Defending the Guilty: A Moral Justification

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ABSTRACT. There are certain acts necessary to exercise the legal profession within an adversary system that are usually morally condemned by public opinion. If the lawyer knows that his or her client is guilty and is aware, therefore, that he or she deserves punishment, defending him or her appears to imply some sort of deceit or interference in the attainment of a just result. The hypothesis defended in the present paper is that the strategies that are usually adopted to rebut public condemnation have not been successful on account of the moral costs involved in assuming each of them. Strategies based on 'role morality' are not an exception. The purpose of this paper is to offer a rebuttal of the condemnation argument that does not entail any moral cost. This novel counterargument is based on the prospective conception of obligation developed by Michael Zimmerman.

KEYWORDS. Legal ethics, defence lawyer, right of defence

I. INTRODUCTION

Few professions have acquired qualifications as extreme and diverse as that of lawyers. The lawyer has been likened to both the Devil and to God. The former analogy has been profusely explored in literature, with Stephen Vincent Benét's *The Devil and Daniel Webster* being the paradigmatic case. The dialogue between Webster and the devil – personified by Scratch – is revealing: "[…] WEBSTER: You seem to have an excellent acquaintance with the law, Sir. SCRATCH: Sir, that is no fault of mine. Where I come from, we have always gotten the pick of the bar […]" (Benét 1939, 25).[1] An example of the latter is found in the gospel of John where the third person of the Trinity is referred to as the *paraclete*, a Greek word equivalent to the Latin *advocates*, which means lawyer.[2]

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Although the situation may seem paradoxical, such an appearance vanishes when the different reasons underlying the different analogies are identified. Each analogy refers to different aspects of the lawyer's professional activity. The analogy with God rests on the zealous advocacy lawyers must exhibit for their client's interests; God is someone who is on our side as unconditionally as lawyers are on the side of their clients; God is not a judge, but a party to the process.[3] The analogy with the devil rests on the type of acts that appear necessary to exercise the legal profession within an adversary system when the client is guilty. If the lawyer knows that his or her client is guilty and is aware, therefore, that he or she deserves punishment, defending them would appear to imply some sort of deceit or interference in the attainment of a just result. The lawyer who, in knowing of his or her client's guilt, attempts to avoid punishment, as with the devil, would appear to be acting in direct opposition to justice.

A peculiar aspect of the condemnation of 'devil's advocates' is its asymmetric nature. Those who condemn their professional performance do not do so because they deem the adversary system that makes lawyers zealous advocates on behalf of their clients' interests morally unjustified. They do not question the guilty party's right to be defended by a zealous lawyer, nor do they question the fact that the latter is bound to confidentiality with regard to his or her client. They likewise do not call into question the standards of proof used in the legal process.[4] Even though the fact that the guilty may remain unpunished seems to them morally wrong, no one considers that the State is to blame for failing to convict the guilty due to lack of incriminating evidence. Nevertheless, despite their willingness to waive any criticism of the adversary system, standards of proof and the State, the same is not forthcoming with regard to the 'devil's advocate'. The lawyer who attempts to avoid the punishment of someone who is known to be guilty is deemed morally blameworthy. It is this kind of asymmetric condemnation that will be the focus of the present contribution.[5]

Popular condemnation is applied paradigmatically to the lawyer who, being aware of his or her client's guilt, still argues in support of their innocence, questioning the validity and strength of the evidence. This is the case, for example, of the lawyer who – with knowledge that the witnesses incriminating his or her client are telling the truth (since he or she is aware of his or her client's guilt) – uses all legal means available to undermine the witness's credibility. Popular opinion condemns this lawyer for manipulating the legal system in order to produce an injustice and considers such lawyers to be morally blameworthy. Since even the soundest legal system can be manipulated to produce unjust results, it is possible to condemn the manipulating lawyer and at the same time to claim that there is nothing morally blameworthy about the system itself. The full moral burden falls on the lawyer.

Popular condemnation of 'devil's advocates' has become a serious problem for the legal profession due to two interrelated circumstances. Firstly, the condemnation is not restricted to a particular time or type of legal culture.[6] Examples of condemned lawyers are to be found in different times and places. Secondly, the fact that this condemnation is so widespread indicates that there is a plausible argument in its favour. Proof of its plausibility is the failure of the most ordinary strategies to counter it.

The purpose of this contribution is to offer a new rebuttal of the argument that serves as the basis of the condemnation levelled at 'devil's advocates'. In Section II, I shall reconstruct the argument I intend to call into question, making its premises plain. In Section III, I shall show why the strategies normally used to refute it have failed. I shall set forth three failed strategies ordinarily used by 'devil's advocates' who hold out against viewing themselves as immoral persons in order to escape condemnation.[7] My hypothesis is that the strategies have not been successful on account of the moral costs involved in assuming each of them. It is of special interest here to demonstrate that strategies that appeal to 'role morality' – according to which "[w]here the attorney-client relation exists, it is often appropriate and many times even obligatory for the attorney to do

things that, all other things being equal, an ordinary person need not and should not do" (Wasserstrom 1975, 5) – are equally costly in moral terms. Lastly, in Section IV, I shall offer a new strategy to defend the 'devil's advocates', one whose acceptance involves no moral cost whatsoever.

II. A Reconstruction of the Condemning Argument

The popular condemnation of 'devil's advocates' rests on several premises that are not always made evident. The first is a political premise. The legitimate State not only has the right to coerce[8], but in certain circumstances it is duty-bound to coerce. The State has a moral duty to punish the guilty and not to punish the innocent.

Two reasons ground this normative premise. The first makes reference to the best course of action the State can adopt when administering punishment. If the substantive norm imposing the punishment is just, the best course of action is to convict all the guilty parties and to absolve all those who are innocent. This course of action is morally superior to those in which the State convicts only those who are guilty, but not all of them – for instance, only those who belong to a certain social class – or condemns neither innocent nor guilty individuals.

The second reason is given by the objectivist conception of moral obligation, according to which "An agent ought to perform an act if and only if it is the best option that he (or she) has" (Zimmerman 2008, 2). Consequently, an agent has performed a morally correct act if no other better course of action exists. It is morally wrong for an agent to perform an act if a better alternative course of action exists. In administering punishment, the State is morally duty-bound to adopt the best course: to impose it upon all and every one of the guilty individuals and not ever to impose it upon an innocent individual.[9]

The second premise states that it is morally wrong to contribute deliberately to another's not satisfying his or her moral obligation. A hypothetical case can help to show the plausibility of this premise. Let us

imagine that a person decides to consult another as to what his or her moral obligations are. The advisor, knowing what his or her obligations are, decides to lie and advise erroneously. As a result, the one asking for advice opts for the morally wrong course of action. If the only duty the advisor has transgressed is that of veracity, the case would be similar to someone falsely advising him or her on the best holiday destination. In both cases, the same duty is being violated. Nevertheless, I think we all find the moral advisor's conduct more blameworthy. The reason for this is that anyone falsely advising on moral matters is not only doing something morally wrong – lying – but is additionally contributing to causing another person to do something immoral. The deceptive moral advisor has transgressed two moral duties, that of veracity and that of deliberately failing to contribute to others' satisfying their moral obligations. This duty is simply to not deliberately contribute to another's doing wrong. Those who condemn "devil's advocates' accept the existence of this duty.[10]

Unlike the first and second premises of the argument, the third and fourth are factual. The former states that the lawyer knows that his or her client is guilty. The lawyer believes his or her client to be guilty, and does so based on good reasons, for instance, because his or her client has confessed it; and the client is in fact guilty. The latter premise accounts simply for the fact that the lawyer, even if he or she is aware of the client's guilt, has defended him or her in the attempt to secure his or her acquittal by calling into questions the validity and strength of the evidence.

These four premises lead to the conclusion of the asymmetric popular condemnation of 'devil's advocates'. Firstly, the lawyer has acted immorally because he or she has deliberately contributed – successfully or not – to the State failing to satisfy its moral obligation to punish the guilty. Secondly, the moral criticism does not fall on the substantive norm – which is considered just – or on the adversary system – which includes the right to defend one's self, the duty of confidentiality or the standards of proof. Substantive and procedural norms are deemed morally

correct. Nor does it fall upon the State, even although it might have left the guilty unpunished, thus failing to fulfil its moral obligation. Even although the State, as with the lawyer, has not fulfilled its moral obligation, their situations are not symmetrical.

The asymmetry is explained by the fact that the State has an excuse for having done something wrong, while the same excuse is not available to 'devil's advocates'. The State that does not punish the guilty can allege ignorance in order to avoid moral blame for not having fulfilled its obligation to punish. Additionally, it can claim that this is not reckless ignorance since the standards of proof and procedural norms are – hypothetically – appropriate. It is the procedure that enables the State to approach the truth with a greater degree of likelihood, while respecting the defendant's dignity. That is, it is the best procedure – measured in terms of likelihood – that a legitimate State, endowed with the authority to exercise coercion – measured in normative terms – can count on. The lawyer who secured acquittal for a client known to be guilty did not fulfil his or her moral obligation – that of not contributing deliberately to the State's failing to punish the guilty – but, unlike the State, cannot allege ignorance as an excuse.[11]

III. Three Strategies to Escape the Moral Condemnation of 'Devil's Advocates'

Given that the argument justifying the moral condemnation of the lawyer is formally correct, only two paths are open in order to avoid this conclusion: questioning the truth of one of its premises or providing moral reasons that defeat the condemning judgment present in the conclusion.

The first defensive strategy ordinarily used by 'devil's advocates' takes the first path. It questions, in the particular case, the truth of the first normative premise. It attempts to show the unjust nature of the substantive norm that establishes the punishment, or of the legal system of which it is a part. This strategy recognizes that the lawyer seeks to

avoid the result prescribed by the substantive norm, but calls into question its justice. The lawyer knows that the client is guilty of having transgressed a norm, but the norm itself is unjust and it is therefore morally correct to prevent the punishment it prescribes from becoming effective. Since in the particular case the substantive norm is unjust, the State is not morally allowed – let alone morally duty-bound – to convict those who violate it.

Barbara Allen Babcock calls this reason for defending a guilty party "the political activist's reason." In expounding upon this point, she highlights: "Most people who commit crimes are themselves the victims of horrible injustice. This is true generally because most of those accused of rape, robbery, and murder are oppressed minorities. It is often also true in the immediate case, because the accused has been battered and mistreated in the process of arrest and investigation. Moreover, what will happen to the person accused of serious crime if he is imprisoned is, in many instances, worse than anything he has done. Helping to prevent the imprisonment of the poor, the outcast, and minorities in shameful conditions is good work" (1984, 6).

The problem with this strategy is that adopting it entails certain moral costs for the lawyer. Specifically, he or she must view him or herself as a kind of infiltrator within an immoral legal system, attempting to change it from within, much like a covert political activist.

The second ordinarily used strategy concedes the truth of the normative premises but questions the truth of the first empirical premise. To be precise, it calls into question the lawyer's capability to actually know of the client's guilt before due legal process has been conducted and a sentence has been given. Some formulate this challenge based on epistemic considerations. The facts debated in the legal process are complex and the only mechanism for accessing them is the legal process itself. Others claim that the judgment of guilt does not refer to mere facts. It is a legal conclusion, which is true only so long as it has been reached in the framework of the legal process.[12]

Adopting this strategy also involves assuming certain costs. If, on the one hand, lawyers claim that they cannot know of the client's guilt based on epistemic reasons, they must assume that the legal process possesses a kind of infallibility when it comes to identifying the guilty and that they suffer a kind of epistemic incapability, which appears to be at odds with common sense. If, on the other hand, they do so because they claim that the judgment of guilt does not refer merely to facts, then they must adopt a concept of 'procedural truth'[13] different from 'truth', which appears equally at odds with common sense.[14]

The costs involved in adopting the strategies above account for why 'devil's advocates' generally prefer a third alternative. Unlike the other two, this strategy does not call into question the premises of the condemning argument in order to then invalidate its conclusion. The condemning conclusion is not invalidated, rather the moral condemnation is offset by weightier 'role morality' considerations. Those who use this strategy recognize the just nature of the substantive norm that the lawyer helps to evade. They also recognize that the lawyer may know of the client's guilt and accept that the act of seeking to secure the acquittal of someone who is known to be guilty is, in principle, morally wrong. However, this act, which is in principle morally wrong, is justified by the long-term beneficial effects it produces.

The values embodied by the adversary system – which guarantees that even the guilty are entitled to a zealous defence – are promoted by the (in principle) morally wrong act of seeking to avoid the conviction of a guilty party who deserves it.[15] The 'devil's advocate's' act may infringe on certain values – specifically contributing to bringing about an injustice – but this same act promotes or honours other higher values – namely, those embodied by the adversary system.[16] Among the most important advantages that are commonly adjudicated to the adversarial system is the fact that permits a morally acceptable distribution of false positives – condemned innocent individuals – and false negatives – acquitted guilty individuals. This is achieved by requiring the State to

try a case with strong evidence and by compelling the lawyer to carry out the role of a zealous defender.[17]

This strategy, which appeals to a 'role morality', also involves costs.[18] On the argument that the lawyer's immoral conduct should promote or honour moral values in a more remote sense, William H. Simon points out:

> […] demands of the lawyer an exacting moral ascetism. Her immediate experience implicates her in violations of the values to which she is most fundamentally committed; the redeeming beneficial effects occur somewhere outside of her working life, perhaps invisible. So in a way most readily associated with religious norms, the lawyering role demands a deferral of the ethical gratification of experiencing the good to which one's right conduct contributes (1998, 2).

The 'devil's advocate' perceives him or herself as one who must stoically bear the immoral component of his or her profession for the sake of promoting a greater moral value. In reference to this experience, Pen Brafman, a famous New York 'devil's advocate', confessed in an interview to Jan Hoffman: "Perhaps 100 people have told me, 'Maybe my family would be better off if I drop dead.' You have to hold yourself back from saying, 'You may be right.' I go home and say, 'It's been one of those days, so everyone leave me alone for a few minutes'" (Hoffman 2004).

It also requires the lawyer to suspend or at least dismiss his or her moral judgments when it comes to exercising his or her profession. Although his or her moral sensibilities may indicate to him or her that the act of securing acquittal for individuals whom he or she knows to deserve conviction is morally wrong, there are long-term beneficial consequences, imperceptible to him or her, that justify it. This causes a kind of moral fracture between his or her professional life – in which he or she must not heed his or her moral judgment – and his or her personal life – in which his or her own moral judgment must be in full force. Brafman himself added in another interview in which he was asked

about his defence of mobsters: "And even if they are mobsters, so what? 'If a person like me begins to pass moral judgment,' he says, 'you shouldn't be in this business'" (Gordon 1984).[19]

These three strategies are unsatisfactory for the same reason: their use brings unacceptable costs as a result. This is so because they either call into question highly plausible premises of the condemning argument (the justice of substantive norms, the possibility of knowing about guilt), or they concede that the conduct of 'devil's advocates' is immoral *prima facie*, even although this immorality is defeated by far-reaching moral benefits. If one seeks to defend defence lawyers, a new strategy must be used.

IV. A New Defensive Strategy

The strategy that I shall propose exhibits similarities and differences with those analyzed above. As is the case with the first faulty strategy, it calls into question the first normative premise. Nevertheless, unlike said strategy, it does not dispute the fairness of the substantive norm. What it questions is the objectivist conception of the obligation upon which the premise rests. That is to say, although it does not question the just nature of the substantive norm and agrees that the best course of action the State can adopt is to condemn only the guilty, it calls into question the conception of obligation that claims that an act is morally obligatory for an agent only if it is effectively the best course of action. What is wrong in the condemning argument would be the objectivist conception of obligation it assumes.

The fact that this new strategy calls into question the objectivist conception of obligation also makes it different from the strategy that appeals to 'role morality'. Like this faulty strategy, it maintains that the 'devil's advocate' fulfils a morally valuable function. Nevertheless, it does not maintain that the lawyer carries out actions that would be incorrect if it were not for the role that he or she fills. A 'role duty' or a 'special duty' does not exist that legitimizes acts that would otherwise be morally

incorrect. When carrying out his or her duties, the 'devil's advocate' fulfils the general duty of helping the other, in this case the State, satisfy its moral obligations.

Michael Zimmerman has waged a powerful attack on the objectivist conception of obligation, and has argued in favour of a prospective conception. An example used by Zimmerman may help us to understand the objectivist conception of obligation. Let us imagine that a physician – Jill – has a patient – John – who suffers from a skin disease. Jill has the option of treating John with three drugs: A, B and C. Jill also has certain evidence of the results each of the drugs will produce: "All the evidence at Jill's disposal indicates (in keeping with the facts) that giving John drug B would cure him partially and giving him no medication at all would render him permanently incurable, but it also indicates (in contrast to the facts) that giving him drug C would cure him completely and giving him drug A would kill him" (Zimmerman 2008, 17). In fact, contrary to the available evidence, giving him drug C will kill him and giving him drug A will cure him completely.

Faced with the case, those who defend the objective conception of obligation indicate that, if the physician, based on the evidence, gives him drug C – causing him to die – she has not fulfilled her moral obligation, since the best course of action – contrary to what the evidence suggested – was to administer drug A. Nevertheless, her ignorance makes her transgression not morally blameworthy. This manner of interpreting the case allows objectivists to accommodate the moral intuition that the physician cannot be blamed without having to conclude that there is nothing to blame her for because there is no obligation she has transgressed. She has not fulfilled her moral obligation – since she did not adopt the best course of action – but there is no blame because her ignorance acts as a moral excuse.

This reasoning is what provides support to the asymmetric nature of popular condemnation that, on the one hand, does not blame the State for not convicting the guilty due to lack of evidence but, on the

other hand, morally blames the lawyer who, aware of his or her client's guilt, seeks his or her absolution by questioning the validity and strength of the evidence. The fact that the condemning argument uses the objective conception of obligation allows it to conclude that although the State has transgressed its moral obligation to convict the guilty, it cannot be blamed for such a failure because it has been produced by the insufficiency of incriminating evidence available to it. The lawyer on the other hand, who knows of his or her client's guilt, cannot claim ignorance as an excuse for moral blameworthiness. The lawyer knew that the State was duty-bound to punish his or her client, knew that his or her client was guilty, and even so sought his or her client's acquittal by taking advantage of the system's imperfection.

The key to the objectivist response to such cases is the distinction between the wrongness of the act and the blameworthiness of the agent performing it on the one hand, and the thesis that uncertainty or defective evidence excuses the agent's responsibility but does not have any influence in determining what the correct act is on the other. What is correct continues to be to choose the alternative whose results are actually the best.

However, if one alters Jill's case slightly, the objective conception response is no longer plausible. The case that serves to question the objective conception was devised by Frank Jackson (1991, 462-463).[20] It involves a case similar to the one analyzed above in which the only change is the evidence available. Now, "[a]ll the evidence at Jill's disposal indicates (in keeping with the facts) that giving John drug B would cure him partially and giving him no drug would render him permanently incurable, but (despite the facts) it leaves completely open whether it is giving him drug A or giving him drug C that would cure him completely and whether it is giving him drug A or giving him drug C that would kill him" (Zimmerman 2008, 17-18).[21]

Our moral intuition in the face of the new case tells us that the physician has the moral obligation to administer drug B. Nevertheless, the

objectivist conception cannot accommodate this response. The distinction between wrongdoing and blameworthiness, and appealing to uncertainty as an excuse for moral blameworthiness, are of no use here. Jill cannot say – as she could in the previous case – that by giving John drug B she was trying to do what was best for him given the evidence available to her. The evidence indicates that giving him drug B would not produce the best result. The best result would come about if she gave him drug A or C. Administering drug B is the second best course of action. But if our intuition is that Jill is morally duty-bound to administer drug B, this shows that we do not consider that what is morally obligatory is to adopt the best course of action available to the agent. We do not consider the objective conception of obligation to be correct.

In place of the objective conception of obligation, Zimmerman proposes an alternative that can accommodate our intuitions in the case above. He points out: "[…] giving John drug B is what I will call prospectively best, in that it provides Jill with a better prospect of achieving what is of value in the situation (namely, the restoration of John's health)" (2008, 18-19). The concept of moral obligation that emerges from the case devised by Jackson is one which maintains that "[a]n agent ought to perform an act if and only if it is the prospectively best option that he has" (Zimmerman 2008, 19). The prospectively best option, in turn, is not equivalent to what is probably the best course of action. In Jackson's case, Jill knows with absolute certainty that giving him drug B is not the best course of action, but rather the second best, and even so she believes it is the best she can do. It is the best in a prospective sense.[22]

Zimmerman proposes understanding the prospectively best in terms of expected value. The expected value of an act is a function of the actual values that its possible outcomes have weighted by the probability of them occurring. Two refinements need to be introduced for the idea of expected value to serve to account for the prospective value. The first is that the probability in question is of an epistemic nature. It involves the

degree of certainty in relation to certain propositions that it is justified for an agent to have based on a certain body of evidence. In explaining epistemic probability, Zimmerman points out:

> If a proposition, p, is certain for someone, S (that is, if S is justified, epistemically, in having full confidence in p), then the probability of p for S is 1. If p is certain for S, then its negation, ~p, is certainly false for S; in this case, the probability of ~p for S is 0. If p and ~p are counterbalanced for S (that is, S is justified in having some confidence in each of p and ~p, but no more confidence in one than in the other), then the probability of each of p and ~p for S is 0.5.66 If S is justified in having greater confidence in p than in ~p, then the probability of p for S is greater than 0.5 and the probability of ~p for S is less than 0.5; in such a case, p may simply be said to be probable for S, and ~p improbable […] (2008, 36).

Following Zimmerman it is possible to formally reconstruct Jill's case using the idea of expected values based on epistemic probabilities. Given that there are four possible outcomes – complete healing, partial healing, incurability, and death – and that the best result is the first and the worst is the last, let us imagine that their actual values are 50, 40, 0, and –100 respectively. The alternative options or courses of action are four: administering drug A, B, C, or not administering any. The probability – based on the evidence at Jill's disposal – that each course of action should produce a certain outcome is: if she administers drug B there is complete certainty of partial healing (the probability of partial healing is 1); if she administers A there is an equal probability of complete healing or of death (the probability of complete healing is 0.5 and the probability of death is 0.5); identical probabilities apply to the option of administering drug C; finally, if she administers no drug at all there is complete certainty of permanent incurability (the probability of incurability is 1).

If we weight the actual value of the possible outcomes of a course of action with the probability of them occurring, we get the expected value of this course of action. Thus the expected value of each course of action is:

(i) Administering A = [(50 × 0.5) + (–100 × 0.5)] = –25
(ii) Administering C = [(50 × 0.5) + (–100 × 0.5)] = –25
(iii) Administering B = (40 × 1) = 40
(iv) Not administering any = (0 × 1) = 0[23]

Our moral intuition that it is a moral obligation to administer drug B to John shows that we do not consider that our moral obligation is to adopt the best course of action. Administering drug B is not the course of action with the greatest actual value. However, drug B maximizes a value, the expected value according to the evidence available to the agent, which serves to support the prospective conception. Our moral obligations are a function of the available evidence.

However, a second refinement must be introduced if the interpretation of what is prospectively best in terms of expected value is to accommodate our moral intuitions. The expected value is a function of the evidence available to the agent, not of the evidence's reliability. However, what is prospectively best is a function not only of the available evidence but – additionally – of its degree of reliability. What is prospectively best is a function of the expected value and the reliability of the evidence.

To illustrate the problem, Zimmerman proposes a variation of Jill's case. He suggests we imagine the following situation: "Jill has a choice between two drugs, A and B, for John. For each drug the probability for Jill of its curing John completely is 0. 7, and the probability of its being ineffective but harmless is 0. 3 […] Drug A has been widely researched; the data are plentiful. Drug B has hardly been researched at all; the data are very meager indeed" (2008, 55). In this case, Zimmerman concludes, our moral intuition is that Jill ought to give John drug A and that she ought not give him drug B, even although the expected value of each option is the same. What is prospectively best, therefore, is a function not just of the expected value based on the available evidence but also of the evidence's reliability.

In short, the moral obligation is to opt for the course of action that is prospectively best. What is prospectively best is that which has the

greatest expected value based on the evidence available to the agent and where the evidence is weighted according to its degree of reliability. What Jackson's case shows – which is captured by the prospective conception of obligation – is that an agent's degree of uncertainty, which depends on the magnitude and reliability of the available evidence, has a direct impact on what his or her moral obligations are. Uncertainty is not an excuse that eliminates moral blameworthiness for not having fulfilled the obligation to adopt the best course of action. Uncertainty eliminates the moral blameworthiness for not having adopted the best course of action – that which has the greatest actual value – because it makes adopting it not a moral obligation.

The claim that the prospective conception of obligation is superior to the objectivist conception entails deep consequences for the argument condemning the 'devil's advocate'. The reason for this lies in the fact that the objective conception of obligation fulfilled a two-fold function in the condemning argument. First, as we have pointed out, it justified the asymmetric character of the condemnation. Second, it is one of the reasons that justify the first normative premise, which claims that the State has the moral obligation to punish the guilty and only the guilty.

Once one is forced to abandon the objective conception, the whole argument is subverted. A hypothetical case can help to demonstrate the magnitude of the transformation. Let us imagine a legal case in which an individual – Paul – is accused of murder and the proof rendered at the trial is merely circumstantial. The individual is indeed guilty and has confessed it to his defence lawyer – Mary. However, he has asked Mary to seek his acquittal. To achieve Paul's acquittal, Mary has called into question the validity and strength of the evidence, searching for some contradiction in the testimony incriminating her client, questioning the reconstruction of the events proposed by the prosecution, showing that the evidence available might lead to the consideration that an individual other than her client might have committed the crime, and so on.

In the scenario described above, the State – represented by the judge – has two alternative courses of action: to convict the accused or to acquit him. Each of these courses of action has two possible outcomes: convicting the guilty or convicting the innocent; the acquittal of the guilty or the acquittal of the innocent. Let us assume that given the scarce evidence available to the judge, the probability that he or she will acquit the innocent is 0.9 and that he or she will absolve the guilty is 0.1, that of condemning the innocent is 0.9 and that of convicting the guilty is 0.1.[24] Let us suppose the actual values of each of the outcomes reflect the idea that the best possible result is to acquit the innocent and the worst is to convict the innocent. With this in mind, the actual values could be stipulated as follows: acquitting the innocent 100, convicting the guilty 80, acquitting the guilty –80, and convicting the innocent –100.[25]

If the objective conception were correct, then the State would have the obligation to convict, since it is the best course of action. However, since it is wrong, and given that the prospective conception appears as the most plausible, what the State must do depends not only on the actual value of each course of action, but on the epistemic probability of each one of their possible outcomes and the reliability of the evidence upon which it is founded. The State must follow the course of action that is prospectively best. The prospective value of each course of action for the case is the following:

(i) Convict = (0.1 prob. of guilt X 80) + (0.9 prob. of innocence X –100) = –82
(ii) Acquit = (0.1 prob. of guilt X –80) + (0.9 prob. of innocence X 100) = 82

What the State ought to do in this case is acquit, irrespective of whether the individual is indeed guilty. The first premise of the condemning argument must be corrected. The State's moral obligation is not to convict the guilty and acquit the innocent. Its moral obligation is to adopt the course of action – convict or acquit – that is prospectively best given the

actual value of convicting or acquitting the innocent or the guilty, given the epistemic probability that the accused is guilty or innocent measured on the basis of the evidence produced in the trial and available to the State, and its reliability.

But correcting the first normative premise allows us to conclude that the lawyer examining the evidence available to the State and putting its reliability to the test does not only not hamper the State's fulfilling its moral obligation, but has actually contributed to it fulfilling it. This continues to be so even if, according to the evidence available to the lawyer – and not available to the State –, the accused is guilty with an absolute degree of certainty. It is the State that possesses the authority to acquit or to punish, and therefore the body of evidence relevant to determining what it is obliged to do is that which is available to the State, not that which is available to the lawyer.

The lawyer who knows that her client is guilty, but believes that the evidence against her client is not conclusive – she believes it is possible to construct a case to call for her client's acquittal – and carries out her defence as aggressively as possible, calling into question each piece of evidence and attempting to undermine its reliability, has contributed to the State's fulfilling its moral obligation. According to the evidence available to the lawyer – given her client's confession – the accused is guilty. But given that the lawyer has the moral duty not to contribute to the State's not fulfilling its moral obligation, what is relevant is the body of evidence available to the State. If this evidence is scarce or unreliable, the lawyer who helps to reveal this has fulfilled her duty of not contributing to the State's not fulfilling its moral obligation. More so, she has actually contributed to the State's fulfilling its moral obligation.[26]

The asymmetry between the State that acquits the guilty and the lawyer who defends them, in the knowledge of their guilt, attempting to undermine the reliability of the evidence disappears. Those who consider that the substantive norm imposing the punishment, the procedural norms that regulate the adversary system and the standards of proof, and

the courts' way of proceeding are morally correct cannot claim that the acts of 'devil's advocates' are morally wrong. The lack of evidence – which the 'devil's advocate' seeks to reveal – does not act as an excuse that exempts the State from blame, but rather alters what the State is morally required to do. The State fulfils its moral obligation if it adopts the course of action that is prospectively best given the evidence available, even if this means leaving a guilty party unpunished. In subjecting the evidentiary material to rigorous scrutiny, 'devil's advocates' contribute to the State's reaching this objective.

A possible objection to the argument I have presented consists in claiming that in fact the lawyer contributes deliberately to the State not fulfilling its obligation by not placing the evidence she has at the State's disposal. If the lawyer knows of the existence of the evidence that accredits her client's guilt, not placing it at the State's disposal would mean she is contributing deliberately to its not fulfilling its moral obligation. Namely, if her client has confessed his guilt to the lawyer, and she does not disclose this information to the court, she would not be placing all the evidence she has at the State's disposal.[27]

A first possible response is to point out that if one accepts the moral justification of the duty of confidentiality, and claims that it is one of the conditions that must be satisfied for the State's power of coercion to be justifiably exercised, then the evidence that is available to the lawyer is not available to the State. In this case, the limits of the available evidence are not empirical but normative.[28] It involves the same kind of limits that exclude confessions obtained by means of torture or information obtained through violating the inviolability of private papers from the body of evidence available to the State.[29]

The second response consists in showing that the objection rests on an erroneous application of the prospective conception of obligation. The criticism accepts the prospective conception of obligation and claims to show that even if one adopts it, one must conclude that the 'devil's advocate' has transgressed her moral obligation. However, if one accepts

that what the State is obliged to do is sensitive to the evidence it does possess, it cannot be concluded that not placing evidence at its disposal contributes to its not fulfilling its obligation. Not placing evidence at its disposal determines what the content of its obligation is and, therefore, it cannot be claimed that it contributes to the State not fulfilling it. Either one accepts that the evidence available to the State influences what its obligations are, or one claims that not placing evidence at its disposal contributes to its not fulfilling its obligations. In order to support the claim that not placing the evidence at its disposal contributes to its not fulfilling its obligations, it must be claimed – contrary to what the prospective view claims – that its obligations are not sensitive to the evidence available to it.[30]

VI. Conclusion

The argument I have offered based on the prospective conception of obligation makes it possible to deconstruct the popular condemnation that weighs upon lawyers who defend those they know are guilty. Unlike the failed strategies I have analyzed, it does not question the justice of substantive norms, or the possibility that the lawyer knows of his or her client's guilt. Nor does it concede that the conduct of 'devil's advocates' is *prima facie* immoral and attempt to offset the immorality with long-term benefits.

Adopting the strategy I have offered does not entail paying inadmissible costs. It does not mean one has to acknowledge that the legal process is virtually infallible and that lawyers are utterly incapable of knowing certain facts. Nor does it mean one has to assume that the judgment of guilt does not refer merely to facts, but to a dark 'procedural truth'. Nor again does it mean one has to question the morality of the legal system itself, presenting the lawyer as an infiltrator intent on changing it from within. Nor does it require the lawyer to view him or herself as someone who must perform immoral acts with the aim of

promoting longer-term values, or require him or her to suspend or dismiss his or her moral judgments when exercising his or her profession.[31]

The argument I have offered makes it possible to reconcile lawyering – even in the extreme case of the lawyer defending an individual he or she knows is guilty – with the lawyer's role in enhancing justice. While popular condemnation tends to view those who defend someone they know is guilty as some kind of mercenaries who sell their argumentative skills to the highest bidder[32], I have attempted to show that such a judgment rests on an erroneous conception of moral obligation. Once this error has been dissipated, it is possible to see the activity of lawyers – even that of 'devil's advocates' – in its full moral dignity. Lawyers once more occupy the place traditionally ascribed to them, that of public servants who through their activity assist the State in fulfilling its moral obligation.[33]

Works Cited

Agustine of Hippo. 2004/416. "Homilies on the Gospel of John." In *The Nicene and Post-Nicene Fathers, First Series,* Vol. 7. Edited by Philip Schaff. Translated by John Gibb and James Innes, 7-45. Peabody, MA: Hendrickson.

ABA. 2002. *Model Rules of Professional Conduct.* http://www.americanbar. org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html [accessed March 15, 2013].

Anand, Rakesh K. 2009. "The Role of the Lawyer in Modern American Democracy." *Fordham Law Review* 77: 1611-1626.

Applbaum, Arthur Isak. 1999. *Ethics for Adversaries: The Morality of Roles in Public and Professional Life.* Princeton, NJ: Princeton University Press.

Babcock, Barbara Allen. 1984. "Defending the Guilty." *Stanford Lawyer* 18: 4-9.

Bell, David E. 1982. "Regret in decision making under uncertainty." *Operations Research* 30: 961-81.

Benét, Stephen Vincent. 1937. *The Devil and Daniel Webster.* Weston, VT: The Countryman; New York: Farrahar & Rinehart. Quoted in the 1999 edition, New York: Penguin.

Benét, Stephen Vincent. 1939. *The Devil and Daniel Webster.* New York: Dramatistis Play Service [Adapted as a booklet, New York: Farrahar & Rinehart, 1939].

Blackstone, William. 2007/1765-1769. *Comentaries on the Laws of England,*Vol IV. New Jersey: The Law Book Exchange.

Dickens, Charles. 1977/1852-1853. *Bleak House*. New York: Harper.

Edwards, Ward. 1955. "The Prediction of Decision Among Bets." *Journal of Experimental Psychology* 50: 201-214.

Fatauros, Cristian Augusto. 2011. "Derecho de Defensa, Inmoralidad e Injusticia." *Revista Via Iuris* 11: 79-87.

Ferrajoli, Luigi. 1995/1989. *Diritto e ragione. Teoria del garantismo penale,* quoted in the Spanish version *Derecho y Razón. Teoría del Garantismo Penal*. Translated by Perfecto Andrés Ibañez *et al*. Madrid: Trotta.

Fried, Charles. 1976. "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation." *The Yale Law Journal* 85: 1060-1089.

Gay, John. 1889/1738. *The Fables of John Gay*. Edited by William H. Kearley Wright. London: Frederik Warne.

Gilbert, Daniel T. and Patrick S. Malone. 1995. "The Correspondence Bias." *Psychological Bulletin* 117: 21-38.

Gordon, Meryl. 1998. "Little Big Man." *New York Magazine,* January 12 http://nymag.com/nymetro/news/crimelaw/features/1984/ [accessed March 12, 2013].

Handa, Jagdish. 1977. "Risk, Probabilities, and a New Theory of Cardinal Utility." *Journal of Political Economy* 85: 97-122.

Hoffman, Jan. 2004. "Public Lives; A Savvy, Scrappy New York Lawyer for Jackson." *The New York Times*, February 12. http://www.nytimes.com/2004/02/12 /nyregion/public-lives-a-savvy-scrappy-new-york-lawyer-for-jackson.html?src=pm [accessed March 3, 2013].

Jackson, Frank. 1991. "Decision-Theoretic Consequentialism and the Nearest and Dearest Objection." *Ethics* 101: 461-482.

Jones, Harry J. 2002. "Plea Deal 'Minutes Away' When Fody found." *The San Diego Union Tribune,* September 17. http://legacy.signonsandiego.com/news/metro/danielle/20020917-9999_1n17bargain.html [accessed March 10, 2013].

Jones, Eduard E. and Victor A. Harris. 1967. "The Attribution of Attitudes." *Journal of Experimental Social Psychology* 3: 1-24.

Kahneman, Daniel and Amos Tversky. 1979. "Prospect Theory: An Analysis of Decision Under Risk." *Econometrica* 47: 263-291.

Karmarkar, Uday S. 1978. "Subjectively Weighted Utility: A Descriptive Extension of the Expected Utility Model." *Organizational Behavior and Human Performance* 23: 61-72.

Kruse, Katherine R. 2005. "Lawyer, Justice and the Challenge of Moral Pluralism." *Minnesota Law Review* 90: 389-458.

Landenson, Robert. 1980. "In Defense of a Hobbesian Conception of the Law." *Philosophy and Public Affairs* 9: 134-159.

Lynch, John and Jerry L. Cohen. 1978. "The Use of Subjective Expected Utility Theory as an Aid to Understanding Variables that Influence Helping Behavior." *Journal of Personality and Social Psychology* 36: 1138-1151.

Lerman, Lisa G. and Philip G. Shrag. 2008. *Ethical Problems in the Practice of Law*. Austin, TX: Aspen.

Luban, David. 1986. "The Lysistratian Prerogative: A Response to Stephen Pepper." *American Bar Foundation Research Journal* 4: 637-649.

Luban, David. 2007. *Legal Ethics and Human Dignity*. Cambridge: Cambridge University Press.

Mellinkoff, David. 1973. *The Conscience of a Lawyer*. St. Paul, MN: West.

Pepper, Stephen L. 1986. "The Lawyer's Amoral Ethical Role: A Defense, a Problem and Some Possibilities." *American Bar Foundation Research Journal* 4: 613-635.

Petrara, Madeleine C. 1994. "Dangerous Identification: Confusing Lawyers with their Clients." *Journal of Legal Profession* 179: 205-206.

Pratt, John W., Howard Raiffa and Robert Schlaifer. 1964. "The Foundations of Decisions Under Uncertainty: An Elementary Exposition." *Journal of the American Statistical Association* 59: 353-375.

Ramsey, Frank Plumpton. 1931. "Truth and Probability." In *The Foundations of Mathematics and other Logical Essays*. Edited by Richard B. Braithwaite, 151-198. London: Routledge & Keegan Paul.

Rivera Lopez, Eduardo. 2010. "¿Es inmoral defender como abogados causas inmorales?" *Jurisprudencia Argentina*, Suplemento Especial, SJA 24/2. http://www.lexisnexis.com.ar/Noticias/MostrarNoticiaNew.asp?cod=6858&tipo=2 [accessed March 14, 2013].

Ross, Lee. 1977. "The Intuitive Psychologist and His Shortcomings." in *Advances in Experimental Social Psychology*, Vol. 10. Edited by Leonard Berkowitz, 173-220. San Diego, CA: Academic.

Savage, Leonard J. 1954. *The Foundation of Statistics*. New York: Wiley.

Simon, William H. 1978. "The Ideology of Advocacy: Procedural Justice and Professional Ethics." *Wisconsin Law Review* 1: 29-144.

Simon, William H. 1998. *The Practice of Justice: A Theory of Lawyer's Ethics*. Cambridge, MA: Harvard University Press.

Volokh, Alexander. 1997. "*n* Guilty Men." *University of Pennsilvania Law Review* 146: 173-216.

von Neumann, John and Oskar Morgenstern. 1944. *Theory of Games and Economic Behavior*. Princeton, NJ: Princeton University Press.

Wasserstrom, Richard. 1975. "Lawyers as Professionals: Some Moral Issues." *Human Rights* 5: 1-24.

Wendel, W. Bradley. 2008. "Legal Ethics as 'Political Moralism' or the Morality of Politics." *Cornell Law Review* 93: 1413-1436.

Zimmerman, Michael J. 2008. *Living With Uncertainty*. Cambridge: Cambridge University Press.

NOTES

1. In the original version of the literary work – unlike the dramatic version scripted by Benét, from which the quotation has been taken – the Devil is depicted as the King of Lawyers (Benét 1937, 22). Other examples are to be found in *The Dog and the Fox* by John Gay, which

highlights lawyers' knack for twisting facts in favour of their clients (Gay 1738, 203) and in *Bleak House* by Charles Dickens, where lawyers' perverse and self-interested motivations are pointed at (Dickens 1852-1853).

2. In remarking on this passage, Augustine establishes the link between the Greek word *paraclete* and the Latin word *advocatus*: "But when He says, 'I will ask the Father, and He shall give you another paraclete,' He intimates that He Himself is also a paraclete. For paraclete is in Latin called *advocatus* (advocate)…" (Augustine of Hippo, 416: 335).

3. This idea of the lawyer as the zealous advocate for his or her client's interests forms part of what William H. Simon calls "the dominant view" of the legal profession. According to this view, "the lawyer must – or at least may – pursue any goal of the client through any arguably legal course of action and assert any nonfrivolous legal claim" (Simon 1998, 7)

4. The Model Rules of Professional Conduct of the American Bar Association (ABA, 2002) are a clear example of adversarial legal ethics. Rule 1.6 (a) establishes that "(a) lawyer shall not reveal information relating to the representation of a client." Additionally the Model Rules recognizes that "(a) lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf" (ABA's Model Rules, art.1.3, cmt.1). This duty has to be balanced against the duty of candour set forth in rule 3.3 (1): "A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer […]." With regard to the standards of proof, the attorney-client and the Fifth Amendment privileges are especially important.

The ABA's Criminal Justice Standards are also relevant. Standard 4–7.6 states that "[… t]he interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily. Defense counsel's belief or knowledge that the witness is telling the truth does not preclude cross-examination […]" Standard 4-7.7 establishes that "[…] in closing argument to the jury, defense counsel may argue all reasonable inferences from the evidence in the record. Defense counsel should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw." Finally, standard 4-7.8 emphasizes that "[… d]efense counsel should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court can take judicial notice." In this paper I have kept the ABA's Model Rules in mind.

5. One possible psychological explanation for this phenomenon could appeal to what is known in social psychology as "the fundamental attribution error" (Jones and Harris 1967 and Ross 1977) or the "correspondence bias" (Gilbert and Malone 1995). According to this explanation, those who blame 'devil's advocates' for the actions that they carry out overlook that their behaviour is in part provoked by the fact that they are situated within the adversary system. The mistake consists in attributing depraved morals to lawyers based on the behaviour that can be explained by the situation in which they can be found. The present work does not take a position for or against this psychological explanation. The argument offered in this text is one of normative ethics. This work intends to evaluate the moral correction of an argument usually offered to

justify popular condemnation. Determining whether it is this argument or that of 'correspondence bias' that ultimately explains why individuals carry out this condemnation, is a task pertaining to social psychology, not to normative ethics.

6. The *Courvoisier* case towards the end of the 19th century is one of the first to have recorded this kind of popular condemnation. A description of this case and of the problems the criminal defence lawyer Charles Phillips had to face can be found in Mellinoff (1973, 304). The *Westerfield* case is a contemporary example of this same condemnation. Popular condemnation of criminal defence lawyer Steven Feldman was sparked by *San Diego Union Tribune* journalist J. Harry Jones's revelations (Jones 2002). Lastly, as an example of popular condemnation extending not only in time but also to different legal cultures, we can quote the Argentinean case *La Unidad Penitenciaria N°1*. In this process, former military officials were being tried for crimes committed during the last dictatorship. The criminal defence lawyers also had to suffer popular condemnation.

7. There are also 'devil's advocates' who have no interest in viewing themselves as moral persons and flaunt the halo of immorality surrounding their activity.

8. This is equivalent to pointing out that citizens do not have the right not to be coerced. Among those who understand political legitimacy in this way is Robert Landenson (1980).

9. It is clear that two different reasons are being dealt with when one realizes that one can take place without the other. This could be the case where the best course of action for the State is to condemn the guilty and acquit the innocent, and that no moral obligation exists to carry out the best course of action. The reverse is also true. It could also be the case that it is morally bound to carry out the best course of action and that this, nevertheless, is not what was described beforehand.

10. Rivera Lopez, for example, points out: "[…] it is not morally correct to help another to do something incorrect […]" (2010). The reconstruction of the condemning argument I am about to make does not use what I consider to be the most debatable premise of the argumentative strategy used by Rivera Lopez, namely, the existence of a duty of the guilty party to accept the conviction voluntarily.

11. Of course, cases do exist in which the State cannot claim ignorance as an excuse. When the State does not file charges for certain crimes due to lack of skill – as was the case, for example, with those wrongs committed during the 2008 financial debacle – ignorance cannot be wielded as an excuse. Neither can it allege ignorance as an excuse when acquittal of a guilty party takes place because the jury or prosecutor selection process is defective and causes there to be incompetent, biased, or ill-prepared individuals to be in these positions. In the last supposition, not only the State, but also juries and prosecutors are subject to moral condemnation. However, unlike the case of 'devil's advocates', they are condemned for not fulfilling their 'role duties'. However, 'devil's advocates' are condemned for specifically having fulfilled their 'role duties'.

12. Barbara Allen Babcock groups these two reasons for justifying the defence of a guilty party under the label of "legalistic or positivist reasons." She points out: "Truth cannot be known. Facts are indeterminate, contingent and, in criminal cases, often evanescent. A finding of guilt is not necessarily the truth, but rather a legal conclusion arrived at after the role of the defense lawyer has been fully played" (Babcock 1984, 6)

13. The idea of procedural truth has been broadly developed by Luigi Ferrajoli (1989, 45-70)

14. Besides the two strategies seen so far, others may be put forward that adopt the same path of attempting to question the premises of the condemning argument. Thus, for example, the first premise could be called into question by pointing out that there are no reasons to claim that the State possesses any moral obligation to punish the guilty, but simply that the guilty have no right not to be convicted. Alternatively, one could call into question the premise referring to the duty of not contributing deliberately to another failing to fulfil his or her moral obligations. Only the duty to fulfil one's own obligations exists, not the additional duty of not deliberately hindering another from fulfilling his or her obligations. Finally, one could call into question the premise claiming that the lawyer is arguing in favour of his or her client's innocence. The lawyer merely restricts him or herself to providing technical assistance, guaranteeing that his or her client's rights are respected, not claiming their innocence.

15. This reason for defending someone whom the lawyer knows is guilty is referred to by Barbara Allen Babcock as "The garbage collector's reason". On this matter she points out, highlighting the sacrifice involved for the lawyer in fulfilling such a task: "Yes, it is dirty work, but someone must do it. We cannot have a functioning adversary system without a partisan for both sides[…]" (Babcock 1984, 6).

16. If the argument holds that is morally correct not to respect certain moral values if these promote to a greater degree the same value or a different one, then we have a consequentialist justification. Although the action of the 'devil's advocate' transgresses a moral value – and is therefore morally wrong – once its remoter consequences are taken into consideration, it is found to be morally justified. There are also non-consequentialist versions of this third strategy.

These attempts to justify the 'devil's advocate's' conduct arguing that it honours the values justifying the adversary system. This justification is not reached based on the remote consequences of the act. On the contrary, it is claimed that the adversary system is morally justified, and if one of its norms is the right to a defence, then the acts of the lawyer defending the guilty become justified by such a right and therefore honour the value it is founded upon. Eduardo Rivera Lopez has explored and criticized this deontological version of the argument (Rivera Lopez 2010). Cristian Fatauros has presented an objection to the line of reasoning developed by Rivera Lopez (Fatauros 2011).

Independent of their consequentialist or deontological nature, all the justifications that appeal to 'role morality' possess the same structure. Something *prima facie* morally incorrect exists in some actions carried out by 'devil's advocates', but that moral evil is defeated by other moral considerations. Thus, Wasserstrom points out: "[…] it is the nature of role differentiated behavior that it often makes both appropriate and desirable for the person in a particular role to put to one side considerations of various sorts – and specially various moral considerations – that would otherwise be relevant if not decisive […] role differentiated behavior often alters, if not eliminates, the significance of those moral considerations that would obtain, were it not for the presence of the role" (1975, 4). What changes in the different conceptions of 'role morality' are the values that they make use of in order to defeat the moral evil that *prima facie* generates the 'devil's advocate' behaviour. In this way, for example, Rakesh K. Anand (2009) appeals to the value of the rule of law; Madeleine C. Petrara (1994) bases her argument on the value of the adversarial system;

Katherine R. Kruse (2005) appeals to moral pluralism and to the value that clients receive competent and unimpaired representation; Charles Fried (1976) defends the existences of a duty of special loyalty between the lawyer and his or her client; W. Bradley Wendel (2008) rests his positions on the fact of political pluralism and the existence of freestanding political values; Pepper (1986) appeals to individual autonomy, equality, and diversity.

According to the strategy based on 'role morality', lawyers have special duties that are weightier than general duties that arise from ordinary morality. Critics of traditional 'role morality' have drawn attention to the moral costs that this implies (Simon 1978; Luban 1986).

17. This is the idea that is behind Blackstone's comment, according to which it "[…] is better that ten guilty persons escape than that one innocent suffer" (1765-1769, 1743).

18. The same idea of 'role morality' implies the possibility of committing acts that are *prima facie* morally incorrect. Arthur Isak Applbaum defined 'role morality' as "[…] claim[ing] a moral permission to harm others in ways that, if not for the role, would be wrong" (1999, 3).

19. It should be highlighted that even lawyers themselves, and not just the public at large, view this type of lawyer as doing something immoral. With regard to this, Gordon points out: "Lawyers who defend the Mafia are typically viewed by the rest of the legal profession as morally compromised" (1984).

20. Zimmerman acknowledges that this case was what led him to review his conviction that uncertainty should act only as an excuse for moral blameworthiness, but ought not to alter our moral obligations. (2008, IX-X)

21. The presentation Zimmerman makes of the case is slightly different from that which Jackson makes, though both versions are identical with regard to their essential elements.

22. There is an enormous amount literature on judgment under uncertainty. The dominant theory for a number of years was 'Expected Utility Theory', originally developed by John von Neumann and Oskar Morgenstern (1944). While the original theory utilized objective probabilities, variants developed by Ramsey (1931), Savage (1954) and Pratt *et al.* (1964) introduced subjective probabilities. The 'Expected Utility Theory' was the object of multiple criticisms that questioned its presumptions about preferences, its calculation of probabilities, and its attitudes about risk aversion.

Faced with the problems presented by the 'Expected Utility Theory', alternative theories arose that modified some of their components. Among those noteworthy theories are: the 'Subjective Expected Utility Theory' (Edwards 1955), the 'Certainty Equivalent Theory' (Handa 1977), the 'Subjectively Weighted Utility Theory' (Karmarkar 1978), the 'Differential-Weighted Product Averaging Theory' (Lynch and Cohen 1978), the 'Regret Theory' (Bell 1982), and finally the 'Prospect Theory' (Kahneman and Tversky 1979), which Zimmerman uses as a basis for elaborating his prospective conception of obligation.

23. The values and the probabilities are attributed arbitrarily – since it is a hypothetical case – but nonetheless they serve to show the attractiveness of the prospective conception.

24. To simplify the case I have assumed that the degree of trustworthiness of each piece of evidence is equal.

25. How to calibrate the disvalue of condemning the innocent or acquitting the guilty, or the value of acquitting the innocent and condemning the guilty is a complicated topic. When

values are adjudicated, I have attempted to capture the idea that condemning the innocent is worse than acquitting the guilty. For a discussion on this topic, see Volokh (1997).

26. Zimmerman addresses a case similar to this between the lawyer and the State. What is relevant here is that both agents have access to different bodies of evidence. In the case presented by Zimmerman, an agent, Jack, has access to evidence that shows that drug A produces complete healing, evidence that is not available to Jill. Zimmerman proposes we imagine Jill asking Jack for help on what she ought to do. In this situation "[…] the Prospective View itself would imply that Jack should advise Jill to give John drug A; for that may be what would maximize expected value for Jack, that is, relative to Jack's epistemic position […] the Prospective View implies that Jack's telling Jill that she ought (that is, is overall morally obligated) to give John drug A would not be truthful" (2008, 32). The mere fact that Jack knows that administering drug A is the best course of action, and that he can communicate with Jill, does not mean that Jill should give him drug A. It is only when the basis of Jack's knowledge (the evidence) can be imparted to Jill that she should give him drug A (Zimmerman 2008, 33).

27. A preliminary response to this objection consists in pointing out that it is not available to anyone seeking to blame the lawyer morally without questioning the adversary system. This objection questions the moral value of the duty of confidentiality that characterizes this system and, therefore, is unsuitable for defending the asymmetric blameworthiness formulated by popular condemnation.

28. Referring to the moral justification of the duty of confidentiality, Lisa G. Lerman and Philip G. Shrag highlight: "The primary purpose of the confidentiality rule is to facilitate open communication between lawyers and clients. Lawyers need to get accurate and complete information from their clients to represent them well. If lawyers were not bound to protect clients' secrets, clients might be more reluctant to share their secrets with their lawyers" (2008, 154).

29. Unlike individuals who possess epistemic empirical limits, the legitimate State – i.e. the State that is justified in exercising coercion – additionally possesses epistemic limits of a normative nature. These are genuine limits because they are constitutive of the State's legitimacy. Did they not exist, we would not be in the presence of a legitimate State. While an individual continues to be whoever he or she is, if the State transgresses moral requirements to obtain information, it forsakes its legitimacy in doing so.

30. The lawyer's duty to disclose his or her client's confession – insofar as it is evidence – cannot be derived from the State's obligation to punish or acquit on the basis of the evidence available to it and the duty of not contributing to another not fulfilling his or her moral obligation. Naturally, it is possible to argue in favour of this additional duty to disclose information entrusted to him or her by his or her client, but this would have to be done based on other reasons.

31. What I have pointed out makes it possible to qualify the principle of non-accountability generally linked to the standard view of the legal profession. In remarking on the standard view of the legal profession, to then criticize it, Luban indicates that according it "[… a] lawyer is not to judge the morality of the client's cause; it is irrelevant to the morality of representation" (2007, 20). The view offered in the text coincides partially with the standard view. The moral correctness of the defence does not depend on whether the client's cause is morally correct. Nevertheless, a moral judgment does exist that the lawyer must make. He or she must ask him

or herself if, given the available evidence, it is the State's moral obligation to convict his or her client. It does not involve a judgment that falls upon the client's individual conduct that is subject to judicial scrutiny, but a political moral judgment regarding the State's conduct.

32. Luban indicates that according to the standard view lawyers are seen as gunmen (2007, 9).

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