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Abstract

This Essay considers the applicability of a particular model of legal ethics, neutral partisanship, to American lawyers' representation of those who violate, or are accused of violating, international human rights. I maintain that neutral partisanship, a deficient model for American lawyers in their domestic practice, is even more problematic when applied in the international arena. The central question is this: are there limits, short of engaging in illegal conduct, that should constrain lawyers in the representation of those who violate international human rights? Neutral partisanship holds that any lawyer may, or, more strongly, must, pursue any legal end for any client by any legal means. I disagree, both in general and with respect to international human rights practice in particular.

NEUTRAL PARTISAN LAWYERING AND INTERNATIONAL HUMAN RIGHTS VIOLATORS*

*Rob Atkinson***

This Essay considers the applicability of a particular model of legal ethics, neutral partisanship, to American lawyers' representation of those who violate, or are accused of violating, international human rights. I maintain that neutral partisanship,[1] a deficient model for American lawyers in their domestic practice, is even more problematic when applied in the international arena.

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** Associate Professor of Law, Florida State University. I am grateful to Adam Hirsch, Richard Lillich, David Luban, Michael Reisman, Deborah Rhode, Mark Seidenfeld, and Nat Stern for reading and commenting on drafts of this paper. Brian Iten and Edward Birk provided invaluable research assistance.

1. *See* DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 132 (1992) [hereinafter LEGAL ETHICS]; Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 605 (1985) [hereinafter *Ethical Perspectives*]. This position is also labelled the lawyer's amoral ethical role, *see* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (1986) the traditional conception, Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) the standard conception, DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988) [hereinafter LAWYERS AND JUSTICE], the full advocacy model ALAN H. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 92 (1980), and the libertarian approach, William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1084-85 (1988) [hereinafter *Ethical Discretion*]; William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 [hereinafter *Ideology of Advocacy*]. I follow Rhode and Luban's choice of the term neutral partisanship to emphasize the two key elements of this model and the fact that this model is not the only option available to lawyers in our culture. LEGAL ETHICS, *supra*, at 132-33.

Lawyers who adopt this model are also known, perhaps somewhat less charitably, as hired guns, an appellation reflected, for example, in the title of the symposium panel of which this paper was originally a part: *The Role of the Lawyer: Hired Gun or Moral Champion? See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.3.1 (1986) (noting ambivalence of lawyers to term "hired gun," some associating it with "servile acts of immorality and lawlessness;" others, with "the macho heroics of the frontier").

ing in illegal conduct,[2] that should constrain lawyers in the representation of those who violate international human rights? The answer derivable from the neutral partisanship model of lawyering is an unambiguous negative: there are no such limits short of the law itself. Neutral partisanship holds that any lawyer may, or, more strongly, must, pursue any legal end for any client by any legal means. Stated positively and aggressively, whenever a lawyer assists a client in exercising legal rights, by legally permitted means, the lawyer has acted laudably.[3] I disagree, both in general and with respect to international human rights practice in particular.

Before sketching my position, I need to delineate its scope, in two dimensions. First, with respect to breadth, I will focus primarily on lawyers in private practice who represent international human rights violators, including states and other entities as well as individuals. I do not cover the problems of government lawyers representing either the U.S. government or foreign governments. The ethical problems of private lawyers representing victims of international human rights violations are even more distinct and thus farther outside my scope.[4] On the other hand, the problem of representing international human rights violators is usefully seen against a background that includes representation of clients engaging overseas in arguably immoral, but not quite illegal, conduct. Accordingly, I use some such illustrations.

Second, with respect to depth, this paper is quite properly headed an essay rather than an article. Originally conceived and written as a comment on two symposium presentations,[5] it is an

2. By "illegal conduct," I mean to include not only conduct that would violate laws of general applicability, but also laws applicable to lawyers as such, which have come to be called "the law of lawyering." *See, e.g.*, GEOFFREY C. HAZARD & W. WILLIAM HODES, 1 THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 101 (2d ed. 1990 & Supp. 1993). For an argument that the codes of professional responsibility that govern American lawyers' domestic practice also apply to their international work, *see* David Weissbrodt, *Ethical Problems in International Human Rights Law Practice, in* MICH. Y.B. INT'L LEGAL STUD. 217, 220-22 (1985).

3. Pepper, *supra* note 1, offers the most expansive defense of neutral partisanship. The theoretical assumptions of this model were perhaps best set out by one of its leading critics, William H. Simon. *Ideology of Advocacy, supra* note 1, at 39-61.

4. *See* Weissbrodt, *supra* note 2 at 220-22.

5. For a general description of the symposium, *see* Editors' Note, *supra*, at 531. The topic of my panel was "The Role of the Lawyer: Hired Gun or Moral Champion?" The principal speakers were Robert F. Drinan, who championed the moral champion,

effort to outline issues rather than an exhaustive blueprint for their resolution. Accordingly, I have painted the picture in rather broad strokes, with very sharp, sometimes harsh, contrasts. As a result, my presentation will inevitably have a black-and-white, Manichean coloration about it. My point is not to deny that there are shades of gray; my point, against the self-imposed moral color-blindness of neutral partisanship, is that some grays are darker and more disturbing than others.

I. *DEFINING NEUTRAL PARTISANSHIP*

Implicit in this conception of lawyering are two correlated principles, partisanship and neutrality.[6] The first of these, partisanship, is the more obvious: the lawyer is to use all legal means, and the maximum of personal energy and zeal, to advance any client end, subject only to the constraint of the outer limits of the letter of the law.[7] The second, less obvious, principle is neutrality toward the morality of clients' purposes.[8] Within the lawyer-client relationship, the neutrality principle means that the lawyer need not personally believe in the causes for which he or she becomes a legal partisan. For third parties looking at the lawyer-client relationship from the outside, neutrality means that clients' ends are not to be imputed to their lawyers. Lawyers are not to be held morally accountable for anything they help clients do, or get away with doing, within the bounds of law, no matter how much their help injures innocent third parties or undermines the public interest generally.

This latter aspect of neutral partisanship is what gives many of us moral pause. In our ordinary moral thinking,[9] we hold

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and Michael Armstrong, who responded with a carefully considered alternative perspective based on his extensive practical experience in the field. In my role as "commentator," I sketched a theoretical response to Mr. Armstrong, whose position is essentially that of the neutral partisan. For the most comprehensive modern defense of the lawyer as moral champion, which he calls "moral activism," *see* LAWYERS AND JUSTICE, *supra* note 1, at 160-61. For the basis of the classical statement, *see* PLATO, GORGIAS (W.C. Helmbold trans., Macmillian ed. 1987).

6. *See Ideology of Advocacy*, *supra* note 1, at 36-39; Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 672-74 (1978) (identifying these two principles). These principles are now firmly ensconced in the literature on professional responsibility. *See* WOLFRAM, *supra* note 1, § 10.2.1 (stating principle of professional detachment), § 10.3.1 (stating principle of zealous advocacy).

7. *Ideology of Advocacy*, *supra* note 1, at 36-37; WOLFRAM, *supra* note 1, § 10.3.1.

8. *Ideology of Advocacy*, *supra* note 1, at 36; WOLFRAM, *supra* note 1, § 10.2.1.

9. Ordinary morality comprises "the moral principles that govern people as *people*,"

ourselves morally responsible for the intentional and careless harms we work on innocent others, even if the harms are not illegal. Seduction with the intent of breaking another's heart is certainly a wrong, and perhaps a sin, though not a crime, or even a tort.[10] What is more, we hold ourselves responsible not only for the wrongs we ourselves do, but also for those we help others do. How, then, can lawyers claim special moral immunity?

II. *NEUTRAL PARTISANSHIP — DEFENSES AND RESPONSES*

I want to set out very briefly the three main theoretical justifications for neutral partisanship and the responses they have evoked,[11] with particular reference to the role of lawyers representing alleged human rights violators. As applied to lawyers in general, the defenses of neutral partisanship have been subjected to severe criticism. The upshot seems to be that complete partisanship is very rarely justified, and that complete neutrality is virtually never justified.[12] I will suggest that the same is true — indeed, more true — with respect to representing alleged human rights violators.

A. *Lawyers as Clients' Special Purpose Friends*

The first defense of neutral partisanship focuses on the lawyer's individual moral autonomy; this is Charles Fried's notion of the "lawyer as friend."[13] His basic syllogism runs like this:

Major premise: As a matter of ordinary morality, we acknowledge the legitimacy of lavishing attention upon a close cir-

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the "ordinary conceptions of how good people or good citizens should behave." Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 118-19 (1990) (emphasis in original).

10. David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 640 (referring to SOREN KIERKEGAARD, DIARY OF A SEDUCER (Gerd Gillhoff trans., 1966)); *cf.* Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374 (1993) (noting decline of civil and criminal liability for seduction and calling for recognition of new tort of sexual fraud).

11. In identifying three main defenses of neutral partisanship, I am following LEGAL ETHICS, *supra* note 1, at 149-54.

12. Luban says this, in virtually these words, in LAWYERS AND JUSTICE, *supra* note 1, at 154-55.

13. Fried, *supra* note 1, at 1060.

cle of friends, even to the exclusion — and sometimes the positive detriment — of innocent third parties.

Minor premise: The lawyer-client relationship is in some critical way like personal friendship.

Conclusion: Therefore what lawyers do for their quasi-friends within the law is morally justified.[14]

The most fundamental problem here is identifying the common characteristic, the redeeming feature, that all lawyer-client relations share with private friendship. Fried's candidate — taking another party's interest as one's own — hardly fills the bill. This is not what most of us take as the essence of friendship, the core value that justifies treating friends specially at the expense of strangers.[15] Furthermore, though friendship may share with the standard conception of lawyering an element of partisanship, friendship emphatically rejects neutrality. When friends adopt one another's ends as their own, they also accept the moral consequences. If the friendship analogy is to be pursued, lawyerly neutrality would have to go; lawyers would, like friends, become morally accountable for the ends of their clients, which is precisely what Fried wants to avoid.[16]

There are other, equally glaring, differences between personal friendship and the typical lawyer-client relationship that undermine the analogy. Friends, unlike lawyers, do not adopt the moral positions of others, or lavish their attentions upon others, for pay.[17] We have another, less morally appealing, word

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14. *Id.*

15. LEGAL ETHICS, *supra* note 1, at 151-53; Edward A. Dauer & Arthur A. Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573, 573-74 (1977); Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631, 639-40 (1984).

16. Susan Wolf, *Ethics, Legal Ethics, and the Ethics of Law*, *in* THE GOOD LAWYER 38, 59 n.4 (David Luban ed., 1984).

17. Since I have in mind the classic conception of friendship described, for example, in Aristotle's *Nicomachean Ethics*, a qualification is in order. In Aristotle's understanding of friendship, there are three kinds, determined by the things friends seek in common: friendships for pleasure, friendships for usefulness, and friendships for goodness or virtue as such. ARISTOTLE, NICOMACHEAN ETHICS 218-20 (Martin Ostwald trans., Macmillian ed. 1989). For Aristotle only the last of these is friendship proper: "Those who wish for their friends' good for their friends' sake are friends in the truest sense, since their attitude is determined by what their friends are and not by incidental considerations," such as whether their friends are useful or pleasant to them. *Id.* at 219-20; *see also* PLATO, *supra* note 5, at 86 ("[I]t appears to me that the strongest bond between friends is, as the wise men of old say, 'like to like.'").

It is this third, narrower understanding of friendship that I have in mind and that Fried's lawyer-client friendship fails even to approximate. By contrast, a successful law-

for those who do that. As William Simon points out, Fried's lawyers look less like friends than they do like prostitutes.[18] Furthermore, personal friendship, Fried's paradigm, involves real people, individual human beings.[19] Thus any analogy to that paradigm is further strained when it has to cover representation of institutional clients, particularly large institutions like multi-national corporations and nation-states.[20] These, of course, will often be the kinds of clients associated with international human rights violations.

We must be careful, however, not to throw out the baby with Fried's bathwater. Though we must discard Fried's notion that every lawyer-client relationship is automatically the moral equivalent of personal friendship, we should not cast aside the very different and more limited notion that *some* lawyer-client relationships are like personal friendship in morally relevant ways. Sometimes, that is to say, lawyers may really befriend, or be the friends of, their clients. In the fairly narrow range of cases where this is true, we shall see in a moment, something like Fried's friendship justification for neutral partisanship has considerable appeal.[21]

B. *Lawyers as Agents of Clients' Autonomy*

The second defense of neutral partisanship, presented most clearly by Professor Stephen Pepper, focuses not on the lawyer's

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yer-client relationship would seem to qualify almost by definition as a friendship for usefulness. The client receives useful legal advice; in return, the lawyer is paid.

18. *Ideology of Advocacy*, *supra* note 1, at 108-09. At the risk of sounding facetious on a truly serious matter, I must be fair to prostitutes here; they are likely to have chosen their occupation from a much more restricted range of options than are lawyers.

19. Loyalty, a virtue implicit in friendship, does indeed extend to institutions, up to and including nation-states. GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS 6-8 (1993). But loyalty, like friendship, is not usually for sale; when it is, the seller is deemed not a friend, but a mercenary.

20. During the previous decade, approximately two-thirds of the members of the American bar "perform[ed] the bulk of their services for entities rather than individuals." *Ethical Perspectives*, *supra* note 1, at 590. Fried anticipated this criticism in Fried, *supra* note 1, at 1075-76.

21. LAWYERS AND JUSTICE, *supra* note 1, at 162-66. The principle exponent of this view of the lawyer as the client's genuine friend is Thomas L. Shaffer. *See, e.g.*, Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988); THOMAS L. SHAFFER, FAITH AND THE PROFESSIONS 173-228 (1987); THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT 21-33 (1981); Thomas L. Schaffer, *Should A Christian Lawyer Serve the Guilty*, 23 GA. L. REV. 1021 (1989).

moral autonomy, but on the moral autonomy of the client. Pepper's argument runs like this: human autonomy is, all things being equal, a good thing. The primary purpose of law, in fact, is to carve out a sphere in which people can exercise their autonomy, without infringing on others' spheres and without others, including the state, impinging upon theirs. In a complex modern society, replete with arcane regulations, you can only understand your sphere of individual autonomy with the help of a lawyer. Without a lawyer, you cannot know when you are in danger of overstepping the bounds of your autonomous sphere, or when someone else has made an incursion into it. Accordingly, whenever a lawyer helps a client understand the client's legal rights, the lawyer is helping the client exercise autonomy, which is both an agreed good and the agreed good that the law is designed to advance. Conversely, were lawyers, individually or collectively, to refuse to help clients exercise their legally defined autonomy, they would be to that extent frustrating the purpose of law itself, setting themselves up against the law as arbiters of social good.[22]

This is, on first face, an appealing argument; closer inspection, however, reveals serious flaws in the facade.[23] Notice, first of all, that, although autonomy is admittedly good, not all exercises of autonomy are good.[24] Nor, in terms of our geometric metaphor, is the sphere of morally appropriate exercises of autonomy entirely congruent with the sphere of legally permitted conduct.[25] Society doesn't always condone morally what it declines to condemn legally. The law, for example, may want to leave women free to decide for themselves whether to have an abortion, but that is not to say that every decision to have an abortion is morally appropriate. Think, along the same lines, of the constitutional protection of non-obscene pornography.[26] In the international arena, think of marketing infant formula in underdeveloped countries in violation of World Health Organiza-

22. Pepper, *supra* note 1, at 615-18.

23. This critique of Pepper comes from David Luban, *supra* note 10, at 637.

24. *See id.* at 639-40.

25. *See id.* at 638; *Ethical Perspectives*, *supra* note 1, at 644.

26. *Compare* LAWYERS AND JUSTICE, *supra* note 1, at 161 (suggesting moral inappropriateness of assisting in legal but immoral publication of non-obscene pornography) *with* Pepper, *supra* note 1, at 617 *and* Fried, *supra* note 1, at 1075 (defending moral goodness of assisting in publication of non-obscene pornography).

tion's non-binding guidelines[27] or selling potentially dangerous prescription drugs or pesticides overseas in countries with substantially laxer testing and warning requirements than the United States.[28] And think, finally, of genocide. Its moral condemnation was much clearer, much sooner, than its legal condemnation. Indeed, on the latter point there is still considerable foot-dragging.[29] This bears on my next point.

The sphere of autonomy supposedly described by the law is not as well defined or as fixed as the autonomy defense of neutral partisanship would suggest. What is worse, the perimeter of the sphere is subject to manipulation by the very agents whose autonomy is in question. This is one of the central insights, of course, of legal realism. Lawyers do not just discover the law for their clients; they shape the law to expand the scope of their clients' autonomy.[30] This is especially true in the field of international law, where much of law is made and applied directly by its supposed subjects, nation-states.[31] And it is even more true in the relatively new and still amorphous sub-field of international human rights law.[32]

This, in turn, raises a final problem with the client autonomy model. Not only are the frontiers of law fuzzy and manipulable; clients with better lawyers are better able to press the law in the direction of their interests, at the expense of others.[33]

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27. *See* TOM L. BEAUCHAMP, CASE STUDIES IN BUSINESS, SOCIETY, AND ETHICS 150-60 (1993) (discussing case study of marketing of infant formula).

28. See LEGAL ETHICS, *supra* note 1, at 369-73 (quoting and discussing U.S. Senate hearings on the sale of drugs overseas under less restrictive foreign laws); THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY 214 (5th ed. 1991) (raising prospect of selling "tainted" wine overseas under laxer standards).

29. Richard B. Lillich, *International Human Rights Law in U.S. Courts*, 2 J. TRANSNAT'L L. & POL'Y. 1, 7-8 (1993).

30. *Ideology of Advocacy*, *supra* note 1, at 43-48; Luban, *supra* note 10, at 646-48; LAWYERS AND JUSTICE, *supra* note 1, at 11-30. *See generally* David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990) (arguing that traditional model of legal ethics fails to take account of legal realism's insights about the limited constraining capacity of legal rules).

31. Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law is Made*, 6 YALE STUD. WORLD PUB. ORD. 249 (1980).

32. Weissbrodt, *supra* note 2, at 244 n.108.

33. Luban, *supra* note 10, at 643-45; *Ideology of Advocacy*, *supra* note 1, at 46, 49-52; *Ethical Perspectives*, *supra* note 1, at 597; *see also Ethical Discretion*, *supra* note 1, at 1092-96 (discussing "relative merit"); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

Here again, the problem is exaggerated in international law, particularly when nation-states and multinational corporations face off against individual human beings or traditionally disadvantaged groups, sometimes with no referee but themselves.

The cumulative impact of these observations is this: the autonomy model promises to defend neutral partisan lawyering as the necessary means for all of us to exercise autonomy within our respective spheres. In an ideal world of equal resources and clear-cut laws, this might be true. That, however, is emphatically not our world. Applied to our world, the autonomy model delivers a way for the powerful to use lawyers to expand or transgress their legally assigned spheres at the expense of the weak.

C. *Lawyers as Agents of the Adversary System*

That brings us to the third defense of neutral partisanship, what David Luban calls "the adversary system excuse."[34] It is the oldest and best defense, but also the narrowest. This defense invokes the ends the adversary system supposedly serves and justifies neutral partisanship as a necessary means to those ends. In particular, an adversary system staffed by neutral partisan lawyers is said to be the most effective means for discovering truth and protecting individual rights.[35]

With respect to truth discovery, the fundamental assumption is that a clash of partisan lawyers, each presenting evidence in the light most favorable to his or her client, presided over by a neutral tribunal, is the best system for generating truth. Note, in the first place, that this is a very problematic empirical assertion.[36]

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34. *See* David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER 83 (David Luban ed., 1984); *see also* LAWYERS AND JUSTICE, *supra* note 1, at 50-103.

35. The classic statement of this position is Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160-61 (1958).

36. *Compare* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) *and Ethical Perspectives*, *supra* note 1, at 595-97 (questioning truth-finding capacity of adversarial trials) *with* Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975) *and* Fuller & Randall, *supra* note 35, at 1161. After an extended comparison of the Anglo-American adversarial system and the continental European inquisitorial system, David Luban concludes that they have essentially offsetting merits and demerits, making choice between them one of relative preferences and transition costs. *See* LAWYERS AND JUSTICE, *supra* note 1, at 93-103. Given that the adversarial system is not significantly superior, he maintains that its requirements are a relatively weak justification for departures from ordinary morality in particular cases. *Id.* at 104. For a criticism of this view, *see* Ellmann, *supra* note 9, at 143-44; for

Even if this is true, however, there is another problem: why do we need neutrality as well as partisanship? Why not allow lawyers to put forward their clients' cases in a fully partisan fashion, but hold lawyers morally responsible for the claims they put forward? This brings us to the other aspect of the adversarial system: it is not designed just to get the truth out, or even to see substantive justice done; it is also designed to protect individual rights.

This second function of the adversarial system is particularly clear in what students of legal ethics call the "criminal defense paradigm."[37] Here, for a variety of reasons mostly having to do with preventing governmental excess, we want lawyers aggressively to press the claims even of those defendants they know to be guilty, and whose actions they personally believe to be both odious and deserving of punishment.[38] A compelling case can be made for letting lawyers go full bore for even the most odious criminal defendants, without identifying the lawyers with the substantive wrongs their clients have committed.[39]

But we need to note carefully the factors that intuitively appeal to us here. These factors make for a strong, but very narrow case, for neutral partisanship.[40] Note, first of all, the David-versus-Goliath aspect of these cases. In domestic criminal law, individual human beings stand against the awesome power of the state.[41] And this disparity may be even more pronounced in the international arena. Individuals may stand against militarily vic-

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Luban's response, *see* David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1020-21 (1990).

37. LAWYERS AND JUSTICE, *supra* note 1, at 63.

38. United States v. Wade, 388 U.S. 218, 256-58 (1967) (Mr. Justice White, whom Mr. Justice Harlan and Mr. Justice Stewart joined, dissenting in part and concurring in part, describing defense counsel's "different mission").

39. LAWYERS AND JUSTICE, *supra* note 1, at 62-66; Schwartz, *supra* note 6, at 671. Note, however, that there have been cogent critiques of neutral partisanship even at the margins of the criminal defense paradigm. Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987); Murray L. Schwartz, *On Making the True Look False and the False Look True*, 41 SW. L.J. 1135, 1149-53 (1988). For the latest round, *see* William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993).

40. LAWYERS AND JUSTICE, *supra* note 1, at 58-66; *Ethical Perspectives*, *supra* note 1, at 605-06; Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 548-50.

41. LAWYERS AND JUSTICE, *supra* note 1, at 58; Schwartz, *supra* note 40, at 549.

torious foreign powers, as at Nuremburg,[42] or against an arguably hostile foreign state, as in the cases of Eichmann[43] and Demjanjuk.[44]

Second, the criminal defense paradigm deals with irreversible past acts. Eichmann and his ilk cannot undo what they did, and the lawyers defending them are not furthering what they did. What the lawyers can do is ensure procedural justice even to the guilty and protect the innocent from the kind of excessive prosecutorial zeal that seems to have infected Demjanjuk's case.[45] Third, the penalties at stake in criminal defense work threaten our most highly prized values: liberty and life itself.

I emphasize these appealing aspects of the criminal defense paradigm to forestall the standard move of neutral partisanship's defenders at this point. They tend to extrapolate beyond this admittedly strong case for aggressive partisanship to areas where its appealing features are much attenuated, or even absent. We must be careful not to follow them down a slope that is not nearly so smooth as they would have us believe.

Their first move, from criminal defense to some kinds of civil defense work,[46] sometimes is fairly smooth. In some sense the power of the state is being invoked against the defendant in these cases; sometimes the defendant is a single human being, and sometimes the stakes are high. Think of representing a defendant like Demjanjuk in a deportation or extradition case, when in the background lies a criminal trial on capital charges

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42. Istvan Deak, *Misjudgment at Nuremberg*, N.Y. REV. BOOKS, Oct. 7, 1993, at 46, 49 (reviewing TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1993) and noting serious logistical disadvantages of defense counsel). The foreign power need not, apparently, be militarily victorious, as evidenced by the recent empaneling of a war crimes tribunal for the Bosnian Conflict. *See* Barton Gellman, *U.N. Security Council Establishes Yugoslav War Crimes Tribunal*, WASH. POST, Feb. 23, 1993, at A1.

43. Eichmann v. Attorney General, H.C.J. 336/61, 16(3) PISKEI DIN 2033 (Isr.), *cited in* 14 ISR. Y.B. ON HUM. RTS. 54 (1984); HANNAH ARENDT, EICHMANN IN JERUSALEM (1963).

44. State of Israel v. John (Ivan) Demianiuk, H.C.J. 373/86, *cited in* 18 ISR. Y.B. ON HUM. RTS. 229 (1988).

45. Fredric Dannen, *How Terrible Is Ivan?*, VANITY FAIR, June 1992, at 132 (questioning evidentiary basis for case against Ivan Demjanjuk); A Translation of the Final Section of The Decision of The Israel Supreme Court on the Appeal of John (Ivan) Demjanjuk (July 1993) (trans. on file with the Embassy of Israel, Wash., D.C.); Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993) (overturning earlier decision against Demjanjuk and reprimanding prosecutorial misconduct).

46. *See* Pepper, *supra* note 1, at 623. "Civil litigation is a contest over which side is to have the vast power of 'the state' on its side in a dispute." *Id.*

in a potentially hostile foreign court.[47] There is arguably an element of this in civil cases where non-U.S. nationals are being sued in the United States or other potentially hostile fora for alleged human rights violations. Think here of the Bosnian women's case against the leader of the Bosnian Serbs.[48] But notice how far we have already been led from the criminal defense paradigm. The penalty in such cases is damages or an injunction, not life or liberty, and the opponent is not the state, but other private parties.

When we take the next step, from civil defense work to civil plaintiff's work, we stray even farther from the criminal defense paradigm, and neutral partisanship is much more difficult to justify on that analogy.[49] Here the proverbial tables may be turned with a literal vengeance. Think, for example, of pressing the claims of the Third Reich to seize the assets of fleeing Jews in foreign banks,[50] or of representing a government trying to have political refugees denied asylum and repatriated. This is not

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47. *See Demjanjuk*, 10 F.3d at 354 (stating that "[t]he consequences of denaturalization and extradition equal or exceed those of most criminal convictions.").

48. Kadic v. Karadzic, Nos. 93 Civ. 0163, 93 Civ. 0878, 1993 WL 385757 (S.D.N.Y. Sept. 24, 1993); Maryanne George, *Serb Leader is Served with Lawsuit over Rapes*, DET. FREE PRESS, Mar. 6, 1993, at 4A. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), is the landmark decision that inspired the present wave of human rights abuse litigation raised under United States law. *Filartiga*, based on the long dormant Alien Tort Statute, was expressly codified by Congress through its adoption of the Torture Victim Protection Act (TVPA) of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (1988 & Supp. IV 1992). *See* Robert F. Drinan & Teresa T. Kuo, *Putting the World's Oppressors on Trial: The Torture Victim Protection Act*, 15 HUM. RTS. Q. 605, 617 (1993). For commentary on the former statute, *see* Anthony D'Amato, *The Alien Tort Statue and the Founding of the Constitution*, 82 AM. J. INT'L L. 62 (1988); Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (1985); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989). For background on enactment of the TVPA for clarification and expansion of existing human rights law, *see supra* Drinan & Kuo at 617. For the general role of federal courts in this area, *see* KENNETH C. RANDALL, FEDERAL COURTS AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM (1990).

49. Schwartz, *supra* note 40, at 555-56.

50. By edict of the Reich, both domestic and foreign holdings of Jews truly belonged to the German people, based on the premise that "the Jews could not have acquired . . . [their capital] honestly." RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 139-44 (1985). To aid the Nazis in their seizure of Jewish assets, Third Reich currency laws required all German nationals with foreign holdings to report such holdings to the government. *Id.* at 142-43. "Foreign agents were sent into Switzerland to find bank accounts of Jews and other dissidents." Lutz Krauskopf, *Regents' Lectures: Comments on Switzerland's Insider Trading, Money Laundering, and Banking Secrecy Laws*, 9 INT'L TAX & BUS. LAW. 277, 293 (1991).

David versus Goliath;[51] it is Goliath versus David, or, perhaps more analogously, Pharaoh versus Moses,[52] or Herod against Mary and Joseph.[53]

If the criminal defense paradigm is of limited force in the context of civil litigation, it has even less force in the normal course of non-litigation representation.[54] It is in this context that most lawyers spend most of their time,[55] and where I suspect most representation of human rights violators also occurs. All of the factors that make neutral partisanship attractive in the criminal defense paradigm may be absent when the lawyer is asked not to litigate, but to advise.[56] Here much of the client's conduct is future, not past, and is thus reversible or avoidable. Here lawyers are likely to be wielding a sword for their clients, not a shield; this work is often offensive, not defensive. And here we may well have the David-versus-Goliath situation in reverse, with lawyers representing the interests of states against individuals. Recall in this connection a point I underscored earlier, the possibility of the powerful manipulating law to their advantage through clever lawyering. It is easy to imagine extreme cases in this context: helping IG Farben secure steady supplies of the raw materials for Zyklon B through neutral countries, or helping arguably outlaw regimes like those in Iraq, Libya, or North Korea obtain critical technology for weapons of mass destruction. This is obviously a far cry from defending Demjanjuk, or even Eichmann, in Jerusalem.[57]

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51. 1 *Samuel* 17:1-58.

52. *Exodus* 3-15.

53. *Matthew* 2:1-23.

54. Even neutral partisanship's defenders concede as much. *See* Pepper, *supra* note 1, at 622. "In the usual justification of the lawyer's amoral role [Pepper's term for neutral partisanship], the model is adjudication, and there is a difficult stretch adapting and applying this to the lawyer's office." *Id.* Pepper's own defense of neutral partisanship is calculated to fill this gap. *Id.*

55. *See* Roger J. Goebel, *Professional Responsibility Issues in International Law Practice*, 29 AM. J. COMP. L. 1 (1981) ("[T]he international lawyer usually serves more as an advisor to, or negotiator for, his clients."). Even of the matters that begin in litigation, very few end that way. Nearly ninety percent of all civil cases are settled prior to trial. *Ethical Perspectives*, *supra* note 1, at 599.

56. *See generally* Schwartz, *supra* note 6, at 669 (proposing different ethical principles should apply to advocate and non-advocate lawyers).

57. It is also arguably a far cry from helping putatively bad guys do routine business, which seems to have been the issue in Covington and Burling's representation of South African Airways, a representation terminated under pressure from the law firm's present and prospective associates. *See* Ruth Marcus, *Covington & Burling Drops S. Afri-*

III. *ALTERNATIVES TO NEUTRAL PARTISANSHIP*

What conclusion do I draw from this? Neutral partisanship on the part of international bad guys, it seems to me, is morally justified only in cases that fit the criminal defense paradigm, Eichmann and Demjanjuk in Jerusalem. Only in such cases should we excuse lawyers from moral responsibility in their choice of clients. In all other cases, we should expect lawyers to choose clients based on an individualized assessment of the merits of their clients' cases, assessed in terms of the substantive justice of those cases.[58]

Do I mean that sometimes lawyers should decline to help clients achieve ends that are within the letter of the law? Yes, emphatically. When? When client ends, although technically legal, are sufficiently out of step with ordinary morality; with the spirit, as opposed to the letter, of the law; or with the lawyer's deeply held individual moral commitments.[59] Doesn't that mean that sometimes clients may find no lawyer to help them exercise their legal rights, and if so, doesn't that mean that an oligarchy of lawyers is thwarting the autonomy the law means to provide?[60] Yes, some legally permitted conduct may be deterred, but that might well be a good thing. It might not be so bad to have this informal screening mechanism filter out some kinds of immoral conduct that the law does not yet forbid, or for a variety of reasons cannot effectively forbid.[61]

But if we are uncomfortable with people being unable to exercise legal rights, even in an immoral way, for want of lawyers, we could do what we already do in the criminal defense paradigm — have lawyers for them appointed if they cannot find lawyers on their own or if lawyers uniformly refuse them on moral

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can Airline as Law Client, WASH. POST, Oct. 5, 1985, at C3. For a nuanced argument that this termination may have been professionally appropriate, *see Ethical Discretion*, *supra* note 1 at 1092-94.

58. *See Ethical Discretion*, *supra* note 1, at 1090; LAWYERS AND JUSTICE, *supra* note 1, at 160-174; *Ethical Perspectives*, *supra* note 1, at 643-44; Schwartz, *supra* note 6, at 680; Schwartz, *supra* note 40, at 543-45.

59. David Luban points us to ordinary morality, *see* LAWYERS AND JUSTICE, *supra* note 1, at 160-74; William Simon, to the spirit of the law, *see Ethical Discretion*, *supra* note 1, at 1083; I, to deeply held personal moral convictions, *see* Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853, 855 (1992).

60. *See* Pepper, *supra* note 1, at 616-19 (raising oligarchy issue); Fried, *supra* note 1, at 1085-86 (same).

61. Luban, *supra* note 10, at 641-42; LAWYERS AND JUSTICE, *supra* note 1, at 168.

grounds.[62] But won't that put us right back where we are, with a huge waste of time? All lawyers will refuse an odious case on moral grounds, only to have it land ultimately in the laps of the very same lawyers who under neutral partisanship would have taken the case in the first place.

This is not a pointless exercise, for two very different reasons. First, even if it did happen that way, there would be a moral difference. Lawyers would have to decline in the first instance or be associated with the moral position of their clients. To be absolved of that, to enjoy the shield of neutrality, they would have to await court appointment.[63] But isn't all that a lot of administrative fol-de-rol for a rarefied moral point? I think not, but then there is my second point:

It wouldn't happen that way. Stripped of the neutrality principle, today's lawyers for bad guys would not turn down tomorrow's bad guy cases. The cast of characters representing bad guys might change marginally under a regime of direct moral responsibility, but I don't think it would change much. The reason is simple: discarding the neutrality principle would change virtually nothing about the way almost everyone thinks about the lawyer's role right now. Outside the criminal defense paradigm, virtually everyone now accepts an alternative model, holding lawyers morally accountable for what they do for their clients.[64] Theories justifying the neutral partisanship model are not meant for external consumption; they are meant to salve the consciences of neutral partisans themselves. For the rest of the world (which includes, I'm convinced, most lawyers) neutral partisans are, simply put, hired guns, a description nicely chosen to reflect the popular moral attitude toward lawyers who are indifferent to the moral harms of their clients' legal conduct.

CONCLUSION

In summary, the case for neutral partisanship is weak for lawyering generally, outside the context of criminal defense and

62. Schwartz, *supra* note 6, at 693-94.

63. *Id.*

64. LAWYERS AND JUSTICE, *supra* note 1, at xix; David A. Kaplan, *Judging a Lawyer by His Clients*, WASH. POST, July 2, 1989, at C5 ("Well-financed clients, no matter how unpopular, will always find good lawyers."); *see also* WOLFRAM, *supra* note 1, § 10.2.1 ("A large portion of the nonlawyer public rejects the moral and political isolation of lawyers that the principle of professional detachment posits." (citation omitted)).

analogous David-versus-Goliath situations. Since these situations are rare in the representation of alleged international human rights violators, neutral partisanship is even less well justified there. In particular, where the clients are entities rather than individuals, our usual sympathy with underdogs and their defenders is appropriately absent, and our willingness to condone legally permitted moral wrongs should be diminished. Moreover, when the legal rightness of moral wrongs is murky, as it often is in international law, and when the legal murkiness is the product of the clients' own efforts at obfuscation, then the degree of our sympathy for lawyers who assist in such wrongs should be close to absolute moral zero.