the nature of the profession as students are initiated
into it. According to the tale, a student is called upon to explain a
case. After the usual amount of verbal intimidation
by
the professor,
the student states the right result, but a moment later blurts out,

31. Cramton, The Ordinary Religion of the Law School Classroom, 2 NAT'L INST.
FOR CAMPUS MINISTRIES J. 72 (1977).
32. Id. at 73.
33. Cramton argues that law students are presented with two dominant models of
professional behavior: the hired gun and the social engineer.
The former is the skilled craftsman of the discrete controversy, while the lat-
ter is the technician and applied scientist of the use of legal tools for broader
social change. Both are technicians who are trained in the dispassionate use of
legal skills for the instrumental purposes of those they serve. The hired gun
gets his goals from the client he serves; the social engineer either prefabri-
cates his own goals or gets them from the interests he serves. . . . Involv-
ment in the messy reality of human feelings is to be avoided by both in favor
of an analytical detachment that gives preeminence to a rational calculation of
alternative strategies of aggressive action.
Id. at 76. It is clear that the model of the hired gun as presented by Cramton has the
same qualities of detached partisanship that I have identified as the essence of the
metaphor. See supra Part I.
34. T. SHAFER, ON BEING A CHRISTIAN AND A LAWYER 166 (1981).
"But that's not just!" To which the professor responds, "If you wanted to study justice, you should have gone to divinity school."

The second story Shaffer tells took place in an evidence class he attended. It consists of a dialogue between students and professor:

Professor: Brown, what's a trial?
Brown: An adversary proceeding.
Professor: For what purpose?
Brown: To discover the truth. [Shaffer reports that there was five seconds of silence], then laughter [by the class].
Professor (after waiting just long enough for the laughter to make his point): Who cares what truth is?
Brown: I care. (Loud laughter [by the class].)
Professor: Well, in your conversations with God, you can take those questions further. [The professor pauses and then turns] (to another student.) Smith, what's the purpose of a trial?

The message could hardly be clearer: Lawyers are not concerned with abstractions like justice or truth. Law is supposed to be "value-free," as if disdain for moral discourse is not itself an extreme expression of a particular value system.

Cramton explains that law students are taught to consider the law as an instrument for achieving social goals — nothing more. Law is a means to an end, the end being to regulate human conduct according to the idiosyncratic values and beliefs of society. Therefore — and this is the most important point — since a lawyer's job is to implement the law, he "need not be concerned directly with value questions. His primary task is that of the craftsman or skilled technician who can work out the means by which the client or the society can achieve its goals." Thus students are taught that they need not worry about ethics and consequences when representing clients. They are detached from their own moral values and beliefs.

In short, the law is a trade and the lawyer is someone who is skilled in the trade and can use that skill to procure what a client wants. The task of the lawyer is to use the law and the facts to achieve the client's ends, but those ends are irrelevant to the lawyer,

35. Id.
36. Id.
37. "The law teacher typically avoids explicit discussion of values in order to avoid 'preaching' or 'indoctrination.' His value position or commitment is not thought to be relevant to class discussion; students are left to decipher his views from the verbal and non-verbal cues that he provides." Cramton, 2 NAT'L INST. FOR CAMPUS MINISTRIES J. at 82. What students usually conclude, of course, is that the systematic exclusion of value-questions is somehow intrinsic to the role of the lawyer.
38. Id. at 75.
39. Id.
40. Perhaps one of my first-year law professors put it best when he said that law
as long as they are not illegal. The lawyer is a mercenary armed with verbal weapons. Aggression permeates the law school.\textsuperscript{41}

Not only are students taught to be zealous partisans of their clients, they are also taught a tough-minded attitude towards lawyering. Teachers stress reason over feeling, data over experience, the "head" over the "heart." There is little place in law school for caring. As Cramton puts it, "[e]motions, imagination, sentiments of affection and trust, a sense of wonder or awe at the inexplicable — these soft and mushy dreams of the 'tender-minded' are off limits for law students and lawyers."\textsuperscript{42} Students cultivate "an analytical detachment that gives preeminence to a rational calculation of alternative strategies of aggressive action."\textsuperscript{43}

This attitude of detachment is impressed upon law students by the way they are taught. As we have already seen, abstract notions of truth and justice are off limits. So too are the law student's own feelings, values, and moral beliefs. The so-called Socratic Method forces students to argue either side of a case with equal fervor. There is no "right" answer to a legal problem. As Cramton says (and my own experience as law student and teacher bears him out), if you ask a law student, "How do you come out on this case?", the normal response is, "It depends on which side I'm on."\textsuperscript{44} Put more cynically, "It depends on who is paying me." Law school becomes a training in the skills that can be used to persuade others that your client's interests should prevail. The good law student and the good lawyer is someone who can argue persuasively any side of any issue for any client. The result is that the student comes to visualize himself or herself as an "intellectual prostitute."\textsuperscript{45}

Errol Rohr notes that underlying these elements of legal education are certain basic values that are in harmony with the dominant ethos of our democratic and competitive society — values such as success, wealth, winning, and status.\textsuperscript{46} Law students come to learn

\textsuperscript{41} Aggression is fueled by the keen competition for grades, pedagogical brow-beating by professors, and course offerings that emphasize trial tactics rather than office skills such as counseling and negotiation. R. GERBER, LAWYERS, COURTS, AND PROFESSIONALISM 38-40 (1989). Judge Gerber concludes that "[a]s a result of this combative, common law pedagogy, American law schools have turned loose on society a thundering herd of combative litigators at the expense of compassionate peacemakers or justice devotees." \textit{Id.} at 40.

\textsuperscript{42} Cramton, 2 \textsc{Nat'l Inst. for Campus Ministries J.} at 76.

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} \textit{Id.} at 87.

\textsuperscript{45} \textit{Id.}

\textsuperscript{46} Rohr, \textit{Response to Cramton}, 2 \textsc{Nat'l Inst. for Campus Ministries J.} 94, 95 (1977).
quickly that the best lawyer is the one who wins the most cases\textsuperscript{47} or earns the most money. Students who are interested in tough-minded and highly lucrative areas of the law like securities or taxation are thought to be more serious than their mushy-headed classmates who plan on practicing poorly paid specialities like criminal law or family law. Lawyers sell their services to clients, and the dominant ethos of the law school and profession teaches that the best lawyers are those who sell their services to the highest paying clients. Lawyers, like gunslingers, give their loyalty to those who can afford to buy it.

This value system is carried over into the treatment of ethical issues. Since Watergate, most law schools have added a course or two on the legal profession to their curriculum. Usually known as "professional responsibility," such courses typically do not focus on the broad questions of what it means to be a good and ethical lawyer, but instead concentrate on the codes of the legal profession,\textsuperscript{48} which govern in detail what lawyers can and cannot do in their practice (down to the details of what can and cannot be written on a lawyer's business card).\textsuperscript{49} These codes are the law of the legal profession. The textbooks offered by the major legal publishers usually consist of a compilation of actual cases or hypothetical problems, interspersed with references to the codes and the scholarly literature.\textsuperscript{50} Students are expected to learn the codes by applying their provisions to the cases or problems.\textsuperscript{51}

The result is to teach students that legal ethics is a matter of

\textsuperscript{47} Like the gunslinger who carves a notch on his gun for each killing, litigators I have known keep a precise tally of their courtroom victories and defeats.

\textsuperscript{48} There are two codes of professional responsibility in widespread use today. \textit{Model Code of Professional Responsibility} (1980) [hereafter referred to as the \textit{Model Code}]; \textit{Model Rules of Professional Conduct} (1990) [hereafter referred to as the Model Rules]. About 35 states have adopted the Model Rules. 2 G. Hazard & W. Hodes, \textit{The Law of Lawyerering} 1255 (2d ed. 1990). The Model Code is in effect in most of the remaining states.

\textsuperscript{49} \textit{Model Code} DR 2-102.


conformity to the codes. It is a bottom-line approach, an ethics of
minimalism. Students learn that certain conduct will get them in
trouble with their peers, and other conduct will not. They must take
care about what they put in their ads in the telephone book. They
must not commingle client funds. They should not reveal client
confidences, unless disclosure fits into an established exception, such
as when a lawyer sues a client for not paying a legal bill. The focus
in most such courses is not on the lawyer’s quest to carve out a mean-
ingful life of integrity while giving competent counsel to clients, but
on avoiding disciplinary sanction.

In short, there is a close correlation between the metaphorical
image of the hired gun as sketched in Part I, and the image of the
lawyer taught in law schools. Law students learn that lawyers are in-
tellectual guns for hire. Their services are for sale to either side of a
dispute. A lawyer should be ready to argue one side of a case today
and the other side tomorrow. The lawyer’s job is to be a zealous part-
sian and achieve the client’s goals. Morality has nothing to do with
law or the lawyer’s task. Lawyers are detached partisans, detached
both from the client (feelings and personal relationships play no role
in the representation) and from the lawyer’s own values and morals
(the lawyer brackets his or her own morals while working for the
client).

In one way, however, the image of the hired gun in Western my-
thology is grossly inconsistent with the image as presented in legal
education. As we saw, the hired gun is usually thought of as little
more than a hired killer. Only in the unusual case, like Shane, is the
hired gun a positive figure who champions the oppressed and the
downtrodden. Even so, the elasticity in the metaphor is sufficient to
allow law schools to preach the virtues of the hired gun as a positive
model of lawyer behavior — not only as a model of what lawyers are
like, but as a model of what lawyers should be like. The black hat of

52. Elkins, Moral Discourse and Legalism in Legal Education, 32 J. LEGAL EDUC.
11, 19-20 (1982). Elkins' article is a most thoughtful and insightful critique of the
minimalism and lack of value-discourse that characterize courses in professional
responsibility.
53. MODEL CODE DR 2-101.
54. MODEL CODE DR 9-102.
55. MODEL CODE DR 4-101(C)(4).
56. As Professor Elkins explains:
   By focusing on such a "bottom line," one is likely to encourage an ethics based
   on what lawyers in general are willing to call ethical — the line which may
   not be crossed by any lawyer. Concentration on the minimum requirements
   imposed on all lawyers obscures the choice of a standard of behavior for the
   individual lawyer, a choice that affects personal integrity, self-image, and
   human aspiration (the spirit as well as the letter of the law).
   Elkins, 32 J. LEGAL EDUC. at 20.
the gunslinger is bleached white. The ideal is that expressed by Lord Brougham in his defense of Queen Caroline in 1821:

[A]n advocate, in the discharge of his duty, knows but one person in the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty, he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.\textsuperscript{57}

Furthermore, legal heroes, like Clarence Darrow and the fictional Atticus Finch of \textit{To Kill A Mockingbird},\textsuperscript{58} are held up as models for students because they stood by their clients at great personal and professional risk. They gave their uncompromising loyalty to their clients. While we might question whether lawyers like Darrow or Finch have much in common with the detached partisanship that is the essence of the hired gun metaphor,\textsuperscript{59} in law school they are typically little more than misty figures of lore known only for their willingness to fight for their clients and withstand public criticism. As such they can be made to fit the dominant metaphor of the lawyer as hired gun.\textsuperscript{60}

\textsuperscript{57} 2 TRIAL OF QUEEN CAROLINE 8 (1821), quoted in D. MELINKOFF, THE CONSCIENCE OF A LAWYER 188-89 (1973). Professor Monroe Freedman calls this the “classic statement” of the ideal of zealous partisanship, and goes on to add that this is “[t]he kind of representation I would want as a client, and it is what I feel bound to provide as a lawyer.” M. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 65-66 (1990). Charles Wolfram says that Brougham’s words “reflect the dominant, although hardly universal, professional ethic” of modern lawyers. C. WOLFRAM, MODERN LEGAL ETHICS 580 (1986). I would suggest that Brougham’s words reflect the dominant, and nearly universal, professional ethic instilled in law students by their education.

\textsuperscript{58} H. LEE, \textit{TO KILL A MOCKINGBIRD} (1960).

\textsuperscript{59} I would argue that these lawyer heroes bear little resemblance to the hired gun. Lawyers like Darrow and Finch are heroes precisely because they are committed to the pursuit of values like truth, justice, or reconciliation that transcend the narrow self-interest of their clients. They are not “amoral technicians” or detached partisans. They are partisans, to be sure, and that helps to explain their popularity among lawyers, but they are not detached from their clients or from their own passionately held moral values. For a study of the legal ethics of Atticus Finch, which makes this point, see T. SHAFFER, supra note 50, at 3-57.

\textsuperscript{60} The extremes to which lawyers can go to make their “heroes” fit the dominant paradigm of the hired gun is revealed in a statement I heard a prominent lawyer make to a group of law students. He said that St. Thomas More should be our model, because he was a lawyer who was willing to “go the extra mile” for his client, to put his loyalty to his client above all else. Of course, said the attorney, More’s client was God, but that didn’t change the lesson we should draw from his life. We owed the same sort of loyalty to our clients as More gave to his. This confusion of the finite with the infinite is what theologians call idolatry. See D.M. BROWN, ULTIMATE CON-
Law students learn that the good lawyer is someone who, in the language of a Mississippi court, "assures all adversaries, . . . 'You may get my client but you've got to come through me first.'"61 The good lawyer is the champion of his or her client. The good lawyer is a hired gun.

PART III

In this section I examine how the image of the hired gun underlies the codes of professional behavior that govern the legal profession, and assess how the image comports with the everyday reality of the practice of law.

There are two codes of professional conduct in widespread use among lawyers.62 Each has been adopted by a sizeable number of states. Both adopt hired gun thinking.63 The Model Code of Professional Responsibility ("Model Code") proclaims that a lawyer shall represent a client "zealously within the bounds of the law."64 Zealousness demands that a lawyer shall not "fail to seek the lawful objectives of his client through reasonably available means."65 A lawyer shall not violate the law (and the provisions of the Model Code itself), but within the boundaries of the law the lawyer is to do all that he or she can to ensure that the client's interests prevail. Any doubts about the right of a client to pursue a particular claim should be decided in favor of the client.66 A lawyer shall not intentionally "prejudice or damage" a client's interests.67

Important decisions — such as whether to plead guilty to a crimi-
nal charge — are for the client to make. "[T]he authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer." 68 The lawyer is not forbidden to raise ethical considerations with a client, and the Code recognizes that "it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible." 69 Ultimately, however, the lawyer is the instrument of the client. "In the final analysis, . . . the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself." 70

The Model Rules of Professional Conduct ("Model Rules") are similar. When serving as an advocate, the lawyer is expected to assert the client's position zealously. 71 The lawyer "should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." 72 The lawyer is expected to abide by a client's decisions concerning the purposes of representation, 73 although the "lawyer may limit the objectives of the representation if the client consents." 74

Furthermore, the Model Rules make clear that lawyers are not to be held morally accountable for the ends they achieve on behalf of clients. "A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities." 75 In short, a lawyer "does not vouch for the justness of a client's cause but only for its legal merit." 76 The lawyer is detached from his or her own moral values when representing clients. 77

68. MODEL CODE EC 7-7.
69. MODEL CODE EC 7-8.
70. Id.
71. MODEL RULES Preamble. See also supra note 63.
72. MODEL RULES Rule 1.3 Comment.
73. MODEL RULES Rule 1.2(a).
74. MODEL RULES Rule 1.2(c). The MODEL RULES do state that "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so." MODEL RULES Rule 1.2 Comment. In general, "objectives" are for the client to decide, while "means" are for the attorney. Id. However, even here the lawyer is enjoined to "defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected." Id. In a civil action, the lawyer must abide by the client's decision whether to settle the case. MODEL RULES Rule 1.2(a). In a criminal action, the lawyer must abide by the client's decision about the plea to be entered, whether to waive a jury trial, and whether to testify. Id.
75. MODEL RULES Rule 1.2(b).
76. This language appears in an early draft of the Model Rules. It is quoted in C. WOLFRAM, supra note 57, at 570.
77. The MODEL RULES do recognize that in counseling clients the lawyer "may refer not only to law but to other considerations such as moral, economic, social and
Of course, the professional codes include limits on what attorneys can do on behalf of clients. For example, attorneys are not to file a lawsuit "merely" to harass the other side, or use perjured testimony, or lie, or assist clients in illegal behavior. And, as we have seen, the codes do permit lawyers to raise moral concerns with their clients, although the final decision whether to forego a legal objective or tactic is for the client, not the lawyer. If a client insists on pursuing a course of conduct that the lawyer opposes, the lawyer can always quit (subject, however, to the approval of the court in cases of litigation), but as long as the lawyer remains in the case he or she is expected to do all that is necessary to achieve the client's objectives. Only the client can decide to "hold back" or "go easy" on the other side.

Several legal ethicists have noted that the codes express a standard vision of the lawyer's role. As Gerald Postema indicates, the two central ideals are partisanship and neutrality. First, the lawyer is the partisan of the client. The lawyer's sole allegiance is to the client. "Within, but all the way up to, the limits of the law, the lawyer is committed to the aggressive and single minded pursuit of the client's objectives." Professor Murray Schwartz calls this the principle of professionalism: within the limits of the law, the lawyer must do what he or she can do to maximize the likelihood that the client will prevail. This corresponds to my notion of partisanship. Second, the lawyer is neutral. The lawyer must not let his or her own moral scruples influence the representation of the client's cause. The lawyer must do all that he or she can do for the client, regardless of the lawyer's personal opinions about the client's character or objectives. Lawyer neutrality also means that "the lawyer need not consider, nor may he be held responsible for, the consequences of his professional activities as long as he stays within the law and acts in pursuit of the client's legitimate aims." Schwartz
calls this the principle of nonaccountability: "[A] lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved." This corresponds to my notion of detachment.\textsuperscript{88}

In short, the standard conception of the lawyer as neutral partisan corresponds closely to my notion of the hired gun as detached partisan.\textsuperscript{89} The lawyer, like the metaphorical hired gun, is the partisan of the client, whose job is to serve the client's interests and see that they prevail. And the lawyer, like the hired gun, is detached from personal morality. Like the hired gun, the lawyer passes no judgment on the client's goals but strives to effectuate them.

As Richard Wasserstrom has argued, lawyers who adopt this standard conception of their role see themselves as "amoral technicians," a phrase that neatly captures the essence of the hired gun metaphor:

For where the attorney-client relationship exists, it is often appropriate and many times even obligatory for the attorney to do things that, all other things being equal, an ordinary person need not, and should not do. What is characteristic of this role of a lawyer is the lawyer's required indifference to a wide variety of ends and consequences that in other contexts would be of undeniable moral significance. Once a lawyer represents a client, the lawyer has a duty to make his or her expertise fully available in the realization of the end sought by the client, irrespective, for the most part, of the moral worth to which the end will be put or the character of the client who seeks to utilize it. Provided that the end sought is not illegal, the lawyer is, in essence, an amoral technician whose peculiar skills and knowledge in respect to the law are available to those with whom the relationship of client is established.\textsuperscript{91}

Although there may be good reasons to adopt such hired gun thinking, at least at times, the resulting constriction of the moral

\textsuperscript{88} Schwartz, 66 CALIF. L. REV. at 673. Schwartz assumes that the principles of professionalism and nonaccountability apply to lawyers acting as advocates, but concludes that the principles should not apply with the same vigor to lawyers acting as nonadvocates. Id. at 695-97.

\textsuperscript{89} There is a further dimension to my notion of detachment, however, that is not adequately expressed in the formulations of Posteman and Schwartz. The hired gun is emotionally detached from his client as well as morally detached from his work. There are no bonds of friendship or intimacy between the hired gun and his client. See supra Part I.

\textsuperscript{90} Other important discussions of the standard conception are R. JACK & D. JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 27-50 (1990); D. LUBAN, LAWYERS AND JUSTICE 393-403 (1988); Simon, 29 WIS. L. REV. at 34-39.

\textsuperscript{91} Wasserstrom, 5 HUM. RIGHTS at 5-6.
world of attorneys has its own costs, a topic I will address below.\textsuperscript{92}

We must now consider the extent to which the hired gun metaphor reflects the reality of the practice of law. As we have already seen, the metaphor shapes the way law students are taught, and underlies the codes of professional responsibility that govern the profession. Not surprisingly, there is evidence that lawyers do in fact see themselves through the lens of the hired gun metaphor.

This can be seen in the results of an empirical study of lawyers in a county in Washington, which included extensive interviews with a number of lawyers about how they would approach and resolve moral conflicts.\textsuperscript{93} The researchers found that lawyers often used the language of the hired gun to describe what they do. For example, when asked what he would do if a client confessed to murder, one attorney answered: “You’re the hired gun for this guy and you have the duty, obligation to represent him, which includes preparation of a defense to the charges. If there’s a chance of excluding the confession, then you’ve got to do that.”\textsuperscript{94} The same attorney likened a trial to a duel of gunslingers: “It’s an adversary context . . . , and the other [guy] has a hired gun and you’re a hired gun for your guy.”\textsuperscript{95}

Another lawyer saw his task in similar terms:

My primary responsibility in the practice of law is to do the best job for my client that I can. Somebody has a dispute and they need a hired gun and I step in, keeping in mind my responsibilities to my client and to the profession, the court, things like that. I think my responsibility is to try to get the best result I can for my client.\textsuperscript{96}

Other lawyers resisted the hired gun model:

I have a responsibility to my clients to assist them in doing what is good for them. Now, that doesn’t necessarily mean to assist them in doing what they walk in thinking they want to do. I have a real sense and feeling and belief, I guess, that my role as an attorney should not be just as a hit man, a hired gun to go out and get whatever your client wants.\textsuperscript{97}

Both those who accepted without reservation the idea of the lawyer as hired gun, and those who recoiled from the notion, used simi-

\textsuperscript{92} See infra Part IV.
\textsuperscript{93} R. JACK & D. JACK, supra note 90, at xi-xiii.
\textsuperscript{94} Id. at 22.
\textsuperscript{95} Id. at 24.
\textsuperscript{96} Id. at 104.
\textsuperscript{97} Id. at 119. It should be noted that Jack & Jack found female lawyers less likely to accept the conventional paradigm of the lawyer as detached partisan, and more likely to interject notions of caring and personal morality, than their male counterparts. See supra note 21. I will return to this in Part IV.
lar language to describe the conventional behavior of lawyers. Both saw the lawyer as an "amoral technician." Even for those who sought to articulate a contrasting model of the lawyer, the influence of the hired gun image remained strong.

Another empirical study of the images of lawyers held by lawyers and the public suggested that the adversary system, with its courtroom clash of opposing interests, forces lawyers to act both as "heroes" (honorable champions of a worthy cause) and "tricksters" (shysters interested in winning at any cost). To be effective under such a system, lawyers must be seen both as the champion of their client's cause and as able to inflict harm on the opposing side. The authors employ the image of the gunslinger to best capture both sides of this reality. "Thus a gunslinger has to be both tough and mean. He may know he's lovable inside but he can't assume himself to be loved. He cannot allow himself to fully trust or relax. The attacker must always be on guard."

The gunslinger is the zealous partisan of his client ("tough and mean"), yet detached from his client and himself ("cannot allow himself to fully trust or relax"), qualities in substantial agreement with the core notions of the hired gun metaphor.

It is also noteworthy that lawyers tend to assume that the public perceives them primarily as tricksters. Actually, the public views them more favorably. This discrepancy may lead lawyers to "present themselves . . . as more tricky, evasive, manipulative, overbearing, greedy, and cold than they really are in order to . . . conform to the expectation. . . ." Although the images of the trickster and hired gun are not identical, they are similar, and it may well be

98. Jack and Jack delineate four approaches lawyers take to the question of relating their personal morality to the demands of their role as lawyers. Position 1 they term maximum role identification, Position 2 subjugation of personal morality, Position 3 recognition of moral cost, and Position 4 minimum role identification. R. JACK & D. JACK, supra note 90, at 99-129. Lawyers who fit into Position 1 were particularly likely to describe themselves as hired guns. Id. at 104. Although much the same sense of the lawyer's role emerged from those in Position 2. Id. at 106-10.

99. Mindes & Adcock, Trickster, Hero, Helper: A Report on the Lawyer Image, 1982 AM. B. FOUND. RES. J. 177, 180, 220-222. Mindes indicates that there is a third common image of lawyers, the "helper" (the friendly helper), but in the courtroom the lawyer must be seen as hero and trickster, not as helper. Id. at 180.

100. Id.
101. Id. at 221.
102. See supra Part I.
104. Id. at 194 (emphasis in original). It is also possible, of course, that the discrepancy may be explained by lawyers presenting themselves to clients and questioners as less trickster-like than they really are. Id.
105. Mindes and Adcock have commented:

The Trickster is sometimes less neutrally called the shyster. He derives his name from the trickiness, cleverness, and guile with which he pursues his
that lawyers see themselves and their work more in terms of the hired gun metaphor than does the public.

In short, there is no doubt that the metaphor of the hired gun exerts a strong hold on lawyers, shaping the way they see themselves and their role. This does not mean that the metaphor adequately illuminates the reality of lawyering. As we have seen, metaphors by their very nature serve to distort reality as they illuminate it. A metaphor always is and is not true. Thus it is not surprising that the hired gun metaphor fails to do justice to the reality of legal practice.

First of all, lawyers are not really mercenaries who move from client to client. Instead, they are likely to have long-term relationships with clients. This in turn can lead to "genuine intimacy" between lawyers and clients. Lawyers who have such relationships with clients are not so much hired guns as paid retainers. The result may be that lawyers feel free to voice their own moral scruples to their clients. Or the result may be that over time the opinions and values of the lawyer come to resemble those of the lawyer's most important and lucrative clients.

Recall that in Part I I suggested that the hired gun is detached from his work in two ways — the hired gun is detached from the client (he maintains his psychological and emotional distance) and detached from his own moral values (the hired gun brackets his own moral values and gets the job done). What I am now suggesting is that lawyers in large firms or other institutions may lose the former sense of detachment, as they become intimates of their clients, but if anything their detachment in the latter sense increases as their own moral values come more and more to resemble those of their most important clients, so that over time their professional values are no longer truly their own. This is even more so, of course, for lawyers employed in corporate legal departments, or government law offices.

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own ends. Like the Hero he is interested in winning. People are intimidated by him, but unlike the Hero, the Trickster does not fight fair or openly; he attempts to best others through sneakiness, deceit, and bluffing. His loyalties are shifting, his ethics weak, and his personal stance cynical and angry. He is devalued so that almost every negative adjective tends to be attached to him. He advances his pocketbook, and incidentally his clients' interests, at the expense of stronger fighters with higher ideals or more important causes.

Id. at 180. The affinities with the hired gun image are obvious.

106. See supra notes 12-18 and accompanying text.


108. Rhode reports that corporate attorneys are under pressure to prove that they are on management's "side." Id. at 627. It has been argued that lawyers who argue positions at odds with their own beliefs will over time find those beliefs changing to become more consistent with their public behavior. Chemerinsky, Protecting Lawyers From Their Profession: Redefining the Lawyer's Role, 5 J. LEGAL PROF. 31 (1980).

who lack the number and variety of clients that provide some check upon excessive identification with any one client's interests and values.

Second, and related, the metaphor of the hired gun stands in tension with the increasing bureaucratization of law practice. Only about two-thirds of lawyers work in the private practice of law; the remainder work in private industry, government, education, legal aid offices, and other special interest associations. Of those who work in private practice, less than half are solo practitioners. The results have been noted by Deborah Rhode:

Growing numbers of lawyers work within organizations that increasingly resemble their clientele. To varying degrees these organizations display attributes that Max Weber associated with bureaucracies: fixed jurisdictional areas, generally ordered by rules; allocation of duties to those with specialized training; firmly ordered systems of hierarchy; and an ethos mandating institutional loyalty. Those structures mesh poorly with ethical traditions that assume moral autonomy and commitment to professional, rather than organizational, objectives.

It becomes more difficult to retain the imagery of the hired gun as more and more lawyers find employment in hierarchical structures such as large law firms. The result has been what Rhodes characterizes as a "stifling level of homogeneity," as lawyers dress and act the same. This pressure towards homogeneity leads lawyers to accept all job assignments — no matter how distasteful — and to suppress any values that might run counter to the law firm's persona. Advancement in the large law firm depends as much on "fitting in" as it does on legal acumen. In short, it is becoming increasingly difficult to view lawyers as lone riders who work for whom they please; more likely their choice of clients is dictated by the institutions that employ them and over which they have little control.

111. Rhode, 37 Stan. L. Rev. at 631 (citations omitted).
112. There are now law firms with more than 1000 lawyers. Johnson & Coyle, On the Transformation of the Legal Profession: The Advent of Temporary Lawyering, 66 Notre Dame L. Rev. 359, 364 (1991). A January 1990 article reported that over the prior twelve years the number of law firms with more than 100 lawyers rose from 47 to 245, and the number of lawyers in those firms rose from 6,558 to 51,851. Goldberg, Then and Now: 75 Years of Change, 76 A.B.A. J. 56, 59 (1990).
114. Id.
Third, the hired gun image fails to do justice to the variety of work lawyers do. Few lawyers are litigators. Perhaps 90% of lawyers never enter a courtroom. Less than 10% of civil cases actually result in a trial; the rest are dropped or settled. Yet the hired gun metaphor conjures up visions of courtroom gun fights. It suggests that all of lawyering is a no-holds-barred battle against dangerous opponents. As such it neglects the fact that “[m]ost persons who seek a lawyer’s counsel . . . do not do so for help in resolving a dispute. Rather, most clients present their lawyers with transactional or planning problems.” Most of the practice of law takes place outside the courtroom and represents not so much a duel to the death between adversaries as an effort to effectuate a client’s intent or achieve an arrangement satisfactory to several parties.

Yet for the hired gun any transaction on behalf of a client is fraught with danger. There are no allies, only present or potential adversaries. Because most lawyers, even those who never set foot inside a courtroom, perceive themselves as hired guns who must get all they can for their clients, conflict is exacerbated and genuine compromise made more difficult. The “other side” is always suspect, regardless of the transaction. Trust is withheld, reconciliation out of place, when gunslingers meet.

116. Id. at 342.
117. For example, by drafting a will that expresses accurately the testator’s wishes, or drafting a partnership agreement or collective bargaining agreement that both parties can accept. Bastress & Harbaugh remind us:

Contrary to popular notions, most of the legal work in this country does not involve dispute resolution; most attorneys spend their time planning for or implementing transactions on behalf of their principals. As the agents of their clients, lawyers are buying, selling, creating, dissolving, or modifying some legal entity or other thing in order that the client can reach some legitimate goal.

BASTRESS & HARBAUGH, supra note 115, at 390.
118. Professor Freedman cautions that “any lawyer who counsels a client, negotiates on the client’s behalf, or drafts a document for a client must do so with an actual or potential adversary in mind.” M. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 66 (1990). All of the practice of law is refracted through the prism of courtroom battle.

119. No part of legal practice is immune from the detached partisanship of the hired gun. Wasserstrom gives several examples of how lawyers function as amoral technicians even when advising clients in cases where no potential adversary is in sight.

Suppose that a client desires to make a will disinheriting her children because they opposed the war in Vietnam. Should the lawyer refuse to draft the will because the lawyer thinks this is a bad reason to disinherit one’s children? Suppose a client can avoid the payment of taxes through a loophole only available to a few wealthy taxpayers. Should the lawyer refuse to tell the client of a loophole because the lawyer thinks it an unfair advantage for the rich? Suppose a client wants to start a corporation that will manufacture, distribute and promote a harmful but not illegal substance, e.g., cigarettes. Should the law-
We must conclude, then, that the metaphor of the hired gun continues to exercise a degree of control over the legal profession out of all proportion to its grounding in the reality of legal practice. The real problem with the metaphor is not that it is only partially accurate, but that it shapes so much of legal education, the codes of professional responsibility, and lawyers' own self-image. All lawyers are shaped by the metaphor in law school, all lawyers must abide by the codes that adopt its core notion of detached partisanship, and all lawyers tend to see themselves through the lens of the hired gun metaphor, even when it bears little resemblance to their own experience of the law. Finally, there are moral costs associated with the adoption of the image by the legal profession, a topic I address below.120

PART IV

In this section I assess the consequences of hired gun imagery on the moral universe of lawyers, and will propose that the imagery be supplemented by other images and metaphors that encourage a richer and fuller moral life.

Let me begin with a brief discussion of the benefits that flow from the legal profession's adoption of the hired gun metaphor. These benefits may appear obvious. Quite simply, the hired gun metaphor instills in lawyers the kind of unflinching loyalty to their clients that the adversary system presupposes.121 And the adversary system, for many, is the "method of dispute resolution that is most

yer refuse to prepare the articles of incorporation for the corporation? In each case, the accepted view is that these matters are just of no concern to the lawyer qua lawyer. The lawyer need not of course agree to represent the client (and that is equally true for the unpopular client accused of a heinous crime), but there is nothing wrong with representing a client whose aims and purposes are quite immoral. And having agreed to do so, the lawyer is required to provide the best possible assistance, without regard to his or her disapproval of the objective that is sought.

Wasserstrom, 5 HUM. RIGHTS at 7-8.
120. See infra Part IV.
121. A brief definition of the adversary system is given by Stephen Landesman:
The central precept of the adversary system is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute acceptable to both the parties and society. This formulation is advantageous not only because it expresses the overarching adversarial concept, but also because it identifies the method to be utilized in adjudication (the sharp clash of proofs in a highly structured setting), the actors essential to the process (two adversaries and a decision maker), the nature of their functions (presentation of proofs and adjudication of disputes, respectively), and the goal of the entire endeavor (the resolution of disputes in a manner acceptable to the parties and to society).

effective in determining truth, that gives the parties the greatest sense of having received justice, and that is most successful in fulfilling other goals as well.\textsuperscript{122} Among these "other goals," none is more important than the protection of human dignity and human rights.\textsuperscript{123}

The adoption of hired gun thinking by the legal profession helps to assure that lawyers will not be weak-willed partisans who abandon their clients at the first hint of trouble. Lawyers who think of themselves as hired guns will give their clients zealous representation regardless of their own moral scruples about the justness of their client's cause. They will not dilute their representation because of a fear of conflict with larger societal interests.

It is not surprising that it is in the criminal defense context that the hired gun metaphor seems particularly apt. Indeed, even Richard Wasserstrom, who is so critical of the amoral behavior of lawyers, concedes that such behavior is appropriate for criminal defense lawyers.\textsuperscript{124} Given that criminal trials involve the risk of a serious deprivation of liberty, given that the vast resources of the state are arrayed against the defendant, and given our skepticism about the morality of punishment itself, Wasserstrom concludes that the highly role-differentiated behavior of the criminal defense lawyer is justified.\textsuperscript{125}

Others point to the Constitutional guarantees of jury trial and the assistance of counsel in criminal trials, the presumption of innocence, the right to confront witnesses, and the right to have improperly obtained confessions excluded at trial.\textsuperscript{126} These rights can only be protected if the criminal attorney puts aside all considerations except loyalty to his or her client. "Generally speaking, a criminal defense situation presents the most telling argument for an advocate with unflinching commitment to client representation at the expense of other considerations."\textsuperscript{127} Monroe Freedman is the most articulate exponent of this vision of the lawyer's role:

No person is required to stand alone against the awesome power of the People of New York or the Government of the

\textsuperscript{122} M. Freedman, supra note 118, at 27.
\textsuperscript{123} Id. at 15-16. Of course, an adversary system of justice pays a price for its laudable commitment to protecting human rights. It may be that other systems that rely less on party presentation of evidence and unbridled advocacy by lawyers may do better at getting at the truth (what really happened) than our own system. This is an empirical question that has not yet been studied in much depth. See the discussion in Luban, The Adversary System Excuse, in The Good Lawyer 83-122 (D. Luban ed. 1983).
\textsuperscript{124} Wasserstrom, 5 Hum. Rights, at 12.
\textsuperscript{125} Id.
\textsuperscript{126} M. Freedman, supra note 118, at 13.
United States of America. Rather, every criminal defendant is guaranteed an advocate — a “champion” against a “hostile world,” the “single voice on which he must rely with confidence that his interests will be protected to the fullest possible extent consistent with the rules of procedure and the standards of professional conduct.” In addition, the attorney serves in significant part to assure equality before the law. Thus, the lawyer has been referred to as “the equalizer,” who “places each litigant as nearly as possible on an equal footing under the substantive and procedural law under which he is tried.”

The “equalizer,” of course, is the hired gun under another name. For those who think like Professor Freedman, the hired gun metaphor not only captures the reality of what lawyers do, it comports with the highest ideals of the profession. The hired gun is not someone in a black hat who is paid to trample the rights of the innocent, but a hero in a white hat who defends the innocent against the power of the state and the tyranny of public opinion. To quote once more from the Mississippi court, the lawyer is the “ultimate advocate,” who resists the “forces of hell” for a client, and who sends out a warning to all adversaries: “You may get my client but you’ve got to come through me first.”

It is not my purpose to contest the benefits of the adversary system or to deny that the hired gun metaphor (especially in its core elements of partisanship and detachment) captures a good part of what lawyers do and should do under such a system. It is important, however, to see the other side of the story, especially because the hired gun is the controlling or dominant metaphor in the adversary system. It is easy to forget that a metaphor is not reality, only a perspective on reality — and only one perspective among many. All metaphors are “inappropriate, partial, and inadequate.” Thus we must ask: What does the hired gun metaphor hide, what does it obscure, what does it distort? Its benefits in an adversary system are obvious, but what are its costs?

Some of the costs are systemic. There is little doubt that hired gun thinking contributes to the delay, the costs, the gameplaying, the large number of frivolous lawsuits, and the procedural abuses that plague the American legal system. When lawyers see themselves as hired guns, they are willing to do whatever it takes to win a case.

129. Thornton v. Breland, 441 So. 2d 1348, 1350 (Miss. 1983).
130. See notes 12-18 and accompanying text.
There are no limits on their conduct other than the law itself. Hired gun thinking leads (perhaps inevitably) to no-holds-barred advocacy, where the courtroom becomes the OK Corral. As a distinguished judge has lamented: "Lawsuits now are not merely a means to resolve disputes but protracted acts of warfare. The purpose is not merely to win, but to 'chew the other guy up,' to 'nail witnesses to the cross,' to 'destroy' the opposition, to 'rearrange their anatomy.'" The pressure to do whatever it takes to win is so great that even lawyers who want to avoid the excesses of partisanship may find themselves succumbing to the temptation, lest the lawyer on the other side gain a tactical advantage by resorting to "dirty tricks." There is a natural tendency for litigation tactics to sink to the lowest common denominator permitted by the codes of professional responsibility.

There is also evidence that the image of the hired gun contributes to the lack of public trust of lawyers. Public opinion polls consistently show a high level of distrust of lawyers and their ethics. In 1976 only 25% of the public rated the ethics of lawyers as "high." A 1986 Harris poll rated the ethics of lawyers near the bottom of twelve occupational groups. The "positive" ranking for lawyers was below accountants, bankers, doctors, corporate executives, newspaper and magazine editors, TV newscasters, and (even) U.S. Senators and Representatives, tied with insurance agents and stockbrokers, and barely ahead of personal financial planners. The "negative" ranking for lawyers was the highest of all groups.

Perhaps more interesting than the overall ratings of lawyers are

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133. This point is made in Luban, Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics, 40 MD. L. REV. 451, 460-61 (1981). Luban explains: Adversarial tactics, in law as elsewhere, tend to escalate more or less independently of anyone's intentions. Game theorists call the structure that compels escalation a "Prisoner's Dilemma:" a lawyer engages in the practice because not to do so would put him at a disadvantage relative to other lawyers who do. All the lawyers might recognize that it would be better for all concerned if no one engaged in the practice, but this recognition, even buttressed with the knowledge that other lawyers share it, does not help anyone unilaterally to refrain from it.

Such practices — of which the tactical motion to disqualify opposing counsel is one example — tend to move the profession towards its lowest common denominator, more or less independently of what lawyers really want.

Id. (citation omitted).
134. C. WOLFRAM, MODERN LEGAL ETHICS 3-4 (1986).
135. Id. at 3 n.9.
the reasons people give for their negative views. When asked to explain the “negative” rating of lawyers, the public points to lawyer behavior that is consistent with and no doubt nurtured by the hired gun imagery that permeates the profession. In a 1986 poll of the reasons for lawyers' negative ratings, those questioned said that lawyers are too interested in money (32%); they manipulate the legal system without regard for what is right and wrong (22%); they file unnecessary lawsuits (20%); they are too interested in representing corporations (12%); and they are just hired guns (8%).

It is clear from the responses that a large portion of the public discontent with lawyers is due to the detached partisanship of lawyers, their apparent willingness to do anything for clients for a price.

More troubling than the systemic costs, and the costs in public esteem, are the moral costs incurred by lawyers who are inculcated into hired gun thinking in law school and lead their professional lives in unquestioning allegiance to the dominant metaphor.

As we have already seen, hired gun thinking typically leads to an abdication of lawyers' responsibility for their actions. As Wasserstrom indicated, lawyers are tempted to become amoral technicians who are unconcerned with the morality of the ends they pursue or the means they employ. They are encouraged to see themselves as the “paid servant of the client, justified in using any technical lever supplied by the law to advance the latter's interest.” This is the vision of the lawyer's role expressed in the so-called standard conception of legal ethics — what Professor Murray Schwartz calls the principles of professionalism and nonaccountability, and what I have termed partisanship and detachment.

As an amoral technician whose highest loyalty is the service of client interests, the lawyer cloaks himself or herself in the sanctity of role, and responds to all allegations of wrongdoing with the refrain, “But I was only doing my job.” Ordinary morality does not apply, and hence it is perfectly appropriate (and at times obligatory) to do what otherwise would be morally blameworthy — to mislead, to make a truthful witness look like a liar, to withhold or distort evidence, to hurt the innocent, to achieve an unjust result, and so on.
Living in accord with the dominant metaphor of the hired gun demands the disassociation of the lawyer’s personal and professional lives. The moral values and attitudes that inform the rest of life are off-limits in the practice of law. Too often the lawyer forgets that the refusal to bring his or her moral values into the practice of law is not morally neutral. To refuse to take a moral stance, to defer to whatever the client wants and the law permits, is itself a moral stance. In short, lawyers are encouraged to see themselves as moral neuters whose conduct on the job has no relevance to the moral life.

This detachment from their work can cause lawyers to lose sight of the moral costs of their actions. The lawyer who lives by the code of the hired gun is unable to appreciate that representing a client can hurt other people, and thereby lacks the capacity to feel regret and to take steps to minimize harm to others. The lawyer looks upon the consequences of his or her action from the stance of an “uninvolved spectator.”

Furthermore, hired gun thinking and the amorality it entails can have negative effects on the character of lawyers. “Even if the role-differentiated amorality of the professional lawyer is justified by the virtues of the adversary system, this also means that the lawyer qua lawyer will be encouraged to be competitive rather than cooperative; aggressive rather than accommodating; ruthless rather than compas-

lawyer’s adversary ethic is unique among moral systems for guilds and practices because it claims dispensation from the conventional ethic of complicity — the ordinary determination that if I help someone to do something I am implicated in the moral quality of what he does.” Shaffer, The Unique, Novel, and Unsound Adversary Ethic, 41 Vand. L. Rev. 697, 698 (1988). As the title of the article makes clear, Shaffer rejects the claim that lawyers are exempt from moral scrutiny for their actions on behalf of clients.

143. R. JACk & D. JACk, supra note 90, at 104. Postema suggests that such distancing is a two-step process. “First, the lawyer distances himself from the argument: it is not his argument, but that of his client. His job is to construct the arguments; the task of evaluating and believing them is left to others. Second, after detaching himself from the argument, he is increasingly tempted to identify with this stance of detachment. What first offers itself as a device for distancing oneself from personally unacceptable positions becomes a defining feature of one’s self-concept.” Postema, 55 N.Y.U. L. Rev. at 77.

144. Rhode, 37 Stan. L. Rev. at 623. Postema, discussing Sartre, remarks, “Simply to identify with one’s role is to ignore the fact that one is free to choose not to act in this way.” Postema, 55 N.Y.U. L. Rev. at 74.

145. Postema, 55 N.Y.U. L. Rev. at 79-80. Postema refers to Stanley Milgram’s notorious research on the willingness of subjects to inflict pain on others when ordered to do so. “Milgram’s well-known experiments underscore the commonplace that the more we are able to distance ourselves (often literally) from the consequences of our actions, the more we are able to inflict pain and suffering on others without moral qualms. See generally S. MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 32-43 (1974).” Postema, 55 N.Y.U. L. Rev. at 80 n.48.

146. Id. at 79-80.
sionate; and pragmatic rather than principled.\textsuperscript{147}

Wayne Brazil has recounted the moral and psychological costs he experienced in his work as a litigator.\textsuperscript{148} He found himself manipulating people and information to serve the client's objects. He found himself deceiving other people, engaging in subterfuge and emotional posturing, continually searching for and exploiting the weaknesses of the opposing party and lawyer. Money and winning became his motivators.\textsuperscript{149} The result was that he felt "not only dishonest, but also in some measure distorted, alienated from the kind of human being our culture has taught me to respect and to strive to be."\textsuperscript{150} His life of manipulation affected the way he viewed other people. He became distrustful and suspicious of others, and grew to see them as things to be used, almost as inanimate objects. "Manipulation, in short, bred objectification."\textsuperscript{151}

Not surprisingly, this kind of compartmentalization of life is unstable. It is not easy to leave the manipulation, the detachment, the amorality at work. As Brazil warns:

There is a very real danger that the modes of behavior that begin as adaptations to a special professional setting will gradually expand to fill virtually all of the lawyer's interpersonal space. Subtly, we may come to view all persons as proper for manipulation and become suspicious that all people will manipulate us if the opportunity and need arises.\textsuperscript{152} Objectification can spread like a virus, infecting relationships with family and friends.\textsuperscript{153}

Finally, as Professor Postema explains, the lawyer cannot represent a client adequately if cut off from his or her own moral values.\textsuperscript{154} Moral arguments have their rightful place in law, but someone who has been trained to ignore moral values can hardly be expected to have the resources at hand to make moral arguments on behalf of clients.\textsuperscript{155} Ironically, the refusal to bring moral values to

\begin{thebibliography}{99}

\bibitem{147} Wasserstrom, 5 HUM. RIGHTS, at 13.
\bibitem{149} Id. at 114.
\bibitem{150} Id. at 115.
\bibitem{151} Id. at 115-16.
\bibitem{152} Id. at 116-17.
\bibitem{153} Jack and Jack remind us, "In a very real sense people merge with the roles they play. What begins as a role becomes part of a person's identity." R. JACK & D. JACK, supra note 90, at 28.
\bibitem{154} Postema, 55 N.Y.U. L. REV. at 80-81.
\bibitem{155} Id. MODEL CODE EC 7-8, states, in part: Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting

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the practice of law can diminish rather than augment the quality of the representation offered by the lawyer.

My guess is that most lawyers are aware, at least dimly, of the moral diminishment that accompanies living their professional life in accord with the dominant metaphor of the hired gun. How else to explain the ambivalence within the profession when the term is employed? Despite the inculcation of hired gun values in law school, despite the codes that enshrine the hired gun mentality into law, and despite the everyday practice of law within an adversary system that encourages hired gun behavior, lawyers are not entirely comfortable with the image. They know as well as others that only by a broad leap of the imagination can the mythical hired gun of the old West be transmuted into the champion of the underdog and the protector of human rights, regardless of the protestations of the profession.

Charles Wolfram notes that for some lawyers the hired gun metaphor conjures up images of the "macho heroics of the frontier, with the lawyer wearing the white hat" and fighting bravely and unreservedly on behalf of a client.¹⁵⁶ For others, however, it is an accusation that they are "lackeys who are prepared to perform servile acts of immorality and lawlessness at the beckoning of paid clients."¹⁵⁷ Studies of lawyers' self-image have revealed this same ambivalence.¹⁵⁸

It is also noteworthy that the metaphor of the hired gun has been invoked pejoratively by courts when disciplining lawyers for over-zealous representation.¹⁵⁹ An example is a California court, which admonished,

An attorney in a civil case is not a hired gun required to carry out every direction given by a client. As a professional, counsel has a professional responsibility not to pursue an appeal that is frivolous or taken for the purpose of delay, just because the client instructs him or her to do so.¹⁶⁰

This view was seconded by then Chief Justice Warren Burger of the Supreme Court, who mourned the decline of the image of the lawyer

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¹⁵⁶. C. WOLFRAM, supra note 139, at 580.
¹⁵⁷. Id.
¹⁶⁰. Cosenza, 152 Cal. App. 3d at —, 200 Cal. Rptr. at 20 (citations omitted).
as an officer of the court, a development he blamed on "cynics who view the lawyer much as the 'hired gun' of the Old West." According to Burger, those who view the profession this way expect the lawyer to do whatever a client wants, whether legal or illegal, ethical or unethical. The comments of Burger, and the use of the metaphor by courts when disciplining lawyers, all testify to the ambivalence of the profession towards its dominant metaphor.

It seems obvious that whatever its benefits the metaphor of the hired gun suffers from two main defects. It does not comport with the reality of modern legal practice, and it distorts the moral world of lawyers by deluding them into believing that what they do and how they do it are exempt from moral scrutiny. In light of these consequences, lawyers would be better off if they recognized that the hired gun metaphor is incomplete and inadequate, distorting the work they do and the moral lives they live. It is vital that steps be taken to lessen its grip on the profession.

This means that lawyers should not be able to hide behind the mask of the hired gun, the detached partisan, the amoral technician. Instead, like other persons, they must assume the burdens of the moral life, and take responsibility for their actions. We would all be better off if lawyers came to see themselves as subject to the demands of ordinary morality.

The first step is one of the imagination. The hired gun is only one way to envision the lawyer. The challenge facing the profession is to explore other images and metaphors that can preserve those values served by the hired gun image — such as the protection of the accused against the power of the state — while liberating lawyers from the morally impoverished world of the hired gun. What these new images might be is not yet clear. Lawyers, though, have a rich reservoir at their disposal. They are, after all, not only hired guns, mouthpieces, and ambulance chasers; they are also counselors at law and officers of the court and servants of their clients, among others. Each of these metaphors and images has its own implica-

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162. Id.
163. See supra Part III.
164. The conclusions of Rhode, Postema, and Shaffer are similar. See Postema, 55 N.Y.U. L. Rev. at 81-83 (arguing that lawyers should take more personal responsibility for their professional actions, by integrating their personal morality with their professional duties); Rhode, 37 Stan. L. Rev. at 643 ("Lawyers must assume personal moral responsibility for the consequences of their professional actions"); Shaffer, 41 Vand. L. Rev. at 715 ("What I want to be able to say is this: When American lawyers feel personally responsible for honesty and justice they behave better than they do when they depend on their institutions").
165. Wasserstrom, 5 Hum. Rights at 12.
166. When I have asked law students to think about the varying images of lawyers
tions for the way lawyers see themselves and their role. Each has its own strengths and weaknesses. None is sufficient. Each should be explored.

Consider, for a moment, how different legal education would be if the dominant metaphor taught to students was not the lawyer as hired gun but the lawyer as officer of the court. The lawyer's responsibility for the consequence of his or her actions would move to center stage. No longer would it simply be taken for granted that whatever can be done for a client should be done. Instead, students would be forced to confront openly the tensions and possible contradictions between their duties to clients and their obligations to the larger society which seeks to have justice served by its legal system. I am not proposing such a change, but I am suggesting that the officer of the court metaphor should be examined and its ramifications explored. Perhaps it offers a useful counterweight to the reigning metaphor of the hired gun.

Likewise, consider the metaphor of the lawyer as healer or reconciler. According to former Supreme Court Chief Justice Warren Burger:

The entire legal profession — lawyers, judges, law teachers — has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers — healers of conflicts. Doctors, in spite of astronomical medical costs, still retain a high degree of public confidence because they are perceived as healers. Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?

Both legal education and the practice of law would undergo dramatic changes if lawyers began to envision themselves more as healers than as hired guns. Feelings and values would no longer be off-limits in the law school. Training in the skills of interviewing, coun-

167. For a blistering attack on the notion of the lawyer as “officer of the court” or “officer of the legal system,” see M. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 9-10 (1990). Wolfram indicates that the phrase “officer of the court” has little legal significance. C. WOLFRAM, supra note 134, at 17.

counseling, and negotiation would become at least as important as moot court competitions and trial tactics courses. Courses in alternative dispute resolution would flourish. Among practicing lawyers mediation and arbitration would be the norm. Litigation would be looked upon as a last resort, an admission of failure. The role of the lawyer would shift from detached partisan to committed go-between. Perhaps the consequences would be detrimental. Perhaps the adversary system would cease to be the proud defender of human rights that it has proved to be over the centuries. But perhaps not. And perhaps the supposed risks could be justified by the real benefits that would result. No longer would lawyers see themselves as mere technicians unconcerned with the morality of their actions. Instead, they would come to see that they are moral agents who are dedicated to the healing of human conflict, and who bear responsibility for the means they employ and the ends they achieve.

Such a change seems improbable. The hired gun metaphor is firmly entrenched in the law schools, law codes, and minds of attorneys. Yet the ambivalence that many lawyers feel suggests that it may be possible to confront openly the moral costs and benefits of the metaphor’s continued dominance of the legal profession. Scholars like Cramton are calling for more recognition of value questions in law school. Thinkers like Wasserstrom, Postema, Rhode, and Shaffer are attacking the detached partisanship that underlies the metaphor. And the reality of law practice is deviating more and more from the notion of the lawyer as solitary mercenary who moves from client to client.

Another new development should be noted. The influx of women into the law profession may also serve to relax the hold of the hired gun metaphor. Women make up over forty percent of those receiving law degrees, and about twenty percent of all lawyers. It is estimated that women will account for one-third of the entire profession by the year 2000. Any effort to predict how this demographic shift will affect the profession is little more than a guess, but

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169. See supra note 31 and accompanying text.
170. Wasserstrom, 5 HUM. RIGHTS 1.
174. See supra Part III.
175. 1990 STATISTICAL ABSTRACT OF THE UNITED STATES 163 (Table #276).
176. Id. at 389 (Table #645).
there is some evidence that women lawyers are less enamored of the traditional hired gun approach to the practice of law, and are more likely to adopt an ethic that stresses relationships and responsibility for outcomes and for others.\textsuperscript{178} If this is so, and if it continues, then we could expect to see a lessening of the dominance of the hired gun metaphor over time, as more women enter the profession. Only time will tell.\textsuperscript{179}

While it is not clear what the future holds, it is clear that lawyers would benefit if they were freed from the grip of the hired gun metaphor. Because of its consequences for lawyers and clients, and because it does not comport with the reality of legal practice, the metaphor of the lawyer as hired gun must be replaced or at least supplemented by other metaphors that better promote the moral autonomy of lawyers and better reflect the reality of legal practice. The metaphor has ruled for long enough. Enough lawyers have been wounded. It is time for the hired gun to lay down his guns.


\textsuperscript{179} Jack and Jack include several accounts of how female lawyers have sought to bring their personal moral values into the practice of law. R. Jack \& D. Jack, supra note 90, at 149-55.