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Devil's Advocates: On the Ethics of Unjust Legal Advocacy

by Michael Huemer

1. Introduction: The Problem of Unjust Advocacy

Consider the following hypothetical scenario, which I shall call the case of *The Murderer's Friend*:

Sally and Joe have known each other for a few months and have become close friends. One day, after securing a promise of confidentiality from Sally, Joe finally confesses to Sally his darkest secret: he is a serial murderer. He has murdered six people so far. He asks Sally for advice about where to hide the body of his latest victim. Sally tries to convince Joe to stop murdering people and, moreover, to turn himself in. Joe refuses to turn himself in and remains noncommittal on future murders. Sally, good friend that she is, keeps Joe's secret and offers Joe helpful advice on how to elude the police.

I take it that most people would not even consider behaving in the manner of Sally in this example. There are two aspects of Sally's behavior that mark it as extremely wrongful. First, it is wrong for Sally to keep Joe's secret; in so doing, she allows Joe, unjustly, to get away with his crimes, and she countenances an unacceptable risk of death for innocent others, due to the likelihood that Joe will kill again. Sally is morally obligated, instead, to turn Joe in to the police.

Second, it is even worse for Sally to actively assist Joe by giving him advice on how to elude the police. Here she not merely allows serious injustices to occur but actively promotes them.

My concern here is an ethical, rather than a legal one. The point is not that Sally would be legally required to report Joe to the police. The point is that Sally would be *morally* required to report Joe and not to aid him. This would be true even if Sally lives in a legal system in which such reporting is not required. Sally's obligation here does not result from any special relationship she has with Joe, nor any special role she has taken on. It is simply a requirement for being a decent human being.

This case supports the following general ethical principle: It is *prima facie* wrong to knowingly contribute to seriously unjust outcomes, including especially unjust harm to others, or to allow such injustice to occur when one is in a position to prevent it at little

cost. I shall abbreviate this principle as follows:

The Duty of Justice: It is prima facie wrong to cause or allow injustice.

This is stated as a prima facie duty rather than an absolute duty.¹ That is, the claim is that it is wrong to cause or allow injustice, *other things being equal*, or, *barring special exculpatory circumstances*. There may be special circumstances that render it permissible to cause or allow an injustice; it may be permissible, for example, to permit or cause a small injustice in order to prevent some much greater injustice. I shall not try to delineate all of these circumstances here. For now, what is important to note is that there is a general presumption against causing or allowing injustice to occur, such that one who wishes to defend an act of causing or allowing injustice must bear the burden of identifying the special exculpatory circumstances that render the action permissible.

This is enough to set up what I shall call “the problem of unjust (legal) advocacy.” *Unjust advocacy* occurs when a lawyer pursues a legal outcome that he knows to be unjust. For example, a criminal defense attorney may defend an accused serial murderer whom the lawyer knows to be guilty; in the course of his duties, the attorney may attempt to secure an acquittal, despite his knowledge that this result would be seriously unjust. A civil litigation attorney may represent a client in a lawsuit that the attorney knows to be unfounded. Another litigator may defend a client against a lawsuit that the attorney knows to be well-founded. In a divorce proceeding, an attorney may seek a settlement that he knows unfairly favors his client. In the following discussion, I shall speak in terms of a criminal defense lawyer defending a client who is guilty of a morally serious crime, but it should be borne in mind that most of the points made apply equally to the case of a lawyer defending an unjust position in a civil case.

On the face of it, there is an obvious and powerful argument that unjust advocacy is morally wrong: as a general rule, one should not knowingly pursue injustice. Yet this sort of behavior is not only permitted by presently accepted codes of legal ethics; often, it is positively *required*. Justice White addressed the issue in the case of *United States v. Wade*:

[D]efense counsel has no [. . .] obligation to ascertain or present the truth. [. . .] He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution’s case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course.²

Practicing defense attorneys often take an extremely strong and confident stand on this

¹On the notion of prima facie duty, see Ross 1988, ch. 2.

²*United States v. Wade*, 388 U.S. 218 (1967), at pp. 256-7.

issue. One criminal defense lawyer, in response to the thought that “an attorney’s ultimate goal must be to seek justice and not to simply win,” writes, “That’s not just wrong. It’s absolutely, fundamentally, incontrovertably wrong.”³

Thus, the conventional view of legal ethics, generally accepted in the legal profession, includes the following proposition, which I shall label “Devil’s Advocacy”:

Devil’s Advocacy: It is permissible and even obligatory for a lawyer to pursue unjust legal advocacy when this is in the best interests of his client.

Devil’s Advocacy does not logically contradict the Duty of Justice, since the latter is only a *prima facie* principle. But the tension between the two principles forces us to ask: *why* is it morally acceptable for a lawyer to pursue injustice in the interests of his client? Given the normal obligation not to cause or allow injustice, to which we are all subject simply as human beings, what special exculpatory circumstances exist in the case of a lawyer that render unjust advocacy permissible?

The burden of proof, or at least of explanation, rests squarely on the shoulders of those who embrace Devil’s Advocacy. Those who doubt Devil’s Advocacy incur no such burden, since it is obvious on its face that promotion of injustice is, in normal circumstances, wrong. Those who think there is something special about the situation of an attorney must articulate what this special circumstance is.

Given how widespread the Devil’s Advocacy view is in the legal profession, and given the extreme confidence with which it is often asserted, one might anticipate that there must be some very impressive and rigorous arguments in its favor. As we shall see, however, this is far from true.

2. Defending Unjust Advocacy

2.1. *The Epistemological Problem*

Some defenders of Devil’s Advocacy appeal to a kind of external-world skepticism: it is said that a lawyer can never really *know* that a client is guilty. Even a client who confesses to his attorney *might* be lying, that is, there is a nonzero probability of this. Perhaps the client has falsely confessed because he is mentally disturbed or is protecting someone else.⁴ Similarly, in a civil case, one can never be 100% certain of what the facts are. Therefore, it is urged, the lawyer’s best course is to pursue the client’s interests without regard to what he (the lawyer) believes to be just.

This is a strange argument. Typically we do not eschew the pursuit of justice or any other value merely on the grounds that we cannot be 100% certain of what will promote or thwart the goal. In the case of the Murderer’s Friend, surely Sally could not be excused for disregarding the demands of justice and the welfare of innocent third parties merely on the grounds that she was not 100% certain that Joe was really a serial murderer. And if one really thought that any uncertainty as to what justice demanded neutralized one’s reasons for acting to promote justice, it is unclear why one would not

³Gamso 2009, responding to Jones 2009.

⁴D’Amato & Eberle 2010, pp. 14-15; Joy 2004, p. 1246n36.

apply the same standard to all other values. Thus, why could one not claim that since one is never 100% certain that a given action will be in the interests of one's client, one should disregard the client's interests in deciding what to do?

Perhaps the intended argument is something like this. Suppose, as is commonly held, that it is better to let many guilty people go free than to convict one innocent person.⁵ In that case, it may be morally correct to attempt to secure a person's acquittal even when that person is probably guilty. Suppose, for instance, that convicting one innocent person is worse than allowing nine guilty parties to go free. Then if there is even a 10% probability that a given defendant is innocent, one ought to attempt to secure an acquittal. Note that this is true regardless of whether one is a defense attorney, a prosecutor, or a juror.

This point is fair enough, but it does not address the interesting cases. The interesting cases are those in which the lawyer is convinced *beyond a reasonable doubt* that the client is guilty – or, more to the point, the probability of the client's being guilty, on the attorney's evidence, exceeds whatever ought to be the appropriate threshold for convicting a person of a crime. In this case, the argument that “it is better to let many guilty persons go free than to convict one innocent person” cuts no ice, since that point has already been taken into account in identifying the appropriate evidentiary threshold, which we have stipulated that the lawyer's evidence surpasses.

Perhaps the idea is merely that the lawyer's uncertainty as to his client's guilt *weakens* the reason the lawyer has for pursuing (what appear to be) the requirements of justice, such that some *other* reason for pursuing the client's interests can then outweigh the duty of justice. While this could be true in certain cases, it seems unlikely that uncertainty should play a decisive role in general, given that the lawyer's justified credence in his client's guilt can be extremely high (even if short of absolute certainty), and the injustice involved in pursuing a client's interests can be extremely serious. It is difficult to see why a very slight uncertainty about whether one is causing an extreme injustice must enable the duty of justice to be outweighed. We shall consider below the moral reasons that might be thought to support pursuing the client's interests regardless of justice; none will be so weighty as to plausibly outweigh the duty of justice in general, even when the inevitable uncertainty about the demands of justice is taken into account.

2.2. *The Lawyer as Friend*

Some view the lawyer as like a friend to his client.⁶ Often, a person will support a friend's cause, even when the friend is in the wrong. And *to some extent*, we may regard this as morally acceptable, even virtuous – specifically, as a manifestation of the virtue of loyalty. If a friend has overparked at a parking meter, it would not be virtuous to hail the traffic enforcer to ensure that your friend receives a ticket.

But while the virtue of loyalty may license *some* degree of disregard for impartial justice in the service of one's friends, this license must be quite limited. It was in light of this thought that I mentioned the friendship between Sally and Joe in the Murderer's

⁵Volokh 1997; Dershowitz 2013.

⁶Fried 1976; Joy 2004, pp. 1246-7n37. For criticisms of the view, see Dauer and Leff 1977.

Friend case. In that case, Sally is a friend of Joe in a clearer sense than a lawyer is a friend of his client. Yet this hardly excuses Sally's complicity in Joe's heinous crimes. Whatever moral value there may be in Sally's show of loyalty, it does not come close to outweighing the moral importance of stopping a serial murderer. The same would seem to hold for many lesser but still serious crimes.

In addition, there is, as D'Amato and Eberle put it, "certainly something strange about an instant friend whose friendship is purchased by paying a retainer."⁷ While a preexisting close relationship may create certain ethical prerogatives to act partially on behalf of a particular person, it is implausible that such prerogatives are established by one's simply hiring someone specifically to help one escape justice.

Return to the case of the Murderer's Friend. We have already said that Sally's friendship with Joe does not seem to override her obligation to report Joe's crimes. Now suppose we add the following: Joe *pays* Sally \$20,000 to keep quiet and to help him elude the police, and Sally accepts the money. Does this strengthen Sally's moral position, such that her failure to report Joe is now ethically justified?

Absolutely not. Sally's acceptance of hush money marks her as even more corrupt than in the original version of the story. She may be obligated to return Joe's money; regardless, her obligation to report Joe to the police persists undiminished.

2.3. The Lawyer's Function, Part 1: Faith in the System

Until now, I have considered relatively peripheral arguments in defense of Devil's Advocacy. The main argument, according to most proponents, appeals to the role of a lawyer in an adversarial justice system.⁸ It is simply the job of a lawyer to represent his client's interests, regardless of where he believes true justice in the given case lies. If one is unable or unwilling to perform this function, then one has no business being a lawyer (or perhaps one is qualified only to serve as a prosecutor).

By themselves, however, observations about the responsibilities attached to a particular job carry little weight. It is equally true that it is the job of a mafia hit man to murder those whom the Boss targets for elimination, and that those who are unwilling to do this have no business being hit men. But this does nothing to justify murders carried out by hit men. If a particular job description includes activities that we are antecedently convinced are morally wrong, the mere introduction of employment opportunities for people who perform those actions will do nothing to render them permissible; normally, it will simply mark the jobs in question as immoral jobs.

Defenders of Devil's Advocacy will say that what differentiates the job of lawyer from that of mafia hit man is the fact that the lawyer's job is socially beneficial, because it is part of a system – the adversarial justice system – that is well designed to achieve justice on the whole. But the system only functions well if the parties in it play their roles faithfully. Thus, the individual lawyer should faithfully discharge his role obligation within the system, namely, the obligation to represent his client's interests to the utmost regardless of the lawyer's own beliefs about justice.

There are two distinct arguments that might be intended here. One is the argument

⁷D'Amato and Eberle 2010, p. 4.

⁸Joy 2004, p. 1246n35; Freedman 1975; Dershowitz 2013, p. 68.

that a lawyer ought to have faith in the justice system, such that, despite his own unjust advocacy, the lawyer should nevertheless expect that justice will be done. Prosecutors are not so incompetent, nor juries so gullible, that a zealous defense attorney alone can cause a miscarriage of justice when the defendant should really be convicted. And of course, if one really knows that justice will not miscarry, then one's unjust advocacy does no harm.

But this argument simply requires an unjustifiedly extreme faith in the justice system. No doubt, the system usually works as intended, to punish the guilty and acquit the innocent. But there are cases in which it fails, and a lawyer can certainly be justified in suspecting that he is presently involved in such a case. This might occur, for instance, because the lawyer is privy to incriminating evidence of which the prosecution is ignorant, because the lawyer is in a position to take advantage of emotional reactions or other prejudices of the jury, or simply because the lawyer is more skilled than his counterpart on the opposite side. Of particular import, it is certainly possible, and must happen fairly often, that a lawyer is justified in attaching a nontrivial credence to the proposition that his own zealous advocacy will prove a key factor in enabling injustice to prevail.

2.4. *The Lawyer's Function, Part 2: Rule Consequentialism*

The second, and perhaps more common line of thinking behind the appeal to the attorney's role in the adversary system, would be based upon a roughly rule-consequentialist ethic. *Rule consequentialists* believe that the ethically correct action to perform in a given circumstance is the action that accords with the set of *general rules* such that, if people in general followed those rules, the consequences would be better for the world as a whole than they would be for any other set of general rules.⁹ This is in contrast to (among other views) an *act consequentialist* ethic, which holds that the ethically correct action to perform in a given circumstance is simply the action that (given the rest of the world as it actually is or will be) will have the best overall consequences. Notably, it might be morally correct, according to rule consequentialism (but not act consequentialism), for a defense attorney to aid a murderer in obtaining release from prison, even though this action will have overall negative effects on society, because the general rule according to which defense attorneys do their utmost to secure their clients' interests is beneficial to the justice system and society on the whole.

The first thing to note in reply to this argument is that the truth of rule consequentialism is far from obvious. The theory is highly controversial among ethicists; on its face, it is not obvious why the mere fact that it would be desirable if *everyone* followed a certain rule gives *me* a reason for following that rule, particularly when (1) it would not be desirable for *me individually* to follow the rule, and (2) my following or non-following of the rule will make no difference to whether everyone else follows it. The theory is also subject to a number of well-known and *prima facie* powerful objections. One objection has it that rule consequentialism collapses into act consequentialism, once we notice that act-consequentialism itself might be put forward as a possible rule. Alternately, the collapse may result from our allowing rules to incorporate exceptions

⁹Brandt 1992, ch. 7.

(for instance, the rule regarding killing cannot simply be “don’t kill people,” but rather something more like “don’t kill people, except in self-defense, or in defense of an innocent third party, or in a case of euthanasia, or . . .”); if sufficiently many exceptions are allowed to be built into a rule, then we will obtain a set of rules extensionally equivalent to act consequentialism.¹⁰ Finally, at least on a naive interpretation (and assuming one can avoid the collapse into act consequentialism), rule consequentialism seems to generate absurd consequences, such as that it is morally wrong to become a philosophy professor, because it would be terrible if *everyone* became a philosophy professor.¹¹

I lack the space to explore these objections here; I simply mention them by way of reminding the reader of why rule consequentialism is far from established doctrine in ethics.

I will briefly state, however, what I make of the issue. There is *something* to rule consequentialism; intuitively, it often seems correct to reason on the basis of the thought, “What if everyone did that?” When deciding whether to walk across a newly planted lawn, thus causing a tiny amount of damage to the lawn, it seems correct to consider what would be the effect of everyone (or at least a great many people) behaving in this way. But in other circumstances, the question “What if everyone did that?” seems entirely irrelevant – when I am choosing a career, it is not to the point to consider what would result were everyone to choose the same career path.

Plausibly, the difference between the two kinds of cases is this: in the cases where “what if everyone did that?” is relevant, not only is the proposed action such that it would be undesirable if many people behaved in a similar way, but also it could plausibly be considered *unfair* for the agent to behave in that manner while others refrained. Thus, we might say, it is unfair for me to walk across the lawn while others walk the long way around. But it is not unfair for me to become a philosopher while others choose other careers. That is why I have a moral reason to avoid walking across the lawn but not to avoid becoming a philosopher.¹²

If that is right, the question then becomes whether a lawyer, in failing to legally pursue injustice in the interests of his client, would be treating others unfairly. More precisely, is it unfair if one lawyer refuses to advocate injustice while others continue to do so?

It is hard to see how. The lawyers who continue to zealously advocate for their clients regardless of the demands of justice will continue to receive the emoluments to be gained from doing so – they will in fact be rendered *better off*, due to diminished marketplace competition, by the restraint of those conscience-bound lawyers who refuse to engage in unjust advocacy.

Perhaps it would be thought that the situation would be unfair to the *clients* of the conscientious lawyers (i.e., the lawyers who refuse to engage in unjust advocacy). But this provides a rather weak argument. How unfair is it that a person is denied assistance in pursuing *unjust* outcomes, while others are given such assistance? If we find that

¹⁰For discussion, see Card 2007; Hooker 2007.

¹¹For discussion, see Huemer 2013, pp. 85-6.

¹²Huemer 2013, pp. 86-7.

situation unfair, surely the fault lies more in those who provide assistance in pursuing injustice, rather than those who refuse to provide such assistance.

Consider another alleged case of unfairness. Some criminals are caught by the police, while others, equally blameworthy, get away with their crimes because the police never catch them. This, too, is a case of alleged unfairness consisting in unequal access to opportunities for getting away with crime. But no one would suggest that a better situation would be for all criminals to have equal opportunity to get away with their crimes. The only rational solution to the unfairness would be to attempt to deny such opportunities to all criminals.

Finally, it should be noted that it is not at all obvious that rule consequentialism favors Devil's Advocacy, because it is far from obvious that the rule whereby defense attorneys ignore justice in the pursuit of client interests really has the best social consequences. This is commonly asserted but rarely argued for. Consider an alternative rule whereby defense attorneys pursue their clients' interests only to the extent that they (the attorneys) believe is consistent with the requirements of justice. Why, exactly, would this be worse than the status quo?

Perhaps the worry is that some defendants who appear guilty would be unable to secure adequate legal representation. Let us consider three variations on this concern.

(a) The concern might be that some factually guilty defendants will be unable to find someone to assist them in pursuing their unjust aim of escaping punishment. But it is hard to see how this situation would constitute a social harm.

(b) Alternately, the concern might be that some defendants who are factually innocent but *appear* guilty will be unable to find a lawyer to defend them from an unjust conviction. This would be a real problem; however, the scenario is farfetched. Given the extent to which defense attorneys tend to be biased in favor of defendants – and the obvious financial interests that defense attorneys have in maintaining this bias – it is unlikely that a factually innocent defendant would be unable to find any defense attorney who thinks there is any reasonable chance of his being innocent, such that the attorney would feel morally justified in pursuing an acquittal. While such a situation is of course possible (e.g., suppose there is overwhelming misleading evidence against the defendant), this mere possibility is not sufficient to generate a compelling argument. If we are to have a criminal justice system that punishes anyone at all, we must accept *some* risk of punishing the innocent; we must hold that there is some level of probability such that, when a defendant's probability of guilt exceeds that level, society is justified in meting out punishment. Now, it seems to me that, if a defendant cannot find any defense lawyer who thinks that he shouldn't be convicted, this is stronger evidence that the defendant is in fact guilty than the situation in which a jury in our present system votes to convict the defendant. Since we accept the punishment of a defendant pursuant to a jury conviction despite the possibility of a wrongful conviction, the smaller risk of an innocent defendant being unable to locate any defense lawyer who can in good conscience support his cause should not cause us any greater concern.

(c) Finally, a more subtle issue is that even guilty defendants may require representation to avoid the violation of their legitimate rights. For instance, while a guilty defendant has no moral right to escape punishment altogether, he nevertheless has a right against being *overpunished*, and competent legal representation may be necessary to safeguard this right. Suppose, for example, that a defendant in fact violated

a just law, and consequently deserves some punishment; however, there were mitigating circumstances which a competent defense attorney would bring forth. It may well be that neither the prosecutor, nor the judge, nor the defendant would bring out these mitigating circumstances if no defense lawyer were present.

In this case, however, it is unclear why the defendant would be unable to secure legal representation for his legitimate interests, even in a world in which lawyers eschew unjust advocacy. For we have stipulated in this case that the defendant has interests whose protection is required by justice, and whose protection requires legal representation. The position we have advanced is not that it is unethical for a lawyer to *represent a guilty client*; the position is that it is unethical for a lawyer to *pursue an unjust outcome*. Even if this position were widely adopted and practiced, the defendant in the above scenario would still be able to secure a lawyer to assist him in avoiding overpunishment.

2.5. *The Defendant's Right to a Fair Trial*

Every defendant, however guilty he may appear, has the right to a fair trial. One requirement of a fair trial is that the defendant should have access to competent legal representation. Every defendant therefore has the right to such representation. But for that right to be satisfied, defense attorneys must be willing to serve even defendants who appear obviously guilty. Therefore, one might argue, a defense attorney should be willing to represent a given client regardless of how guilty the client appears, even if the client insists on pleading not guilty.

The last sentence in the preceding paragraph is a non sequitur. The conclusion that a given attorney should represent a defendant who appears obviously guilty does not in any way follow from the preceding premises. The question with which I am here concerned is not one of *social policy* – I am not, for example, considering whether there should be a law forbidding attorneys from defending clients they strongly believe to be guilty. The question I am concerned with is one of *individual ethics*: suppose that you are a defense attorney, and a particular defendant has asked you to represent him. You are for all practical purposes certain that the defendant is guilty, yet he insists on pleading not guilty. What should *you as an individual* do? If you decline the case, you will not be denying or violating the defendant's right to counsel, any more than you would if you declined the case because you were about to go on vacation. The right to counsel does not mean the right to be represented by the specific person one most prefers, and you will not have prevented the defendant from finding another lawyer.

But what if *all* competent defense attorneys similarly reject the case? *Then* wouldn't the defendant's right to competent representation be violated? That is a matter for debate – for the reasons already given, no particular lawyer would have violated the defendant's right in this situation, nor would the state have violated the defendant's right, since the state did not prohibit anyone from representing the defendant. Fortunately, however, we need not rest on these points. It does not matter what would happen if all competent defense attorneys rejected the case, since an individual lawyer, by rejecting the case, does not thereby cause all competent defense attorneys to reject it. Bearing in mind, again, that our question is one of individual ethics, not of social policy, it is irrelevant what would happen if all lawyers rejected the case. What is

relevant is what will happen if *you* reject the case. This typically will not result in the defendant's right to competent representation being violated.

3. Candor towards the Tribunal: Lying versus Misleading

As I have indicated, the central argument against Devil's Advocacy is one that appeals directly to the Duty of Justice. In addition, however, there is a striking tension contained in the conventional view of legal ethics. In the conventional view, it is unethical for a lawyer to actually lie in court. A lawyer may not, for example, state that his client did not commit the crime for which he is charged, if the lawyer knows that his client did in fact commit that crime. Similarly, it is unethical for a lawyer to knowingly introduce fabricated evidence, or to suborn perjury.¹³

I shall assume that the conventional view is right on this point. This gives rise to the following argument:

1. It is unethical for a lawyer to lie, suborn perjury, or introduce falsified evidence.
2. There is no ethically significant difference between (typical cases of) unjust legal advocacy and lying, suborning perjury, or introducing falsified evidence.
3. Therefore, it is (typically) unethical for a lawyer to engage in unjust legal advocacy.

Why is premise (1) true? Plausibly, the reason is that lying, suborning perjury, and introducing falsified evidence are all forms of deception, and this type of deception is particularly serious because it undermines the trial's function of determining the truth so that justice may be done. Considerations of defendants' rights do not override this concern, since defendants have no right to have false evidence introduced, nor does a fair trial require the introduction of such false evidence.

If this is correct, then it appears that we should also endorse premise (2). Unjust legal advocacy is also (typically) a form of deception. The lawyer engaged in such advocacy is, by definition, attempting to mislead the tribunal as to *how the case should be decided*. He is attempting to convince the tribunal that it should come to a particular decision, when he knows that they ought not to make that decision. This form of deception is, if anything, *more* serious than deceiving the tribunal about some subsidiary matter. If falsifying evidence is wrong because it undermines the tribunal's ability to correctly decide a case, then *a fortiori* it is wrong to mislead the tribunal directly about how the case should be decided. Considerations of defendants' rights do not override this concern, since defendants have no right that the tribunal be misled.

Furthermore, unjust legal advocacy will typically involve numerous subsidiary acts of misleading. Consider the famous 1840 trial of François Benjamin Courvoisier, in which the defendant confessed to his lawyer, Charles Phillips, during the trial. On the advice of the judge, Phillips continued to mount the best defense that he could, which turned out to involve impugning a prosecution witness with implications that she, the witness, might be lying because she herself had been involved in the crime. This was deceptive, since Phillips knew that the witness was not lying and was not involved in the

¹³American Bar Association 2013, rule 3.3.

crime.¹⁴

Phillips did not violate conventional legal ethics: he did not *lie* in court, since he did not *assert* that the prosecution witness was lying; he merely suggested it. But this is a very tenuous distinction on which to rest much moral weight. Compare the following non-judicial example:

The Misleading Implication: Professor Malicious is asked to write a report for the tenure file of Professor Sobre. In his report, Malicious, seeking to sabotage Sobre's tenure case, states that Professor Sobre's drinking problem is not a conclusive reason for denying Sobre tenure, since Sobre comes to class sober at least 80% of the time. In fact, Malicious knows that Sobre has no drinking problem and is always sober.

In this case, Malicious can be rightly condemned for his deception. Malicious can hardly plead innocence by pointing to the literal truth of his statements, when his intention was to induce the audience to draw false inferences and thus to induce them to make the wrong decision in the tenure case. The intentional exploitation of false implications is not morally superior to lying. Similarly, a lawyer can hardly avoid criticism for deception by appealing to the distinction between lying to the court and merely making statements designed to induce the court to draw false conclusions.

But now consider a case in which the prosecution has failed to meet its burden of proof; nevertheless, the defense attorney knows his client to be guilty because the client secretly confessed to the attorney. The defense attorney argues for acquittal, confining himself to arguing, correctly, that the prosecution has failed to meet its burden of proof, and thus that the jury ought to acquit. Is this deceptive? One might argue that it is not deceptive, since nothing the lawyer says licenses the inference that the defendant in fact did not commit the crime, and the conclusion the lawyer wants the jury to draw – that the jury ought to acquit (based on their evidence) – is correct.

An argument can be made that this behavior is deceptive nevertheless. Suppose Alice says to Bob, "I think Charles stole my donut from the break room. I saw him chewing on something after the donut disappeared, and he had powdered sugar around his mouth." "Oh," Bob responds, "That's no reason for accusing Charles. For all you know, he might have just bought his own donut. Leave Charles alone." In fact, Bob *saw* Charles steal the donut, but he intentionally neglects to mention this, because he wants to help Charles get away with the theft. In this case, Bob could obviously be criticized for his deception. Similarly, it seems that in a criminal trial, a person who intentionally neglects to mention information establishing the defendant's guilt, with the purpose of helping the defendant get away with his crime, can be criticized for deception.

Moreover, whether the lawyer's behavior counts as "deception" or not, it appears to share in the main defect that makes deception in a courtroom wrong in general: it undermines the ability of the tribunal to serve its function of ascertaining the truth so that justice may be done.

4. The Ethical Lawyer

¹⁴My account of the case is based upon that of Asimow and Weisberg (2009, pp. 230-32).

So far, I have criticized the conventional view of legal ethics. There simply is no good argument for the view that pursuit of injustice is morally permissible provided that one is a lawyer serving the interests of one's client. What ought a lawyer to do instead? Should a criminal defense attorney, for example, refuse to represent clients whom the attorney takes to be clearly guilty? Should he attempt to avoid finding out whether his clients are guilty, so that he can represent them with a relatively clear conscience? Should he leave the profession altogether?

4.1. Defending the Apparently Guilty

The proper conclusion is not that it is always wrong to defend those whom one believes to be guilty. We have said that a lawyer should not pursue a legal outcome that he knows to be unjust. But there are at least two reasons why this does not preclude defending those who appear to oneself to be guilty.

First, as suggested in section 2.1 above, there are cases in which outcome A has a higher probability of being unjust than outcome B, but in which if outcome B is unjust, it is *more* unjust than outcome A would be. For example, if a defendant is 75% likely to be guilty, then there is a 75% probability that acquittal of that defendant would be an unjust outcome, and only a 25% probability that conviction would be unjust. However, conviction of the innocent is much more unjust than acquittal of the guilty. Because of this, it is ethically justifiable to attempt to secure acquittal for such a defendant. This point applies as long as the lawyer has reasonable doubts as to the guilt of his client.

Second, as noted in section 2.4 above, even the guilty have rights; it is therefore ethically justifiable for a lawyer to represent a client for the purpose of protecting that client's rights, even if he is certain the client is guilty. The lawyer may seek to prevent overpunishment or other mistreatment of the defendant. In some cases, where the expected punishment for a crime is excessive, it may be less unjust for the defendant to be acquitted than for the defendant to be convicted, even though the defendant is guilty. Barbara Babcock relates the case of a defendant facing a mandatory 20-year prison sentence for possession of heroin (her third offense). Though Babcock knew the defendant to be guilty, she successfully pursued an acquittal based upon a (rather thin) mental illness defense. In this case, the lawyer acted ethically, since it would have been much more unjust for the defendant to receive a 20-year prison sentence than for the defendant to go free.¹⁵

These are justice-based reasons for defending an apparently guilty client. What is not ethically justifiable is for a lawyer to simply disregard considerations of justice and pursue an apparently unjust outcome solely on the grounds that it serves the interests of his employer.

4.2. The Duty of Disclosure

Should a lawyer disclose his policy regarding unjust legal advocacy? If he does so, guilty clients may decide to seek a lawyer more friendly to unjust advocacy – in which case they are more likely to obtain an unjust legal outcome. This suggests that perhaps the

¹⁵Babcock 2013, pp. 5-8. Elsewhere (Huemer 2010), I have argued that drug prohibition itself is unjust; if this is correct, then *any* punishment for drug possession would be unjust.

lawyer should *not* disclose his policy.

Nevertheless, a lawyer who rejects unjust advocacy should disclose this policy to his clients. While the clients have no right to an unjust legal outcome, they have a right against being defrauded. Because the Devil's Advocacy view is widely accepted in the legal profession, and because this fact is widely known within our society, clients who are not told otherwise are likely to assume that they are paying for a zealous advocate who will give no regard to truth or justice. Failure to disclose one's own quite different policy would therefore amount to one's receiving payment under false pretenses. While a lawyer has every ethical right to pursue what he takes to be justice, he does not have the right to profit from clients who take themselves to be purchasing something quite other than what he is prepared to provide.

Of course, this sort of disclosure is likely to greatly diminish a lawyer's employment prospects. Very likely, in our current environment, such a policy would end the career of any criminal defense attorney, or place severe burdens on an attorney of any other kind. This, however, provides no objection to the ethical arguments I have given. Ethics very often rules out some otherwise desirable career options. Imagine a "conscientious assassin" who only assassinates people who he is sure really deserve to be assassinated: no doubt this assassin would find greatly diminished employment prospects and would wind up being forced out of the business. But this provides no argument against the proposition that it is wrong to assassinate innocent people.

4.3. *Intentional Ignorance*

Many practicing lawyers attempt to avoid ethical dilemmas through maintaining ignorance. If one doesn't know whether the client is guilty, then one need not face the dilemma of deciding whether and how to defend a guilty client. Therefore, they avoid asking the client whether he is guilty and discourage the client from providing them with that information, or any information that would interfere with the lawyer's providing a forceful defense.¹⁶

This surely cannot be ethically correct. Imagine another case in which one seeks to maintain innocence through ignorance. I am about to turn the corner onto Mapleton Avenue. I am concerned that there may be children playing in the street, whom I might hit as I drive down the street. But I don't want to have to stop the car or take a different route; therefore, as I turn the corner, I close my eyes to avoid knowing whether there are any children in the street – with the thought that if I don't *know* that children are there, I will not be morally culpable.

This attempt at avoiding responsibility obviously fails. When performing an action with a high risk of causing a terrible outcome, one is normally obligated to gather information, if one can easily and cheaply do so, to find out whether one is in fact going to cause that outcome (and to desist if the answer is yes). Certainly one may not actively avoid such information. In the present case, the driver would be morally responsible for the outcome, should he hit a child in the street due to his failure to see the child.

Similarly, a lawyer pursuing acquittal for a criminal defendant is engaged in an activity with a high risk of causing a very bad outcome – that a criminal who otherwise

¹⁶Mann 1985, pp. 103-23; Freedman and Smith 2004, p. 169.

would be justly punished is released without punishment. If the lawyer winds up causing that bad outcome due to his intentional ignorance as to his client's guilt, the lawyer will then be morally responsible for the outcome. Willful ignorance is not a way of avoiding responsibility. The lawyer is rather obligated to attempt to discern whether his client is guilty, if he can do so at reasonable cost (for example, by asking the client whether he is guilty).

5. The Ethical Prosecutor

The ethical problem of the defense attorney defending a guilty client is often raised in popular discourse. But as Paul Butler points out, the much neglected ethical problems faced by *prosecuting* attorneys are even more serious.¹⁷ Prosecuting attorneys argue for the conviction and punishment of criminal defendants. There are at least three important ways in which a defendant's punishment may be unjust:

- i) It is unjust to punish a person for a crime he did not commit.
- ii) It is unjust to punish a person for an action that was not wrong (whether or not the person performed the action).
- iii) It is unjust to punish a person in a manner that is disproportionate to the wrong committed.

There are thus at least three distinct ways in which a prosecutor, while pursuing the punishment of a criminal defendant, may be guilty of unjust advocacy.

The first kind of unjust advocacy is widely condemned, both within and without the legal profession: a prosecutor must not attempt to secure the conviction of a factually innocent defendant, or even one who is likely to be factually innocent. Interestingly, however, the latter two types of unjust advocacy are regarded much more leniently. Prosecutors routinely prosecute defendants for behavior that is illegal but ethically blameless, such as recreational drug use (though it is unclear how many prosecutors realize that such behavior is blameless). Prosecutors will also frequently advocate for disproportionate punishments when such punishments are legally prescribed, for instance, in the case of draconian "three strikes" laws. These forms of unjust advocacy are widely accepted as part of the prosecutor's job and are not generally regarded as ethical breaches in the way that advocating for the punishment of factually innocent defendants is seen as a serious ethical breach.

Our earlier arguments against unjust advocacy would seem to apply equally well to all three types of prosecutorial unjust advocacy, just as they do to unjust advocacy by criminal defense attorneys and civil litigators. If anything, unjust prosecution is *far worse* than unjust advocacy by defense attorneys, because it is much worse to punish a person unjustly than it is to merely fail to punish a person justly, and so it is worse to advocate for unjust punishment than to merely advocate for an absence of just punishment. In a case in which a prosecutor has reason to believe that a successful prosecution of a defendant will result in an unjust punishment – whether because the defendant did not perform the act of which he is accused, or because the act was not wrong, or because

¹⁷Butler 2013.

the likely punishment is disproportionate – the prosecutor should decline to prosecute.

In the current regime – assuming, as I do, that many legal punishments are disproportionate and that many law-violations, including all cases of drug possession, are ethically blameless – the refusal to engage in unjust prosecution is likely to cost a prosecutor his job. This fact is unfortunate but provides no ethical defense of unjust prosecution. Similarly, a mafia employee may well fear losing his job if he should refuse to help his employers violate the rights of others – but this would provide no ethical defense for his helping to violate the rights of others.

What about the case of prosecutors who genuinely believe that almost all law-violations are blameworthy and that almost all legal punishments are just and proportionate – do such prosecutors act wrongly in prosecuting those whom they mistakenly believe deserve the legal punishments that will follow upon a conviction?

My answer is that the prosecutor's behavior is blameless if and only if the prosecutor justifiably believes that the legal position he is advancing is just, after the prosecutor has exercised due care in attempting to discern whether that position is just. Suppose, for example, that a prosecuting attorney is called upon to prosecute defendants for drug possession. Because the relevant law is a controversial one, in order to behave ethically, this attorney must study the justice of drug prohibition (for example, by reading the academic literature on that subject), making a good faith effort to appreciate the most important arguments on both sides before forming an opinion on the issue. Only if, after doing so, the attorney honestly finds drug prohibition to be just will it be ethical for the attorney to prosecute citizens under the drug laws. I rather doubt that these conditions are typically satisfied.¹⁸ I therefore suspect that there is a very large amount of unethical prosecution in the current legal regime of the United States and other countries with drug prohibition. Similar points apply to other controversial laws and controversial punishments.

6. Public Policy

Much of the discussion surrounding the issue of unjust advocacy appears to be concerned with public policy issues, such as whether lawyers should be censured for defending the obviously guilty. The concern of this paper, by contrast, has been one of individual ethics – what ought an individual lawyer to do when confronted with a client who wishes to pursue an unjust legal outcome?

Before concluding, I want to add one brief remark about public policy. Should there be a law according to which lawyers are prohibited from defending clients known to be guilty? The answer to this is rather clearly no – unjust advocacy should not be legally proscribed, even though it is ethically wrong. The reason is that a law proscribing unjust advocacy would have a chilling effect on the legal profession. A lawyer might, for example, believe that a particular defendant should be acquitted, but also believe (1) that the defendant *might* well be convicted, and (2) that after the defendant's conviction, the authorities *might* conclude that he, the lawyer, knew all along that the defendant deserved to be punished. In such a case, it would be ethically correct for the lawyer to

¹⁸A central reason for my doubt on this score is simply the extreme weakness of the case for prohibition; see my 2010.

accept the case and argue for acquittal, yet the lawyer would face strong pressure to refuse the case to avoid personal risk. Thus, the result of such a law would likely be that lawyers would give up a great deal of ethically appropriate advocacy, in addition to giving up unjust advocacy.

7. Conclusion

The ethical dilemmas facing a lawyer with a guilty client appear frequently in popular drama, where the ethical resolution is often supposed to be for the lawyer to betray his client by intentionally sabotaging the case.¹⁹ I propose a less extreme means of avoiding contributing to injustice: a lawyer should inform his client up front that he will refuse to advocate for a position that he, the lawyer, finds to be unjust. If the client wishes to retain the lawyer's services after being informed of this condition, the lawyer then does no wrong by following through on the stated condition, and indeed would do wrong by failing to follow through.

Most legal professionals would confidently reject my proposal in favor of some version of Devil's Advocacy, the view that a lawyer should pursue his client's interests without regard to justice. But the confidence with which lawyers advance this view is not matched by the arguments in its support. Some appeal to the impossibility of being absolutely certain of a client's guilt, but this hardly seems to explain why pursuing an outcome that one believes to be in the client's interest is more important than avoiding something that is *almost* certainly a serious injustice.

Others view the lawyer-client relationship as a kind of friendship and appeal to the virtue of loyalty to friends. But we may doubt how much moral import should be attached to a friendship that is established on the spot by paying someone to help one get away with a crime. In any case, even a good friend should not aid his friend in getting away with serious infringements on the rights of others.

Others believe that a lawyer should have faith in the justice system, such that despite his own unjust advocacy, the lawyer should trust that the system will produce the correct outcome. But this would simply be an unjustified faith; skilled lawyers have often caused miscarriages of justice.

Other writers appeal to the defendant's right to a fair trial, which can be satisfied only if the defendant has competent representation. But in refusing to advocate for an unjust position, a lawyer does not violate anyone's right to a fair trial, since the lawyer does not prevent the defendant from hiring a different lawyer, nor does the lawyer refuse to defend the prospective client's legitimate rights.

Finally, the most common argument in defense of unjust advocacy appears to be an appeal to rule consequentialism. Specifically, it is said that the justice system as a whole works best if lawyers in general follow the rule of doing their utmost for their clients' interests, as opposed to the situation in which lawyers in general follow the rule of pursuing what they take to be just. This argument faces two problems: first, rule consequentialism itself is a dubious ethical theory; it is unclear why the results of *everyone* following a given rule are practically relevant to an individual's decision, when the

¹⁹Asimow and Weisberg (2009, pp. 248-53) discuss several examples; they conclude, however, that such betrayal "should never be tolerated."

individual has no control over what everyone else will do. Second, it is hard to see in any case why it would be better if lawyers followed the rule of pursuing their clients' interests without regard to justice than if they followed the rule of pursuing justice.

There are two main arguments against Devil's Advocacy. The first is simply that it is generally wrong for a person to pursue unjust outcomes. In the absence of a sufficient countervailing argument, the presumption against promoting injustice stands. Second, it is widely accepted that it is wrong for a lawyer to lie to the court. But the sort of deception involved in unjust legal advocacy – deliberately exploiting false inferences, for example – is not morally superior to lying.

Why, then, is Devil's Advocacy so widely accepted in the legal profession? One is tempted to speculate that the financial interests of lawyers may play some role in the widespread acceptance among lawyers (but not the lay public) of this otherwise puzzling position. Surely a lawyer's services will be in greater demand if he can promise to serve his clients' interests without regard to justice than if he must impose ethical constraints on his service to his clients. The lawyer's duties to the client, however, may be abridged when the client's interests would conflict with those of the lawyer. Consider, for example, that attorney-client confidentiality is held to be so important that an attorney may not breach confidentiality in order to prevent a violent criminal from going free. It is, however, entirely permissible, according to the ABA Rules of Professional Conduct, to violate confidentiality if doing so is necessary for the lawyer to collect his fee.²⁰ Can it be that the collection of lawyer's fees is morally more important than preventing violent criminals from going free?

Why should we be concerned about this speculative psychological question? Many adherents of Devil's Advocacy and other doctrines in legal ethics rely at least to some degree on appeals to authority – for example, a lawyer may feel that he is on sure footing in observing the ABA's Model Rules of Professional Conduct. It is not unreasonable to suppose that many accept Devil's Advocacy because it is widely accepted in the profession, including by the ABA. It is well to remind readers, then, that these are not unbiased sources of ethical advice. To decide what constitutes ethical behavior in the legal profession requires careful examination of the relevant ethical arguments. This examination seems to reveal, as I have argued, that the conventional view of legal ethics is fundamentally misguided, and that in consequence, a great deal of standard legal practice is ethically unacceptable.

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²⁰American Bar Association 2013, rule 1.6. D'Amato and Eberle (2010, p. 23) suggest the explanation that the ABA rules are designed to benefit lawyers.

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