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Is it Morally Wrong to Defend Unjust Causes as a Lawyer?

EDUARDO RIVERA-LÓPEZ

ABSTRACT *The question I address in this article is whether it is morally wrong for a lawyer to represent a client whose purpose is immoral or unjust. My answer to this question is that it is wrong,* prima facie. *This conclusion holds, even accepting certain traditional principles of lawyer's professional ethics, such as the right of defence and the so-called principle of 'adversarial' litigation. Both the adversarial system and the right of defence are sufficient to support or justify the* right *of potential clients (and citizens in general) to defend their interests in the judicial system and to do so with the technical assistance of a lawyer. This right includes a right to pursue unjust or immoral purposes (within the law). However, having a right to do X does not mean that it is morally permissible to do X. We can have a right to do something morally wrong. This being so, the fundamental moral reason for a lawyer not to accept representation for a client with an immoral purpose is that it is,* prima facie*, morally wrong to help someone do something wrong.*

1.

The question I want to address in this article is whether it is morally wrong for a lawyer to represent a client whose purpose (the purpose for which she needs legal services) is immoral or unjust. My answer to this question will be that it is wrong, *prima facie*. This conclusion holds, even accepting certain traditional principles of lawyer's professional ethics, such as the right of defence and the so-called principle of 'adversarial' litigation.

Let me start with some preliminary points. First, the question refers only to privately hired lawyers (I will call them 'professional lawyers'). I will assume that professional lawyers are allowed to accept or reject clients freely, at least when the withdrawal does not imply a setback to the potential client's interests. I therefore exclude from my consideration official representation or representation otherwise appointed by any authority or court. This assumption is not trivial and requires some discussion. The principle that lawyers are allowed to exercise discretion in the selection of clients is not universal. In England, for example, barristers (but not solicitors) are, *prima facie*, required to accept clients.[1] Some authors think that a similar requirement exists in the US (although it is not explicit in professional regulations).[2] However, there are reasons to accept professional freedom as the default standard. Most codes of professional conduct do not require accepting clients, at least if this is not harmful to the potential client. They do establish restrictions in the case of appointed lawyers, and also some constraints to the decision to terminate an ongoing lawyer-client relationship.[3] Client selection by professional lawyers, on the contrary, seems to be unregulated in most jurisdictions.[4] The assumption of professional freedom certainly constrains the scope of

my argument. It also implies some more general ideas about the role of lawyers in society that might be controversial. As is well known, lawyers are considered to be, at least in part, public officials, who are therefore subject to different kinds of regulations. The dividing line between the private and the public role is not straightforward and professional freedom is one of the points that might be contested. Still, we can safely say that many jurisdictions accept professional freedom either explicitly or *de facto*. It seems therefore meaningful to ask about the morality of lawyers' decisions in this context.[5]

Secondly, it is worth stressing that my question refers specifically to the acceptance (or rejection) of a potential client, not to the purposes that a client might pursue *once* the lawyer-client relationship already exists. While our position on the first question (the one I want to focus on here) obviously may affect our position on the second, the two issues are distinct. In some sense, the question I address here is simpler, since, once a relationship with a client has been established, there are several further commitments that make independent decisions by the lawyer more complex.

Thirdly (and connected to the previous point), when I claim that accepting a client with an immoral purpose is (*prima facie*) wrong, I mean accepting the client unconditionally and in full agreement to help the client advance his purpose as far as possible (within the law). I am not referring to the situation in which a lawyer accepts an 'immoral' client with the purpose of reforming him, or otherwise trying to avoid immoral actions afterwards.

Finally, a more fundamental preliminary consideration: what does it mean that the case accepted (or not) by a lawyer, or that the purpose suggested by a potential client, is immoral, wrong, objectionable or unjust (terms that I take as roughly synonymous)? I am not referring to an illegal purpose. Advising a client to perform a criminal or fraudulent act is often prohibited by the codes of professional ethics, and is not the kind of case I am interested in.[6] My central question assumes that it makes sense to say that the purpose of a client is immoral or unjust, even if not clearly illegal. This requires some explanation.

In order to motivate the assumption, I would like to mention some kinds of cases, although I do not claim they are each uncontroversial. For example, we might think that, at least in some cases, a person who has clearly committed a criminal offense (who has killed, raped, bribed, etc.) has a moral duty to accept his culpability and the imposition of a fair punishment (independent of what one thinks a fair punishment should be). Many guilty criminal defendants, however, deny any responsibility.[7] We might also think that a person who has harmed another, or breached a contract, has a moral duty to compensate the injured party. Again, this is not what many people do. They usually seek to avoid or minimise the payment of compensation. Finally, it also seems plausible to believe that it is not correct, in a dispute or negotiation, to take advantage of one's own (economic or legal) superiority to force the opposing party to accept a disadvantageous agreement (an agreement that is more disadvantageous than the one that would be attained if the balance of power were more equal). However, this is usually what stronger parties do. Note that in all three cases, it is not illegal to act in these ways: trying to avoid punishment, trying not to pay fair compensation, and imposing greater bargaining power. These considerations are only tentative but should be sufficient to generate specific examples. A corrupt politician accused of receiving bribes can try, with the help of his lawyer, to be acquitted, despite being guilty. A murderer or a rapist can plead his innocence and exhaust, with the assistance of a

lawyer, all procedural tools to forestall punishment.[8] A company that has polluted a small town may attempt, with a lawyer's advice, not to pay fair compensation (or to pay as little as possible). An economically powerful husband, facing divorce, may, within the scope of his legal rights, pressure his comparatively weak wife into accepting an unfair division of property.

As I have said, it is controversial that the purposes of these potential clients (evading criminal punishment, not paying compensation, obtaining an overly favourable divorce settlement) are immoral or unjust. It is not my aim here to make the case that they are. These examples are meant to illustrate what it would mean to say that what a potential client intends to do with the help of a lawyer is immoral, even absent a clear violation of the law. One might certainly hold a sceptical position and deny this possibility. This would certainly turn the whole issue moot.[9] I assume in this article that my theoretical opponent is not a moral sceptic. She accepts that a client can have an immoral purpose (within the law). The disagreement concerns the lawyer's conduct of representing such a client. The traditional view is that the client's immorality does not touch or contaminate the lawyer,[10] even if the client's purposes are objectionable or even abhorrent. In other words, the traditional view is not (necessarily) sceptical. Its main point is to claim that the lawyer is not responsible for helping to perform the client's impermissible purpose. This is the basic claim I want to discuss (and reject).

2.

There are two main grounds for arguing that the lawyer's action is not morally objectionable when she accepts a client with immoral purposes. According to the first argument, representing the interests of any client (regardless of the content of those interests) is functional to our adversarial system of justice. I give the notion of adversarial system (or principle) a very broad meaning: it is a system in which the conflicting parties defend their positions or interests in an active and partisan way, and a judge decides the dispute impartially. This system requires that everyone can effectively defend her interests and the only way to do so (at least in most cases) is with the technical advice of a lawyer.

This argument depends, of course, on assuming that the adversarial system is morally acceptable. Otherwise, we could not justify actions within the system, especially if such actions are questionable from the moral point of view.[11] I will not discuss here the plausibility of the adversarial system (whose justification, by the way, is not obvious). I will accept for the sake of argument that it is a legitimate system of adjudication.

The second argument for exempting lawyers from blame for the unjust purposes of their clients appeals to the right of defence: we all have a right to legally defend our interests, against those with whom we have a legal dispute (whether another individual or the state). Because the ability to defend those interests depends on the technical ability to do so, that right includes the access to a lawyer's advice. The right of defence has a different scope in different legal domains and legal jurisdictions. Its scope is broad in the case of criminal law, where the state guarantees, through a public defender, that the accused is provided with legal assistance.[12] It is more restricted in the area of civil law, except in some cases (such as family law). How far the state should go in ensuring an effective capacity to all citizens to defend an interest is controversial, especially in other

large sectors of civil law, like contract law and torts. I will not enter into this discussion. Rather, I will take for granted the existence of a robust right of defence including, at least in some cases, the guarantee of public counsel.

3.

Both the argument based on the adversarial system and the argument based on the right of defence are sufficient to support or justify the *right* of potential clients (and citizens in general) to defend their interests in the judicial system and to do so with the technical assistance of a lawyer. This right includes a right to pursue unjust or immoral purposes (within the law). The polluting company has a right to defend its interest in not compensating victims. The corrupt politician and the serial murderer have a right to defend their interest in not being punished. And they have a right to do all this with the advice of a lawyer. It is important to consider the nature and justification of this right more carefully.

When I argue that there is a right to defend interests in the judicial system with the advice of a lawyer, I am not referring to a legal right (which certainly exists). The nature of the right I am pointing to is *moral*. I assume that we have a moral right to defend our interests before the law. Now, what does it mean to say that I have a moral right to do *X*? In general terms, that I possess the moral right to do *X* implies that others have a moral duty not to prevent (or attempt to interfere with) my doing *X*. This duty involves basically two types of actions: (i) not establishing (or supporting) legal norms (in a broad sense, including disciplinary rules) that forbid me to do *X*, and (ii) not performing actions that prevent, or interfere with, my doing *X*. If *X* is a partially or fully 'positive' right (one that correlates with an active duty), then we need to add a third correlative duty: (iii) carrying out actions aimed at ensuring the satisfaction of the right to do *X*.

It is crucial for my argument to note that *having a right to do X does not mean that it is right to do X*. We can have a right to do something morally wrong.[13] That I have a moral right to do *X* means that it is morally required *of others* not to interfere or attempt to prevent me from doing *X*, and, therefore, that it is also morally required that legal rules ensure that I can do *X* without coercive interference. But having a right to do *X* does not imply that doing *X* is right or that it is not morally objectionable. The moral rights of a person provide moral reasons *to others* (for not preventing or, in some cases, for helping). The moral duties of a person offer moral reasons *to that person* (to do something or not).[14]

To understand how this distinction is relevant to our case it is necessary to say more about the arguments presented in the previous section about the adversarial system and the right of defence.

The relationship between the adversarial system and the right of defence is controversial. For some authors, the rationale for the adversarial system is that it is the best system for guaranteeing the right of defence (and other procedural rights). For others, the justification of the adversarial system lies in its ability to reach fair decisions.[15] The idea is that the adversarial system is an institutional arrangement designed for the real, imperfect world. In an ideal world, a perfectly impartial and omniscient judge could adjudicate without such institutional expedients. Unfortunately, the real world is imperfect, both from the normative and epistemic standpoint. Therefore, we allow people to defend their interests in a partisan way and use every available resource to plead their

causes, even if we know they will commit excesses. In the long run, this maximises the likelihood that the judge's decisions are ultimately just. In the case of the right of defence, the rationale is different. The right of defence has a special function in criminal law and its main purpose is to warrant (as far as possible) that no innocent person be punished (even at the risk of guilty persons being acquitted).

The justification of an adjudication system that combines the adversarial principle and a robust right of defence is clearly compatible with particular actions within the system being morally wrong or immoral. The system accepts or tolerates such immoral behaviour as serving the function of a higher goal, that of finding fair solutions and, in particular in criminal law, minimising the possibility of condemning innocent persons. But this does not turn each act undertaken in the context of the system into a morally right act. What it does, is offer a moral reason not to prevent the parties from performing (or even, in some cases, for helping another perform) these behaviours, i.e. for granting them a right to perform those actions.

In order to determine whether an action is morally permitted or prohibited we have to analyse the moral reasons that the agent herself has in favour of or against performing such an action. The reasons are partially independent of whether the agent holds the right to perform the action. Indeed, if she has no moral right to do *X*, this is a moral reason not to do *X*. However, as Waldron notes, the possession of a right to do *X* is not a reason to do *X*.[16] If someone asks for a moral explanation of *X* and asks, 'Why did you do *X*?', it makes no sense to respond 'because I have a right to do *X*'. Having a right to do *X* simply means that others should not interfere, but it does not provide a moral reason to do *X*.[17] There is, then, a kind of conceptual independence between the question of whether someone has a right to do something and the question of whether doing so is morally right (in the sense of permissible) or wrong (unless the person has no right, in which case, as we saw, the action is wrong). '*X*'s being objectionable' means that there are prevailing moral reasons not to do *X*, whereas 'having a right to do *X*' means that others have no right to prevent her from doing *X*.

Returning to our case, a defendant who is (and knows herself to be) guilty of a crime is entitled to plead her innocence (or at least not to acknowledge her fault). A firm that has polluted has the right to seek (legally) not to pay compensation (or to pay as little as possible). That these parties have these rights means that the rest of the society has a moral duty not to coercively prevent them from doing so and thus to guarantee (to some extent) that they legally can do so. However, these behaviours can be morally objectionable, because there are moral reasons against performing them. The powerful husband has a moral reason to accept an equitable agreement on property division or child support, although he has a right to try to force (within the law) a favourable agreement. Again, that he has that right means that the rest of society has no moral reason to prevent him from attempting to do so or even that the society has moral reasons to ensure that he can do so (reasons that are based on the value of the adversarial system and/or the right of defence). But this does not affect *his* moral reasons not to.

4.

My first conclusion, then, is that there is a moral right held by the potential client to defend her interest with the help of a lawyer, even if that interest is unjust or morally

objectionable. This right is correlative with a non-specific duty to provide, to some extent, access to a lawyer. I call this duty 'non-specific' because it does not imply that each lawyer has a duty to accept every case. Nor does it imply (at least not without additional assumptions) that each lawyer has the moral right or (even less) the moral permission to accept every case. It only implies that, somehow, society must ensure to some extent that people are not left without legal representation, and that they can thus exercise the right to defend their interests within the adjudication system.

The scope of this non-specific social duty depends on the extent of the right to defend one's interests within the judicial system. If we believe that such a right involves an effective guarantee of having a lawyer for every possible case, then the corresponding social obligation will be stronger, since it must be ensured that each citizen has a lawyer, whatever her purpose. If, however, we think that the right only involves a minimum guarantee not to be rejected by every available lawyer, then the correlative duty will be weaker. Other combinations are possible. I need not determine the precise scope of this duty in this article, since my argument does not depend on it. Let us call this non-specific duty the 'social duty to ensure legal representation'.

5.

There are several ways to meet the social duty to ensure legal representation. For the sake of argument, I shall concede that the best way to meet the social duty to ensure legal representation implies that lawyers have a right to accept cases, regardless of the intended purpose. Since this right does not follow straightforwardly from the social duty to ensure legal representation, the transition requires some comment.

From the moral point of view of an individual lawyer, what follows from the social duty to ensure legal representation? There are at least three possibilities: First, this social duty could generate an individual duty for every lawyer to accept (as far as possible) all cases. This is contrary to the principle of professional freedom as usually stipulated in the codes of professional ethics and that I have initially assumed.

Second, imagine we understand the social duty to ensure legal representation only as a duty to ensure the representation of morally acceptable causes. This might create a (moral) reason to legally prohibit a lawyer from accepting clients with immoral purposes. Although it is not essential to my argument to exclude this alternative, I think there are reasons to consider such a prohibition excessive and counterproductive, at least in most circumstances. First, removing the right to accept some kinds of cases implies giving the state undue power to determine, prior to trial, the moral merits of the causes, which is in tension with the liberal spirit of the judiciary system. Second, the adversarial system itself and the right of defence would be affected when a cause is only apparently immoral, but in reality is not. Just as we allow people to advance their interests, even if they are immoral, we should allow lawyers to represent those interests. Note, however, once again, that this is entirely compatible with deeming the representation of those interests by a lawyer morally objectionable.

Third, the social duty to ensure legal representation could generate not just a right, but also a moral permission to accept any case (including immoral ones). I argue against this alternative in the next section.

6.

Why should not lawyers have the right *and* the moral permission to accept immoral causes? Why is it wrong to accept? In order to answer these questions we must first answer the same question posed before with respect to the client: what are the moral reasons that vie in favour of and against accepting. These reasons are certainly *prima facie*, i.e. defeasible in particular cases. As we shall see, we can always find situations in which these reasons are superseded by others. However, in most cases, there seems to be no moral reason to accept such cases. Instead, there are strong reasons against accepting.

The fundamental reason not to accept representation for a client with an immoral purpose is obvious: it is morally wrong to help someone do something wrong. As we have seen, the client has a right to pursue such a purpose in spite of not having moral permission to do so. If the client's actions are wrong, contributing specifically, and in full awareness, to the performance of such actions must also be (*prima facie*) wrong.

It must be remembered here that considerations related to the adversarial system or the right of defence are no longer relevant. These considerations are sufficient to support a *right* to accept, but they do not give a *reason*.[18] Neither do these considerations override moral reasons against accepting. Suppose I have the right to enter into any (legally permitted) association or club, but I have a moral reason not to enter association P (for instance, P is a racist club). Having a right to become a member of P does not override or diminish my reason against doing so.[19] Similarly, having a right to accept a client with a wrong purpose does not affect the moral reason I have for not accepting this client.

There are additional reasons against accepting representation for immoral causes. First, the resources devoted to representing an unjust cause might be assigned to other, valuable (or at least not unjust) ones. This is particularly important in countries where legal resources are far from being justly distributed. Second, in many cases, the representation of an unjust cause typically contributes to the success of other unjust or immoral causes, especially when the case is institutionally relevant (appeals to the Supreme Court, cases of public interest, etc.).

One might object that there are situations in which I have a moral reason to do *Y* and no moral reason against doing *Y*, but this does not imply that I should do *Y*. Applied to our case, one could argue that, despite having moral reasons for rejecting immoral cases and having no moral reason to accept them, it is not true that one has a duty to reject them. This possibility is plausible in the case of supererogatory actions. Let us assume that I have a moral reason for donating money to a worthy cause and have no moral reason against doing so. However, it does not follow that I am morally required to donate. This argument is plausible when the reasons in favour of doing *Y* are reasons of beneficence. This would happen in the case of donating money to help the poor (assuming that helping the poor is just a duty of beneficence). In contrast, the case of rejecting an immoral client is different. A potential client with an immoral purpose is typically one that intends to perform a kind of conduct that causes some harm to others or to society. The firm that wants to avoid paying due compensation and the corrupt politician who wants to escape punishment clearly harm others or society. In cases in which the reason for *Y* is to avoid evil, one can say that, if there are

prima facie reasons for doing *Y* and there is no *prima facie* reason against doing *Y*, I am required to do *Y*.

Obviously, in particular cases there may be reasons to accept representation for an immoral cause. There may be cases in which defending an unjust cause is necessary to preserve or support another important value. For example, such is the case of the lawyers who, in defence of freedom of expression, have defended members of the Ku Klux Klan.[20] Another possible case is that of accepting a client who is prepared to pay very high fees when the profits from this client are used defend other clients that could otherwise be left without adequate legal representation.[21]

These arguments are certainly worth considering in individual cases and can effectively shift the moral balance in favour of accepting certain objectionable clients. However, it should be noted that the mere fact that it is necessary to offer such justifications for the acceptance of representing an immoral cause reveals that, in principle, such acceptance is not justified. It is necessary to overcome the moral presumption against doing so.

7.

I would now like to consider several possible objections:

(1) An obvious objection might be that the lawyer *does* have a moral reason to accept a client, even if the client's purpose is immoral: the reason is to satisfy the potential client's right to legal representation. If the client has the right to defend her interest with the help of a lawyer, to the point that the state will guarantee (to a greater or lesser extent) that she is provided legal assistance, then it sounds strange to claim that a lawyer does not have moral permission (and not just a right) to accept. In other words, it sounds implausible to claim that it is wrong to do something that is necessary to meet a right of another person.

However, the question is more complex and requires us to return once more to the justification of the client's right to defend unjust interests within the law. This right, as we have seen, is based on some essential features of our adjudication system: the adversarial principle and the right of defence. This system, we have assumed, is justified on the basis of epistemic and moral imperfections occurring in the real world. The right that emerges from this adjudication system is the right to defend one's interests within the system. The positive right, correlated to the duty to ensure legal service, is subsidiary; it emerges only when, for some reason (financial or otherwise), that right is in danger. From the standpoint of a professional lawyer, the fact that, ultimately, the potential client has a positive right to legal services, gives him no moral reason to accept the case. Note that we have assumed the lawyer's freedom to refuse clients. This is because there is, in principle, no moral reason to accept. The moral reason to accept only appears when the client is in danger of being left without representation. In this case, it is the state that, through different mechanisms, ensures that this does not happen. Therefore, the fact that the client has a right to defend an immoral interest does not imply a moral permission for the lawyer to accept the client, in so far as other lawyers are ready to exercise their right to accept, or the state (in some cases) is ready to fulfil its obligation by imposing a lawyer's appointment to the case.

Note that, when the state fulfils this obligation, it does so following moral reasons that are different from those of a particular lawyer. The state (at least ideally) aims, first, to

ensure that the adjudication system works without exception, for all cases. Second, it seeks to avoid inequalities in the satisfaction of the right to defend an interest. This is why an officially appointed lawyer is obligated to pursue the case with the same zeal as a professional one. In contrast, the professional lawyer is not acting on such grounds. He is not responsible for the proper functioning of the system, or for equality among citizens (if he were, I insist, he would have an obligation to accept every case). Therefore, the client's right to advance an unjust interest does not generate any moral reason *for the lawyer* to ensure that such a right is properly satisfied.

(2) Another objection to my argument is that it is not morally universalisable. If all lawyers accept my point of view (not to accept clients with immoral purposes), some clients could be left without adequate representation, which violates the right of defence and undermines the adversarial system. However, this is not so. In the case of criminal law and family law, this risk does not exist, since there is an effective guarantee by the state to provide legal service. In other areas of civil law, the risk that a potential client will not easily find a lawyer willing to accept to advance an immoral purpose is not necessarily endangering the right of defence or the adversarial system, except in extreme cases in which it is not possible to find a lawyer willing to accept. However, these cases are very unlikely. In such unlikely cases, the state should ensure the satisfaction of the right to representation.[22] In the vast majority of cases, there is not the slightest risk of affecting the right to appropriate representation, because there are other lawyers willing to exercise their right to accept such cases.[23]

(3) Assume that the position I advocate is internalised by lawyers and, therefore, the defence of certain types of clients or causes is widely considered immoral (despite there being a *right* to accept them). This seems to ground moral blame from the rest of lawyers and from society in general toward the lawyers who accept such cases. One might think that this is dangerous. Persons falsely accused of belonging to that class of potential clients could not obtain adequate defence, and lawyers willing to accept them would unjustly be the target of social condemnation. A seemingly corrupt politician might be innocent (or he might claim no more than his right to a just sentence). A seemingly polluting firm might in fact be acting according to environmental regulations. If defending corrupt politicians or polluting firms receives social condemnation, these innocent people could not access (or would have difficulty in accessing) a good defence and the (few) lawyers willing to accept would be unfairly vilified.

This is certainly a strong objection. However, we should be very careful at this point. My thesis is that lawyers that represent a client with a morally objectionable purpose do something (*prima facie*) morally wrong and are therefore culpable. However, there is a (subtle) distinction between, on the one hand, one person being morally blameworthy and, on the other hand, other persons having authority (justification, legitimacy) to blame the person who has performed the wrong action. The fact that a person is blameworthy for performing a wrong action means that she deserves to be blamed, not that others are entitled to blame her.[24] There may be (moral) reasons that prevent this reproach. For example, others may not have the moral authority to criticise, or, perhaps, doing so may generate harm to others. In the case of accepting or rejecting clients for moral reasons, we should be very careful before launching reproaches at those who accept cases that appear to be morally objectionable. We should hear the reasons of the lawyer in favour of accepting the case.

In cases of uncertainty, we should suspend judgment. Note, however, that this is fully independent from, and compatible with, my main thesis: lawyers who help a client do something morally wrong are doing something morally wrong and are, in principle, blameworthy.

Furthermore, it should be noted that the risk of wrongful stigmatisation exists for *any* moral norm. For example, suppose that it is morally wrong to help people escape from prison. Surely, however, there are cases where this is justified. The person helping somebody to escape in one of these (few) cases is at risk of being criticised unfairly because his action belongs to a class of actions that are normally wrong (helping people escape from prison). However, this does not prevent us from saying that, *prima facie*, we should not help people escape from prison. Something similar happens with lawyering. My claim is that helping clients perform wrong actions is, *prima facie*, wrong. There may be cases in which doing so is not wrong, all things considered. Or there may be cases in which the purpose of the client seems to be wrong but is not. The existence of these kinds of cases together with the difficulty of distinguishing them from those in which helping the client is really wrong (all things considered) gives us reasons to be very careful before blaming or criticising lawyers. It also gives lawyers reasons to be very careful before accepting or rejecting a potential client. Still, we have to remember that the standard view is not sceptical about the existence of immoral causes or about our capacity to detect them. The standard view just rejects that such detectable immorality works as a reason for the lawyer to reject the client.[25]

(4) I have argued that the reason why it is wrong to accept a client with a questionable purpose is that it is normally wrong to help someone do something wrong. However, this could be questioned. One might think that there is a 'division of moral labour,' so that helping someone with a service that can be used for good or bad purposes does not necessarily makes the service wrong when that service is used to do something bad. For example, we might think that a knife-seller does nothing wrong when she sells a knife to someone who intends to use it to murder someone, even if the seller knows that this will be the use. She fulfils her function (selling knives) and is not acting objectionably by doing so. The lawyer also offers a service (her technical knowledge of the law) that can be used for good and for bad purposes. The fact that the client uses it for a wrong purpose does not make the lawyer's acceptance wrong.[26]

Note, however, that I did not say it is always wrong to aid in a wrongdoing. There may be cases where it is not. There may be cases in which, all things considered, it is proper for a lawyer to represent someone who wants to pursue an immoral purpose. My point is that there is a moral reason not to, such that it becomes, in principle, wrong. In this sense, I am prepared to argue that, if the seller knows that the knife she sells will be used to kill, she has a reason not to sell it (although she knows that the murderer may purchase the knife somewhere else and has a right to buy knives). Furthermore, the case of the knife-seller might not be sufficiently analogous to the case of the lawyer. The knife is an object that can be used for a good purpose (cutting food) and a bad purpose (killing people). The lawyer who advises a client for a particular purpose is not giving the client something he can use for *any* purpose whatsoever; the advice is intended precisely for that (immoral) purpose. A case more similar to the lawyer's case is that of a publisher who publishes a book defending Nazism. In this case, it is arguable that the publisher has the right to publish such a book (and the author to write and publish it); however, it is deeply objectionable. The rights of the Nazi author to write the book and of the publisher

to publish the book are justified by the principle of freedom of expression. However, this right does not mean that both the author and the publisher are not morally blameworthy for publishing horrendous ideas.

(5) Finally, my position seems to assume that it is possible to determine objectively what is a just or unjust cause, and that lawyers have access to that knowledge. They would therefore constitute a sort of moral tribunal, which would establish what causes are worthy of being defended and which are not. At least two problems are worth mentioning. First, even if we assume that there are morally wrong causes, why should we assume that lawyers are able to know which causes are morally wrong? Second, my position might be considered undemocratic, since the lawyer would replace the authority of the (democratic) legislature, who has already established what clients (and lawyers) are (or are not) allowed to do.[27]

Concerning the epistemic problem, I think it is a serious one. However, it is unfortunately a problem that embraces every aspect of our moral life: we are not always epistemically reliable moral agents. We often make moral mistakes. Is this a reason to suspend judgment in all our moral choices? I think it is not. It is plausibly a reason to be careful in our moral choices. In moral philosophy, there is controversy regarding whether the actions of an agent performed in moral ignorance (or as a mistake) are excusable, justified, or neither. I will not enter into this discussion. A lawyer that accepts a client sincerely believing that the client's purpose is morally acceptable, when it objectively is not, is committing a moral mistake. Depending on the details she might be excused or even justified. This is, I insist, a general feature of moral decision-making.

The objection about the lack of democratic credentials of lawyers arises from a misunderstanding, in my view. Throughout my argument, I assumed the right of potential clients to defend any cause (within the law). I have also defended the right of lawyers to accept any cause (within the law). I have even conceded that this right is not only a legal or disciplinary right, but also a moral right, i.e. a moral constraint prohibiting others to prevent (or attempt to interfere with) the lawyer from accepting this type of case. I have accepted all this because it is necessary to uphold the values of the adversarial system and of the right of defence. I have tried, however, to show that these values are independent of whether the purpose of a potential client is moral or immoral, right or wrong, praiseworthy or reprehensible; in fact, they are compatible with that purpose's being immoral, wrong or objectionable. Similarly, the right of the lawyer to represent clients with immoral purposes is independent of whether the conduct of representing those clients is right or wrong, praiseworthy or reprehensible, and such a right is consistent with its being wrong and reprehensible. From this point of view, helping someone do something objectionable, unless there is some consideration to the contrary, is objectionable. Unless the adversarial system or the right of defence is in danger, considerations based upon these are insufficient to override this claim.[28] If someone wants to deceive another and needs our help, we do not become paternalistic and undemocratic if we refuse to render such assistance. We just do not allow ourselves to be used for an immoral purpose. From this point of view, the situation of the lawyer is the same: that of someone needed to do something morally objectionable. If your doing something is (in principle) objectionable outside the legal profession, there is no reason to think doing so is unobjectionable within it.[29]

8. Conclusion

The upshot of my argument is that even if there is a moral right to accept representation for unjust causes, it is, in principle, morally objectionable to do so. I now conclude by making some considerations about the scope of this thesis.

First, the duty not to accept representation for unjust causes is *prima facie*. As we have seen, there may be reasons to override this duty. There may be cases where it is necessary to accept, for example, in order to preserve a higher value. Second, the inappropriateness of a behaviour is a matter of degree: there are behaviours that are more and less incorrect. There is a grey area of borderline cases in which it is unclear whether the behaviour is really wrong or not.

One might think that these considerations concerning the balance of reasons undermine the fundamental idea that it is wrong to defend unjust causes. They show, indeed, that moral decisions are complex. However, we should not be so tempted by these considerations. It is easy (and human) to rationalise in order to legitimise our decisions to ourselves and to others. If my argument is plausible, it should help avoid this kind of rationalisation by helping us to understand more clearly why, when a client intends to do something that is clearly wrong or immoral, the lawyer who assists this purpose also does something that, *prima facie*, is morally wrong or immoral, although he has a morally justified right to do so. Invoking, as is often done, the right of defence or the adversarial system is not enough to immunise the lawyer against moral criticism.[30]

Eduardo Rivera-López, Universidad Torcuato Di Tella, School of Law/CONICET, Av. Figueroa Alcorta 7350 (1428), Ciudad de Buenos Aires, Argentina. erivera@utdt.edu

NOTES

1 This is the so-called 'cab-rank rule' (see rule 601–607 of the *Code of Conduct of the Bar of England and Wales*).
2 See W. Bradley Wendel, 'Institutional and individual justification in legal ethics: The problem of client selection', *Hofstra Law Review* 34 (2005–2006): 987–1042, at pp. 993–1000.
3 In the case of the US, see rule 6.2. of the *Model Rules* (1983) for the regulation of accepting or rejecting appointments by a tribunal, and 1.16 for rules concerning withdrawal. The *Model Code* of 1969 (which is still adopted in many jurisdictions) does include professional freedom explicitly (EC 2–26). See also art. 3.1.4 of the *Code of Conduct for Lawyers in the European Union*.
4 See D. Markovitz, *A Modern Legal Ethics. Adversary Advocacy in a Democratic Age* (Princeton, NJ: Princeton University Press, 2008). Markovitz describes the current adversary system along the same lines: professional lawyers are free to select clients, appointed lawyers cannot freely reject an appointment, and both professional and appointed lawyers cannot freely withdraw from an ongoing representation (see pp. 66–77).
5 I thank an anonymous reviewer for stressing the importance of this assumption.
6 See for example rule 1.2 (d) of the ABA *Model Rules*.
7 Note that I say 'at least in some cases.' There can be cases in which this might not be true (for example, when background social institutions are radically unjust or inegalitarian).
8 For an example of an unjust procedural resource in the case of rape, see R. Wasserstrom, 'Lawyers as professionals: Some moral issues' in D. Luban (ed.) *The Ethics of Lawyers* (New York: New York University Press, 1994), pp. 6–7.
9 I return to this objection in Section 7 (5) from a different perspective.
10 For a critical exposition of the traditional view, see D. Luban, 'The adversary system excuse' in D. Luban (ed.) *The Ethics of Lawyers* (New York: New York University Press, 1994), pp. 140–143, and A. Ayers, 'The lawyer's perspective: The gap between individual decisions and collective consequences in legal ethics', *The Journal of the Legal Profession* 36 (2011): 77–137, at pp. 90–91. The traditional or standard view contains

three related principles: partisanship, neutrality, and non-accountability (see Ayers op. cit., pp. 90–91). The principle of partisanship requires lawyers to defend their clients zealously. The principle of neutrality requires lawyers to exclude their own moral views from their professional activity. Finally, according to the principle of non-accountability, lawyers are not responsible for the moral quality of their causes. These principles are general principles that apply to the lawyer's activity across the board, including, of course, client selection. I agree with Ayers (op. cit.) that the best interpretation of the standard view is in terms of practical reasons for action. These principles (especially the two first ones) should be seen as offering reasons for practical decisions by lawyers.

11 This point has been lucidly made by David Luban (op. cit., p. 143).

12 A public defender is a lawyer directly appointed by the state to represent people without resources.

13 With regard to this possibility, I follow, with some differences, Jeremy Waldron in his article 'The right to do wrong', *Ethics* 92,1 (1981): 21–39. For a more conceptual argument about the logical possibility of having a right to do wrong, see David Enoch, 'A right to violate one's duty', *Law and Philosophy* 21,4/5 (2002): 355–384. It is important that such a right (to do wrong) should always be understood as a moral right. From the legal point of view, I accept the idea that having a (legal) right to do *X* implies a (legal) permission to do *X*.

14 I owe this last point to Marcelo Ferrante.

15 For a discussion on the merits of adversarial system, which includes the presentation of the most common arguments, see Luban op. cit.

16 At best she has what Jonathan Dancy has called an 'enabling reason', but not a 'favouring reason' (a reason in favour of). See J. Dancy, *Ethics Without Principles* (Oxford: Oxford University Press, 2004), pp. 38 ff.

17 Waldron op. cit., pp. 27–28.

18 Unless the client's right to counsel is not satisfied. Note that, in this case, in addition to a moral permission to accept, the lawyer would have a *duty* to accept. I come back to this point in the next section (objection (1)).

19 Similar examples can be found in Waldron op. cit., p. 21.

20 The case is cited for the same purpose in Roberto Gargarella, '¿A quién sirve el derecho? La ética profesional del abogado en una sociedad desigual', *Jurisprudencia Argentina* III,5 (2009): 1347–1353, at p. 1352.

21 I do not defend this consequentialist argument. I just say it is a possible (and not clearly unreasonable) argument.

22 In any case, I am prepared to concede that, if no other lawyer accepts a client and the state also fails to provide him with legal assistance, there is (not only a moral permission but also) a moral obligation to accept the case.

23 In a similar vein, see Ayers op. cit., p. 106.

24 On this distinction, see A. Smith, 'On being responsible and holding responsible', *The Journal of Ethics* 11 (2007): 465–484, p. 469, and T. Scanlon, *Moral Dimensions* (Cambridge, MA: Harvard University Press, 2008), pp. 166–179.

25 This objection is closely related to a similar one about the limited epistemic capacities of lawyers to know that a cause is immoral. I address this objection in point (5).

26 In slightly different versions, I owe this criticism to Carlos Véliz y Marcelo Alegre.

27 An objection of this kind can be found in Monroe Freedman, 'Personal responsibility in a professional system' in D. Luban (ed.) *The Ethics of Lawyers* (New York: New York University Press, 1994), p. 85.

28 It may well be true that cases in which the adjudication system (either the adversarial rule or the right of defence) is in danger are vastly more probable in criminal law. In that sense, I accept that my thesis can be less relevant in these kinds of cases. It may be true that the cases in which it would be, all things considered, wrong to accept a client in this area are exceptional. Note, first, that the vast majority of lawyers work outside criminal law (contracts, torts, corporate law, etc.). Second, even in criminal law, there may be cases in which the *prima facie* reason not to accept a client is not debunked by other reasons.

29 A different way to face this objection is that of Duncan Kennedy, who also argues that we should not accept unjust causes. However, he claims that each lawyer should reject those causes she considers unjust or immoral. See Duncan Kennedy, 'The responsibility of the lawyers for the justice of their causes', *Texas Tech Law Review* 18 (1986): 1157–1163, p. 1162. I, instead, assume that there is some agreement about the moral quality of certain behaviours.

30 I thank Yuval Abrams, Marcelo Alegre, Marcelo Ferrante, Roberto Gargarella, Guillermo Orce, Carlos Véliz, and two anonymous reviewers for their helpful comments and criticisms.