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Moral Accountability of Advocates

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The Moral Accountability of Advocates

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Can an advocate ever be held morally accountable for the consequences of a claim he advances while adhering to professional standards? For more than two centuries, the weight of opinion among lawyers has been that an advocate is exempt from moral accountability as long as he violates no professional norm when furthering a cause. During the nineteenth century, commentators as diverse as George Sharswood,[1] James Fitzjames Stephen,[2] Baron Bramwell,[3] and Showell Rogers[4] argued against accountability under these circumstances. More recently, scholars taking the same

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1 [The advocate] is not morally responsible for the act of the party in maintaining an unjust cause, nor for the error of the court, if they fall into error, in deciding it in his favor. . . . The lawyer who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury.

G. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 83-84 (4th ed. 1876).

2 No doubt it may be, and often is, morally wrong to exercise a legal right. It may be unmerciful, vindictive, grossly selfish, and abominably cruel to do so, but this is the concern of the litigant, not of the advocate. A legal right is a power put by society at large into the hands of a private person to be used at his discretion. The officers of the law, in their various degrees, enable him to use it, but there is no moral difference at all between the advocate who conducts to a successful termination a prosecution instituted from the vilest motives, and the judge who passes sentence on the verdict. No one blames the latter, nor ought one to blame the former.

Stephen, *The Morality of Advocacy*, 3 CORNHILL MAG. 447, 453 (1861).

3 A man's rights are to be determined by the Court, not by his advocate or counsel. It is for want of remembering this that foolish people object to lawyers that they will advocate a case against their own opinions. A client is entitled to say to his counsel, "I want your advocacy, not your judgment. I prefer that of the Court."

Johnson v. Emerson, 6 L.R.-Ex. 329, 367 (1871) (Bramwell, J.).

4 A forensic advocate who pleads a cause the soundness of which he doubts or disbelieves, is not in the same position as a party politician who votes in Parliament, or a speaker who appears on a public platform in support of measures and objects which he disapproves. There is no moral obliquity on the part of the former, such as indisputably exists in the case of the latter.

Rogers, *The Ethics of Advocacy*, 15 LAW Q. REV. 259, 267 (1899).

position have included Zechariah Chafee,[5] Henry Drinker,[6] Charles Fried,[7] and Murray Schwartz.[8] Their thesis, which the earlier writers also shared, might be called "exemptionism," since it insulates advocates from even the possibility of blame, provided professional standards are honored while rendering service. Professor Schwartz succinctly expressed exemptionism's central tenet when he argued that as long as an advocate's conduct is professionally proper, he is "neither legally . . . nor morally accountable for the means used or the ends achieved" when furthering a cause.[9]

Whether practicing advocates would agree with this can only be a matter of conjecture. Clearly, though, exemptionism does at least allow for an instrumental approach to advocacy which is both widespread and easily recognizable. The key to this approach lies in an advocate's zealous effort to maximize the legal advantages available to his client. Personal opinions about the merits of a claim are set aside. If evidence is morally relevant but damaging to a claim, efforts are made to exclude it. Wearing down an opponent is accepted as a matter of course. Even arguments about the justifiability of a claim are developed for the sake of convenience rather than conscience—and then are delivered with greatest effectiveness

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5 "The doctrine of guilt by association is abhorrent enough in the criminal or deportation fields without being extended into the relationship between lawyer and client." Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 359 (1941).

6 Our legal system does not constitute the lawyer or the judge as to the justness or soundness of the causes committed to him, but deems it in the end of justice to have all the facts and arguments on each side of the controversy presented by expert counsel, stimulated to a maximum of industry by the contest, for decision by the court and jury.

H. DRINKER, LEGAL ETHICS 142 (1953).

7 [T]he lawyer must distinguish between wrongs that a reasonably just legal system permits to be worked by its rules and wrongs which the lawyer personally commits. . . . Consider the difference between humiliating a witness or lying to the judge on one hand, and, on the other hand, asserting the statute of limitations or the lack of a written memorandum to defeat what you know to be a just claim against your client. In the latter case, if an injustice is worked, it is worked because the legal system not only permits it, but also specifies the very details by which it is worked. Your conduct as a lawyer is efficacious only insofar as legal institutions have created the occasion for it. What you do is not personal; it is a formal, legally defined act. . . . [Thus, if an injustice is accomplished,] we should absolve the lawyer of personal moral responsibility for the wrong he accomplishes because the wrong is wholly institutional. It is a wrong which does not exist, has no meaning, outside the legal framework.

C. FRIED, RIGHT AND WRONG 191-192 (1978). *See also* Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE L.J. 1060, 1084 (1976).

8 "When acting as an advocate for a client, according to the Principle of Professionalism [i.e. within the constraints set by authoritative codes of professional conduct], a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved." Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 673 (1978). Professor Schwartz, it should be noted, argues that nonadvocates cannot claim immunity from moral accountability.

9 *Id.* at 673.

by emphasizing the latter over the former. Once professional life is considered in this way, a theory that encourages advocates to advance claims by offering immunity from possible moral censure is bound to be attractive.

This article examines and challenges the arguments that have been used to shield advocates from blame for their professional conduct. By defining the scope of advocates' accountability, the article's first section aims at showing the appropriateness of bringing moral considerations to bear on legal claims before they are advanced in court. The point may seem only too obvious, whatever the weight of legal opinion to the contrary. Lay critics, for instance, have long faulted advocates for their indifference to moral issues,[10] while in recent years confessional memoirs by advocates seem to have taken accountability for granted and so have offered justifications, interspersed with occasional handwringing, for causes advanced.[11] Those allowing for accountability, however, have assumed rather than demonstrated the falsity of traditional arguments against it. Lay critics, confessional lawyers, and even the philosophers who have written on the subject[12] have tended to argue past the denial of accountability and so have left it intact for those who want to seize upon it.

The article's second section builds on the principles of accountability established in the first by asking when advocates should act on their moral concerns by refusing to advance proffered claims. The most straightforward answer to this would be that conscientious refusal is warranted whenever a litigant seeks an unjustifiable result. To recommend this for advocates, however, ignores the values that can result from providing access to the adversary process, and ignores as well the screening function the adversary process often performs with respect to unjustifiable claims. If this

10 Some of the better-known jibes at lawyers include these: "They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters . . . ," T. MORE, *Utopia*, in FAMOUS UTOPIAS 203 (1937); "The first thing we do, let's kill all the lawyers," W. SHAKESPEARE, KING HENRY VI, PART II, ACT IV, SC. 1, 86; "He saw a Lawyer killing a viper on a dunghill hard by his own stable; And the Devil smiled, for it put him in mind of Cain and his brother, Abel," S. COLERIDGE, *The Devil's Thoughts*, in POEMS OF SAMUEL TAYLOR COLERIDGE 320 (E.H. Coleridge ed. 1912); "They utterly exclude and banish all attorneys, proctors, and sergeants at the law; which craftily handle matters and subtly dispute of the laws. For they think it most mete that every man should plead his own matter and tell the same tale before the judge that he would tell to his man of law," T. MORE, UTOPIA 126-27 (R. Robinson trans. 1935).

11 Recent advocate memoirs that have taken accountability for granted (and so have presented only justifications for advocacy) include A. DERSHOWITZ, THE BEST DEFENSE (1982); J. KUNEN, HOW CAN YOU DEFEND THOSE PEOPLE? (1983); and S. WISHMAN, CONFESSIONS OF A CRIMINAL LAWYER (1981).

12 *See* A. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 90-155 (1980); Cohen, *Pure Legal Advocates and Moral Agents: Two Concepts of a Lawyer in an Adversary System*, 4 CRIM. JUST. ETHICS 38 (Winter/Spring 1985).

screening function were carried out perfectly or nearly perfectly, there would be little need to consider conscientious refusal at all. However, as will be argued in the second section, it is because occasions arise when the adversary process *cannot* prevent unjustifiable harm that conscientious refusal constitutes an important option for advocates. The second section, then, addresses both sides of a perennially troubling issue of advocacy. It asks when an advocate may justifiably provide representation for an unjustifiable cause. More importantly, it asks when representation cannot be provided and thus asks when an advocate should decline to offer either zealous service or any service at all.

Some points about terminology should be noted before turning to arguments designed to answer these questions. First, the terms around which the paper's two sections are organized—"accountability" and "conscientious refusal"—deserve brief discussion. To say that a person is accountable for an event, it may be suggested, is to say that he can fairly be asked to justify conduct related to the event.[13] Not all requests for an accounting can be considered fair ones. One might argue, for example, that one's conduct was not closely enough related to an event to require an accounting with respect to that event; one might argue that the conduct was not voluntary; and so on. When modified to suit the special circumstances of the legal system, denials of accountability have actually been advanced along these lines on behalf of advocates.[14] It is because there is no *legal* accountability for harmful but profes-

13 Circumstances sometimes arise in which individuals plausibly argue that they should not be called on to justify their conduct since it would be unfair to hold them accountable for the conduct itself. If, for instance, a person is coerced into engaging in a certain act, he might argue that the act in question cannot fairly be attributed to him but must instead be attributed to the person who coerced him. If coercion were shown, it would certainly be inappropriate to ask the person subjected to it to justify his conduct. It is because accountability denials are sometimes persuasive that the issue of accountability, when raised, must be considered *before* turning to the question of the justifiability of conduct. Professor Schwartz appears to have had this logical priority in mind when he wrote that "in procedural terms, the concept of moral nonaccountability is equivalent to the filing of a demurrer, rather than an answer, to the charge of immorality." Schwartz, *supra* note 8, at 674.

14 The distinction between accountability and justification has not been adequately appreciated in discussions of the ethics of advocacy. Denials of accountability for advocacy have taken two forms: (1) claims that professional conduct is not *personally* attributable to advocates (discussed in the first part of Section I of this essay); and (2) claims that, whatever the resolution of personal attribution, the *results* of the adversary process cannot be subjects of accountability because arbiters freely choose those results (an argument that is discussed in the second part of Section I of this essay). Justifications of advocacy, by contrast, involve an implicit concession of accountability for the likely consequences of claim-advancement. Often-mentioned justifications (which are discussed in the third and fourth parts of Section II of this article) are the following: that it is always justifiable to aid individuals in realizing their legal rights; that advocacy for even wrongful causes is justifiable because it provides an incentive to laypersons not to resort to self-help remedies; and that given the likelihood

sionally proper conduct that the issue of *moral* accountability takes on critical importance.

As used here, "conscientious refusal" refers to two options available to advocates when asked to advance morally objectionable claims: refusal to offer any access to the adversary system and provision of qualified access on condition that the litigant forgo objectionable legal advantages accompanying a claim. While full refusal is the more dramatic option (and is often cited by defenders of zealous advocacy when searching for a straw man to attack), this article supports the provision of qualified access whenever it will not risk significant harm to others. Qualified access requires agreement between a litigant and an advocate concerning the scope of the advocate's representation. The second section of the article discusses the propriety of advocate/client bargaining over the conditions of service.

Two other terms that appear throughout the article should be noted as well. First, "claim" should be understood not in a technical sense as referring to a plaintiff's request for relief.[15] Instead, "claim" should be taken in a broader, more colloquial sense as covering a party's assertion of fact (a claim that something is the case), assertion of law (a claim of entitlement), or assertion of a combination of these elements. Given this broad definition of "claim," an advocate's work can be said to center on claim-advancement for laypersons. That is, an advocate can be said to give legal significance to lay claims of fact or entitlement and to render zealous service by exploiting the legal advantages that accompany these claims.

Second, an "unjustifiable result" should be understood as a result which should not be reached given the morally relevant considerations bearing on it.[16] "Justifiability" is appealed to instead of

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that some other advocate will advance a wrongful cause, there is no reason why the original advocate asked for help should not do so.

A further distinction should also be noted. The defenses just mentioned can be presented in across-the-board form (for accountability, these defenses have been classified under the general heading of *exemptionism*; justifications of this kind can be said to be *blanket* in nature), or they can be presented as defenses framed in terms of a specific situation. Both distinctions (between accountability and justification and between across-the-board and situational defenses) must be borne in mind in order to come to grips with the moral structure of advocates' professional conduct.

15 *See* FED. R. CIV. P. 8(a)-(b) (distinction drawn between claims for relief on the one hand and defenses and denials on the other). As used here in its more colloquial sense, a "claim" can be advanced not only as a means of gaining relief, but also as the means by which a defense is mounted (as when a party asserts he is not legally liable to a charge), or by which a denial is made (as when a party asserts that another party's claim is factually false).

16 The result at stake can be either a final judgment or a consequence of the working of the adversary process. For example, an advocate might be concerned about the justifiability of causing anguish to a complaining witness via severe cross-examination in the course of

"justice" for two reasons: (1) because antinomies within the concept of justice can make a result just in one sense and unjust in another;[17] and (2) because the concept of justice does not, in any case, exhaust the range of moral considerations relevant to possible results of the adversary process.[18] When judges and juries perform their screening roles properly, they consider both kinds of complications in moral reasoning. Advocates, it is suggested here, must consider these complications as well when they have good reason to believe that arbiter screening will not be effective.

I. A Theory of Advocate Accountability

Stated most generally, accountability is grounded in the relationship between action aimed at a desired result and the reasonably foreseeable consequences of that action. For advocates, we may thus say that accountability is grounded in the relationship between the decision to advance a claim and the reasonably foreseeable consequences of advancing the claim in the adversary system.[19] This seemingly unobjectionable principle is in fact open to two exemptionist objections, one of which focuses on the *personal attributability* of advocates' acts when they represent clients, and the other on their *causal responsibility* for decisions rendered by judges or juries. Each exemptionist defense raises significant difficulties for a theory of advocate accountability. By considering each defense with some care, it will be possible to vindicate the general principle

representing a client accused of rape. The justifiability of this proximate result will depend in part on the justifiability of seeking the final one. However, even if the client is not guilty of rape, certain kinds of questioning might still not be justifiable. It might, for example, still not be justifiable to suggest on cross-examination that the complaining witness has a history of unchastity when the advocate knows this is not true.

17 Notice is frequently taken of tensions between distributive, retributive, and commutative justice. Also, trade-offs are sometimes accepted between procedural and substantive justice and between comparative and noncomparative justice. For discussions of the tensions that arise between different versions of justice, see Feinberg, *Noncomparative Justice*, 83 PHIL. REV. 297 (1974); Honoré, *Social Justice*, 8 MCGILL L.J. 77 (1962).

18 It has been argued, for instance, that given the complexity of the moral considerations that can bear on conduct, it can actually be justifiable to treat a person unjustly. Joel Feinberg has suggested that "the realm of justice is not the whole of morality, and even within its spacious domain, certifiable injustice is unavoidable." *See* J. FEINBERG, SOCIAL PHILOSOPHY 75 (1973). Another commentator states:

> The just act is to give the man his due and giving a man what it is his right to have is giving him his due. But it is a mistake to suppose that justice is the only dimension of morality. It may be justifiable [given other moral considerations] not to accord a man his rights.

Morris, *Persons and Punishment*, 52 THE MONIST 475, 599 (1968).

19 Thus, even if an advocate does not achieve his client's desired goal, he will nonetheless be accountable for the reasonably foreseeable consequences of seeking it via the adversary process. For the implications of accountability for a likely result even when a client's ultimate goal is *not* achieved, see note 39 *infra* and accompanying text.

of advocate accountability just outlined and to show how it can be applied to situations that arise in the everyday practice of law.

A. *The Significance of Professionalism*

Of the two defenses, the more far-reaching is the one that ignores causal issues in order to focus on the personal attributability of the acts advocates undertake as professionals. Advocates, it is argued, are "not themselves" when advancing claims for clients. They act vicariously; they are professionally required not to state their personal views when advancing a claim; they follow rather than create the legal formulae necessary to reach desired results; their conduct in fact takes on significance only because of contextual conditions created by the legal system itself. More than "role distance" is at stake in this defense of advocacy. Clearly, an important psychological gap is created when advocates provide representation for clients. Even more important to this defense, though, is its claim that acts are not personally attributable to agents when the meaning of those acts is derived wholly from institutional norms. Advocate accountability, so this defense goes, is thus inappropriate given the institutional context that gives meaning to advocates' acts.

1. The Occasion for Service

The most cogent version of this defense can be found in the writings of Charles Fried.[20] According to Fried, only two conditions need prevail for an advocate to be able to deny accountability. First, an advocate's conduct must be impersonal; by this, Fried means that an advocate's acts must be engaged in for others and that the legal system in which an advocate renders service defines their meaning as acts. Second, the legal system must provide the formula for achieving a desired result. In Fried's terms, the "occasion" for achieving a result must be provided by legal institutions. According to Fried, the combined effect of these conditions is sufficient to insulate advocates from accountability, a point he makes clear in the following statement of his position:

> [T]he lawyer must distinguish between wrongs that a reasonably just legal system permits to be worked by its rules and wrongs the lawyer commits himself . . . . [I]f an unjustice is worked, it is worked because the legal system not only permits it but specifies the very details by which the result is reached. Your conduct as a lawyer is efficacious only insofar as legal institutions have *created the occasion* for it. What you do is not personal; it is a

20 As an aside, it should be noted that Fried developed his position on accountability while he was a law professor and now has an opportunity to test it in his new position as Solicitor General of the United States.

> formal, legally defined act. . . . We should thus absolve the lawyer of personal moral responsibility for the wrong he accomplishes because the wrong is *wholly* institutional.[21]

Fried's argument, it should be noted, avoids two rather straightforward mistakes professionals often make in arguing for nonaccountability. One of them is to be found in the claim that role distance is sufficient by itself for denying accountability. Catch phrases for this include: "It's not personal;" "Don't take this personally;" and "Please understand, I wouldn't do this for myself."[22] However, factors such as disinterestedness in an ultimate result, skill in reaching that result, and willingness to apply special training in helping laypersons are grounds for praise when a goal is itself laudable. They are not insulating conditions with respect to accountability. If they were, then not only would advocates and other professionals be unaccountable for wrongful harm, the list of persons enjoying this insulation would also have to include contract killers, soldiers of fortune, and anyone else willing to help reach a questionable goal.

The second, and related, mistake has to do with the effect of role-based behavior on accountability. The concern here is not merely with accountability but with the supposed incommensurability of role-based codes of ethics. That is, according to proponents of this approach, each role can be said to generate its own moral values, thus creating accountability according to the values of a given role *but not* according to those of other roles. For advocates, this has proven to be a particularly attractive way of limiting accountability, for accountability can be conceded according to norms established by professional codes and at the same time be denied when "lay" standards of morality are employed in censuring advocate conduct.

Many difficulties accompany this balkanizing approach to ethics, however. To give moral primacy to role-performance, for instance, fails to take into account the negative value accorded many roles. If role-performance or even the fulfillment of expectations engendered by assumption of a role were sufficient for immunity to criticism from other moral perspectives, then one would have to assess contract killers and the like only from the standpoint appropriate for their roles. Furthermore, even if a concession were made by focusing only on approved roles (with approval determined by some method other than role analysis), the fact of approval for the role would still not be sufficient to exclude the use of evaluative criteria that questioned conduct designed to further the role's ends.

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21 FRIED, *supra* note 7, at 191-92 (emphasis added).

22 For a review of these denials, see J. NOONAN, PERSONS AND MASKS OF THE LAW (1976).

For instance, when assessing the conduct of persons acting as parents or friends, we speak of parents' or friends' codes of ethics in only a limited sense, for allowance is made for special solicitude to be shown children or friends, but not for the active infliction of harm on others in order to further the interests of those specially cared for. A *role-based valence*, it may be suggested, is created by parenthood or friendship. The fact that special expectations are engendered by assumption of such roles does not mean, though, that accountability disappears for harm done while carrying out those roles. The same point may be applied to advocacy. For while the expectations created by an advocate's agreement to serve make it appropriate to show special solicitude for a client, mere assumption of the advocate's role is insufficient by itself to insulate an advocate from accountability for the harm caused to others in furthering a client's interests.[23]

Fried avoids both of the mistakes just mentioned by focusing on the occasion the adversary process offers for reaching a client's desired goals. He does not ignore either the disinterested nature of professional service or the fact that advocacy is carried out in the context of a socially defined role. His key point, though, is that a person is not accountable for harmful conduct when the occasion for that conduct has been created and the formulae for it prescribed by a socially approved institution such as the law. Under these circumstances, he says, what is done "is not personal; it is a formal, legally defined act" for which there cannot be personal responsibility.[24]

One must ask, though, why social creation of the occasion for impersonal conduct should suffice for denying accountability. That disinterestedness is not a reason for denying accountability has already been established. The fact that a role is socially approved has also been shown not to be relevant here. What, then, is added by the fact that the legal system "creates the occasion" for reaching a desired result? This question can best be approached by considering whether laypersons (rather than lawyers) can deny accountability when they appear *pro se* in legal proceedings.[25] Disinterestedness and role-performance are certainly not at issue when laypersons argue their own cases. By focusing on laypersons, it is

23 Alternatively, accountability could be conceded in the course of arguing that it is always morally justifiable to show special solicitude for a client, no matter what harm could foreseeably be done others as a result of this special care. This point is addressed and rejected in Section II, Part 3 of this article.

24 FRIED, *supra* note 7, at 192.

25 It is not critical to Fried's argument (in the passage quoted in the text accompanying note 21 *supra*) that a lawyer be the person who works an injustice via the legal system. A layperson could do this for himself and still deny accountability on the grounds Fried offers.

possible to consider what significance, if any, the *occasion* for impersonal conduct has on accountability.

When framed in this way, it is hard to see what is added by Fried's emphasis on social creation of the occasion for action. One can agree with Fried that legislators and judges prescribe the means by which landlords carry out evictions, by which debtors use statutes of limitations to avoid otherwise meritorious debts, by which spouses obtain harsh property settlements in gaining divorces, and so on. One can also agree that when these results are obtained following *pro se* appearances, other people have created the occasion for such appearances. None of this means, though, that when a formal act (such as a *pro se* appearance) is freely undertaken, it is any less attributable to the person choosing to undertake it. A landlord who agrees to sign a lease cannot avoid accountability for this because the context for his conduct was formally defined. The same point holds if a landlord later seeks an eviction—that is, given an unconstrained decision to turn to the adversary system, a landlord is accountable for his decision to do so and is accountable as well for the likely consequences of doing so. Indeed, for *pro se* litigants in general, there is accountability for a freely chosen act to use the adversary system to reach a desired goal and *further* accountability for the likely consequences of using it. Why should this conclusion be different for advocates? No reason exists to distinguish the layperson who chooses to use the adversary system from the lawyer who does the same thing. Of course, grounds exist for distinction on other points, in particular because lawyers act in compliance with a social role and because, in most instances, they have no direct interest in the object of litigation. As has been noted, though, disinterestedness and role performance are not reasons for denying accountability. Since the occasion for formal action also does not provide a ground for denying accountability, one must conclude that none of the factors mentioned so far can affect accountability, although some of them (in particular, a disinterested willingness to provide aid) can be relevant in assessing the justifiability of an advocate's conduct.

2. Professional Constraints

Alternatively, it could be argued that advocates act according to professional obligations in rendering service, and that the effect of these obligations is to insulate them from accountability since they cannot choose the kind of conduct in which they engage. According to this argument, advocates can be held accountable for their *unconstrained* professional conduct. Performance of a professional role cannot—at least according to this argument—be suffi-

cient for a denial of accountability. However, by focusing on constraints on advocates' freedom of choice, this argument only modifies the rationale for avoiding accountability, not the conclusion that advocates are unaccountable for their professional conduct. Murray Schwartz, in taking this approach, frames his defense of advocacy as a personal statement an advocate can offer on his own behalf:

> I represent him [the client] because the system *demands* that I do so. Moreover, I *must* cross-examine him and try to impeach truthful witnesses, make arguments with which I personally disagree, decline to introduce probative, adverse evidence against my client, and attempt to present matter in ways I think personally are inaccurate because the system demands that. You [others besides the lawyer and client] may not hold me . . . morally accountable for that behavior.[26]

This "constraint defense," as this might be called, should be examined from an empirical and then from a moral perspective, for it contains a claim about what advocates are actually obligated to do and a further claim about the moral consequences (exemption from the possibility of blame) that supposedly flow from advocate obligations. Empirically, there can be no doubt that advocates are *not* professionally obligated to accept cases offered them. Also, there can be no doubt that they may, within certain limits, withdraw from cases already accepted. The Code of Professional Responsibility is explicit on the issue of acceptance, saying that "a lawyer is under no professional obligation to act as an adviser or advocate for every person who may wish to become his client . . . ."[27] The Code also permits withdrawal in matters not pending before a tribunal when a lawyer's judgment differs from that of a client concerning an aspect of the client's case.[28] The Model Rules of Professional Responsibility may well allow greater scope than the Code since they permit withdrawal if this "can be accomplished without material adverse effect on the interests of the client . . . ."[29] In terms of profes-

26 Schwartz, *supra* note 8, at 673-74.

27 MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-26 (1980) (hereinafter cited as MODEL CODE).

28 MODEL CODE DR 2-110(c)(1)(e). When representing a client, a lawyer may withdraw from employment if his client "insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules." *Id.* This rule does not state whether the judgment to be employed here can be moral or whether it must be merely tactical in nature. A good reason to believe that the exercise of moral judgment is encouraged in this context can, however, be found in the Preamble to the Code, where the authors state that "each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above [the] minimum standards" set by the Code.

29 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1983) (hereinafter cited as MODEL RULES). Rule 1.16(b) allows for one exception—that an advocate may not withdraw

sional obligations, acceptance of a proffered claim is always a matter of choice, while some freedom is even permitted concerning questions of withdrawal.

This relatively straightforward point about advocates' leeway under professional codes provides a foundation for systematic reasoning about both advocate accountability and conscientious refusal. It is important to pause at this point, though, to emphasize the significance of an advocate's freedom to refuse service when he concludes that the consequences of providing it would be unjustifiable. The agreement to serve, it may be suggested, carries with it a "lock-in" device. That is, absent a special understanding to the contrary, an advocate's consent to serve has the legal effect of binding the advocate to honor the professional obligations (in particular, the obligation of zealous service) which arise in the course of advancing a claim. From a legal point of view, an advocate faces three options, given this lock-in device, at any time when service is sought and refusal professionally permitted. First, he can provide unqualified access to the adversary process.[30] Second, he can qualify access by noting obligations which, the advocate believes, would be likely to produce unjustifiable results and by then seeking a litigant's permission to waive or limit those obligations.[31] And third, an advocate can refuse service altogether, either because a litigant rejects proposed qualifications or because the likely consequences of even qualified service appear so wrongful that providing any representation at all cannot be justified.[32]

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when ordered by a tribunal to continue representation. *See* MODEL RULES 1.16(c). The exception appears to have been broadly drawn, for it permits tribunals to order continued representation even when withdrawal would not have an adverse effect on a litigant's case.

30 If an advocate does not obtain a client's agreement concerning the service to be provided but nonetheless agrees to serve, he is subject to the professional obligation to seek his client's lawful objectives and to defer to the client's decisions concerning harm that might result from the means employed in pursuing those objectives. The Model Code calls this the obligation of zealous service, and that is what it is called here. *See* MODEL CODE DR 7-101(A)(1). The Model Rules do not specifically refer to an obligation of zealous service. However, Rule 1.2(a) employs the Code's terminology in stating that a "lawyer shall abide by a client's decisions concerning the objectives of representation." Furthermore, the comments following Rule 1.2(a) indicate that while a lawyer may reject a client's choice of means on tactical grounds, the client's wishes must prevail even with respect to means when the issue of possible harm to third parties is at stake.

31 For the Model Code's comments on a lawyer's right to qualify access before the commencement of adjudicatory proceedings, see MODEL CODE EC 7-8. For the comments of the Model Rules on qualification of access, see MODEL RULES 1.2(c). Both codes take the following approach: (1) They allow lawyers to ask litigants not to press legal advantages that might lead to wrongful results; (2) They require a litigant's informed consent for a valid waiver of an advantage; and (3) They create rights of refusal for both parties: litigants can seek other lawyers and lawyers can decline employment if the litigant rejects their proposed qualifications.

32 The codes' authorization of refusal of service on the grounds of conscience prior to undertaking representation can be understood by considering the conjunction of separate

If attention is turned to the moral implications of these options, it should first be noted that they are consistent with the principle of accountability noted at the beginning of this section; that is, an advocate is accountable for the reasonably foreseeable consequences of his decision to provide or deny service. Given this principle, an advocate must be prepared to justify the professionally unconstrained decisions he makes concerning service. Furthermore, an important implication of advocate accountability in this context is that if an advocate *fails* to qualify the access he is willing to provide, he is accountable for obligatory conduct that can reasonably be anticipated at the time he is free to refuse service or qualify it. This last point helps to focus attention on a dimension of advocate accountability that requires particularly careful attention, for it is by asking the baseline question of what he would be accountable for if service were *unqualified* that an advocate can meaningfully consider the alternative options of qualified access and complete refusal. The *significance* of accountability for unqualified access has yet to be determined, for if there is little chance harmful results will be achieved when unqualified access is provided, then accountability for providing it may not be a serious matter. That there can be accountability for offering unqualified access is at least clear, though, and it is on this basis further reasoning can proceed.

Before, however, considering the significance of accountability for an unconstrained decision to serve, it would be best to review the moral status of conduct undertaken to comply with professional obligations. Professor Schwartz, I would suggest, is incorrect not only in his empirical claim that the legal system "demands" advocate representation of clients, but also in his moral claim that an advocate can deny accountability in every instance when conduct is professionally required. This normative claim is grounded in an assimilation of professional obligations to duress, for Schwartz apparently believes that the demands made by lawyers' codes are backed by sanctions of such severity that it would not be reasonable to ex-

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parts of each code. First, each code allows for refusal of service but says nothing about the exercise of conscience with respect to this. *See* MODEL CODE EC 2-26 and MODEL RULES 1.2(c). Second, the authors of each code state that lawyers should consult their own consciences in determining how to conduct themselves within the framework of their professional rules. As already noted, the Preamble to the Model Code states that "each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above [the] minimum standards" established by the Code. The Preamble to the Model Rules takes the same position. It notes that "the Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law."

pect advocates to resist these demands when they arise in the course of providing service.[33]

A constraint defense such as this can be sustained only if it would *always* be unreasonable to expect advocates to anticipate (at a time when service can be refused) the demands that professional obligations will create. The rationale for this anticipation principle is not difficult to understand, for it would not be plausible to allow someone to escape accountability for constrained conduct when he could have anticipated the constraints likely to be imposed on him and so could have avoided them. It is because an advocate can often anticipate constraints that qualified access and complete refusal of service are important options. Admittedly, an advocate cannot foresee every professional obligation at a time when he can permissibly decline service. On many occasions, though, he *can* anticipate these obligations and it would certainly be unreasonable to allow an advocate to escape accountability when this is the case. For foreseeable obligations, at least, an approach that emphasizes justification rather than denial of accountability provides the proper foundation for moral reasoning. In fact, in this context a denial of accountability becomes a pretext for evading the burden of choice posed by the professional freedom to refuse service.

What, then, can be said about obligatory conduct that an advocate could *not* reasonably anticipate in time for discretionary refusal? Schwartz's defense might be persuasive on at least some occasions when obligations unexpectedly arise in the midst of service. A verdict on this point would not, however, depend on the issue of foreseeability; clearly, some kinds of obligatory conduct cannot be anticipated in time for discretionary refusal. Instead, the verdict would turn on whether the sanctions (in particular, the threat of disbarment) backing professional obligations can provide threats of sufficient severity that advocates cannot reasonably be expected to resist these threats. The point is a close one, at least with respect to the threat of disbarment. Perhaps the best solution would allow for the possibility of a persuasive denial of accountability in this context, while noting that only rarely do occasions arise which involve both unforeseeability and extreme severity of sanctions.

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33 The sequence of points that Schwartz makes about nonaccountability indicates that duress is central to his argument. He seeks first to demonstrate the uncontroversial point that a lawyer cannot be legally or professionally liable for his conduct as long as he adheres to professional norms when providing representation. Schwartz then uses the fact of professional obligations—"systemic demands," as he calls them—to argue for the controversial point of moral nonaccountability. He states that "the Principle of Nonaccountability for the Advocate proposed here goes [beyond legal and professional immunity] in asserting [that] the . . . demands of the system also justify the *moral* nonaccountability of the advocate." Schwartz, *supra* note 8, at 673 (emphasis in original).

When only one of these conditions is present—when, for instance, an advocate could have anticipated conduct but did not, or when disbarment exists as a formal but unlikely possibility[34]—an advocate once again faces a problem of justification and cannot plausibly deny accountability. In this case the factors which determine what is now at issue—that is, the justifiability of violating a professional obligation encountered in the midst of service—are somewhat different than the ones relevant to deciding how to act when conscientious refusal is professionally permitted. Ranged on one side of this new justificatory equation will be expectations of present service that professional obligations engender in specific clients and the expectations of future service that these engender in the general public. On the other side will be the risk and gravity of harm to a third party from honoring a professional obligation. One might argue that rarely should the prospect of harm because of fidelity to a professional obligation encountered in the midst of service count as a decisive reason against service. Advocates, it could be claimed, cannot estimate the damage to the general practice of client representation from setting aside an obligation under these circumstances. Even if this point were true, however, it would merely underscore the necessity, in most instances, of justifying conduct with respect to professional obligations rather than denying accountability because of them. Properly understood, such obligations rarely offer insulation from accountability. Instead, where professional obligations are encountered in the midst of providing representation, they must be taken as specially weighted factors in an advocate's moral universe. Advocates in turn must assign them reasonable weightings in determining what course of action is morally justified.

This said, it would be wise to focus in the remainder of the article on situations in which advocates possess professional discre-

34 The formal threat of disbarment can be discounted for at least three reasons. First, even in well-administered jurisdictions, only a small percentage of complaints result in disciplinary sanctions of any kind. One study found, for instance, that during 1969 to 1970 "only slightly more than 1% of [the complaints filed in California against attorneys] resulted in private or public reprimands or recommendations of suspension or disbarment." *See* Marks & Cathcart, *Discipline Within the Legal Profession*, 1974 U. ILL. L.F. 193, 214-15. Second, even after disbarment lawyers can often apply for readmission to the bar after a stated period of time. California procedures, for example, permit an application for reinstatement upon good cause shown and in the discretion of the State Bar of California after a lapse of five years from disbarment. CAL. BUS. & PROF. CODE §§ 6068, 6078, 6082 (West 1985). And third, the American Bar Association Committee on Professional Discipline, chaired by Thomas C. Clark, found that, in a few states, even lawyers who had been disbarred or suspended indefinitely experienced relatively little difficulty in gaining reinstatement. *See* A.B.A. Special Comm. on Evaluation of Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement* 150-55 (1970). Therefore, the threat of disbarment because of conscientious refusal to honor professional obligations must be considered extremely remote, and denials of accountability on this score will rarely be plausible.

tion *not* to act—that is, on situations in which advocates can refuse proffered claims or withdraw from service if professional obligations will require unjustifiable conduct. There are two reasons why this narrowing of focus is worthwhile. One is that it underscores the importance of producing a justification for *unqualified* service. That is, if an advocate is in a position to foresee the kind of zealous conduct that advancing a claim will require and can either qualify service or refuse it altogether, then it will be especially important to ask him why, given other available courses of action, he is nonetheless willing to settle for unqualified service. The second reason for narrowing the focus has to do with the force of professional obligations that arise unexpectedly in the midst of service. While these do not defeat accountability on most occasions, careful analysis of the weight to be accorded obligations encountered while serving can only distract attention from the general issues of accountability and conscientious refusal. Rather than introduce such complicating factors into the situations that will be discussed, it is best to emphasize now their possible relevance to decisions concerning the justifiability of conduct. In the rest of the article, though, attention will be confined to situations in which the consequences of obligations are foreseeable when an advocate is free to refuse service altogether or to provide it on a qualified basis.

B. *A Precatory Defense*

Even if an advocate agrees, without qualification, to advance a claim, the significance of his accountability for doing so remains open to question. The advocate is of course accountable for asking for something; and "asking" can be broadly defined in this context to include not only assertion of a claim, but also zealous promotion of it within the adversary process. One can reasonably wonder, though, how important accountability for asking actually is, for even when an advocate zealously presses a claim he can still be said only to *request* a result that arbiters will then grant or deny.

Two factors, it might be argued on behalf of advocates, underscore the importance of arbiter decision-making and thus the minor significance of advocate influence in this context. One is that arbiters (trial or appellate judges or jurors, depending on the nature of the adversary procedure at stake) must pass on the claims addressed to them. It is in this sense, an exemptionist might note, that advocates can be said to stand in a precatory posture toward arbiters. That is, advocates *plead* causes of action, *pray* for relief, *submit* evidence, and so on; indeed, no matter how zealously they pursue claims, advocates always stand in a position of precatory subordination vis-à-vis arbiters. The second factor that could be

cited on behalf of a precatory defense is that arbiters perform their roles while subject to a general charge to render justice according to law. Given both factors, a precatory defense of advocates could be framed in the following way: As long as an advocate has a reasonable belief that arbiters will evaluate a request for a result according to criteria morally relevant to the result, he should not be held accountable for unjustifiable results sought and obtained since he is entitled, at the time he acts, to rely on the assumption that unjustifiable elements of his client's claim will be screened out through the operation of the adversary process.

Even under this defense, an advocate is accountable for advancing and zealously pursuing a morally questionable claim. Given the precatory defense just outlined, it would not be difficult, however, to justify mere claim-advancement or even the zealous pursuit of a claim, no matter how questionable a result sought might be. Because an advocate can reasonably expect a division of moral labor to prevail within the adversary process, so this argument goes, the issue an advocate faces is whether there are good reasons to *advance* a claim; he does not have to consider the further question of justifying the content of the claim itself.

As far as the *content* of a claim is concerned, an advocate can, according to this argument, expect that arbiters will evaluate a result according to criteria morally relevant to it. As far as *claim-advancement* is concerned, numerous reasons can be offered for providing service: to promote the public resolution of disputes; to help laypersons by providing them with the kind of zealous effort they would make on their own behalf if they possessed the skills to do so; and to provide at least one person to counsel another when the latter's interests are significantly threatened. Reasons such as these—"access justifications," as they might be called—do not provide convincing justifications for service if zealous advancement of a claim carries with it a strong likelihood of a wrongful result. However, if *only* zealous service is at stake—if advocates can reasonably expect arbiters to prevent the occurrence of wrongful harm during the course of a proceeding and can also expect that the final disposition of a claim will be proper as well—then access justifications will often be persuasive in demonstrating the propriety of providing service.

Current professional codes lend significant support to the precatory defense just outlined. Neither code deals explicitly with the issue of accountability. Both, however, contain statements designed to buttress the belief that arbiters will assess results sought according to morally relevant values. The authors of the Model Rules suggest, for instance, that only one variable—the presence of competent opposing counsel—need be considered in deter-

mining whether justice is likely to be done. The Rules state that "when an opposing party is well represented, a lawyer can be a vigorous advocate on behalf of a client and at the same time assume that justice is being done."[35] The Code of Professional Responsibility is even more definite on this point. By quoting a famous reply by Samuel Johnson to James Boswell when the latter asked about the morality of defending a bad cause, the Code's authors suggest that advocates should never act on their own judgment but instead should rely on arbiters' capacity to reach morally correct conclusions:

> Sir [Johnson said], you do not know it [i.e. the result sought] to be good or bad till the Judge determines it. . . . An argument which does not convince yourself may convince the Judge to whom you urge it; and if it does convince him, why, then, Sir, you are wrong and he is right.[36]

Statements such as these are open to challenge not because of the approach they take to accountability but because of the assumptions they contain about the adversary process. Given the precatory role advocates perform, one must of course agree that their accountability is rooted in the act of claim-advancement. However, only when the risk of an unjustifiable result is itself low are claim-advancement and zealous pursuit of a result relatively minor matters for which accountability can easily be discharged. The code authors suggest that this likelihood is always low. They imply that even when a litigant wishes to achieve a questionable result, an advocate need not concern himself with the result's moral status, since the advocate will have good reason to believe that the legal system's arbiters will screen out unjustifiable results.

It would be reckless, though, for advocates to accept code assurances on this point without further inquiry, for at least two obstacles can stand in the way of effective arbiter screening. First, rule-based constraints—especially evidentiary rules—can prevent arbiters from considering information morally relevant yet damaging to claims. These rules create "formal advantages," as they might be called, for the furtherance of claims. The other obstacle can be classified under the heading of "informal advantages," for in this case persons advancing claims can benefit from known arbiter preferences to exercise discretion in a favorable way. If one could be certain that the legal system would make it impossible for advo-

35 MODEL RULES Preamble.

36 MODEL CODE EC 2-29 n.68 (cited with respect to a lawyer's opinion concerning the merits of a civil case). *See also* 5 J. BOSWELL, THE LIFE OF JOHNSON 26 (Hill ed. 1887): "A lawyer has no business with the justness of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge."

cates to deploy formal and informal advantages to achieve morally justifiable results, the code positions would then be vindicated. However, the opposite is a far more tenable hypothesis. Although not every claim is strongly advantaged, certainly some claims are accompanied by sufficiently strong advantages to make it foreseeable at the time service is provided that arbiter screening will not be morally effective. Claim-advancement, one can thus conclude, lies at the heart of advocate accountability. When questionable claims are accompanied by strong advantages, however, accountability becomes a far more serious matter than the code statements suggest.

The points just made allow for transformation of the precatory defense into a theory that captures important and serious dimensions of advocate accountability. The foundation for the theory was noted at the beginning of this section: advocate accountability is grounded in the relationship between an unconstrained decision to advance a claim and the reasonably foreseeable consequences of advancing it within the adversary process. With the centrality of the precatory role now clear, this can be seen to mean that an advocate is accountable for the likelihood, foreseeable at the time service can be declined, that the legal system will not prevent an unjustifiable result from occurring. Four questions an advocate should ask capture the core of this approach to accountability. They are listed below along with brief commentary on the implications of providing unqualified access to the adversary process. The comments following the questions help to identify the features of claims whose zealous advancement can produce unjustifiable results, and it is in this sense that the questions of accountability listed here set the stage for an offer of qualified access or, if necessary, for complete refusal of service.

1. *Could one or more of the results of providing unqualified access be open to moral challenge?*
The codes concede the possibility that litigants can seek questionable results—that is, results that appear to be (and may or may not actually be) morally unjustifiable. The two approaches thus do not differ on this point. In fact, one can go further than the codes and suggest that a mature legal system *should not* prohibit litigants from seeking questionable results.

2. If no to 1, then an advocate is accountable for his decision to provide unqualified access, but it is unlikely he will have a difficult time providing a moral justification for what he has done. If yes to 1, *is there a significant likelihood that by providing unqualified access a questionable result will be achieved?*
The codes suggest that because of the effectiveness of the adversary system's screening procedures, advocates need not worry about the risk that an unjustifiable result will be the consequence of claim-advancement. This point must be challenged. What I am suggesting is that advocates are often in a position to

know when the advantages accompanying a claim are strong and when arbiter screening is thus likely to be cursory or nonexistent. Once it is clear that the formal or informal advantages accompanying a claim are strong (and the professional obligation of zealous advocacy, it should be remembered, often requires the exploitation of such advantages), then a significant risk of a questionable result can be posed by the precatory activities undertaken by advocates.

3. If no to 1 and 2, then accountability for claim-advancement would certainly not be difficult to discharge. If no to 2 but yes to 1, accountability would center on the issue of why an advocate chose to seek a questionable result which at best had only a modest chance of success. Justificatory responses to this would require balancing the value of providing access to the adversary process against the inefficiency associated with pursuit of a result not likely to be achieved. If, on the other hand, the answer to 2 is uncertain while the answer to 1 is positive, an advocate would be accountable for seeking a questionable result whose chances of success were uncertain, thus making the third question, and if necessary the fourth, worth asking. Finally, if yes to 1 and 2, then an advocate should ask, *is the result which is likely to be achieved not merely open to question but actually morally unjustifiable?* According to the codes, the adversary system will rarely, if ever, produce unjustifiable results. However, given the possibility that formal and informal advantages can accompany a questionable claim, this point simply cannot be treated as an article of faith. Rather, if weak or nonexistent arbiter screening seems likely with respect to a given result, it would be callous for an advocate not to question the justifiability of the claim. An advocate's significance in the adversary process, it may be suggested, increases in proportion to any decrease in the expectation of a strong arbiter role in evaluating the moral status of results sought. Thus once the likelihood of arbiter screening is determined to be low, advocates requested to advance claims must ask about the justifiability of results sought.

4. A "no" to 3 resolves the apparent difficulty raised by positive answers to 1 and 2, and accountability will be relatively easy to discharge. If, however, 3 is answered positively, an advocate must ask, *given both the risk* (question 2) *and gravity* (question 3) *of the harm that unqualified access could cause, are there nonetheless access values of sufficient importance to warrant zealously seeking the result?* The codes ignore this question altogether, when it is actually fundamental to conscientious refusal of service. As the risk of achieving an unjustifiable result decreases or as the gravity of the result appears less severe, the value of offering access to the adversary process, it may be suggested, can provide an increasingly strong reason in favor of service. Even when the risk of harm is high, something of importance can still be realized by aiding an individual who would zealously advance his own claim if only he had the skill to do so. However, because of the importance of the injunction not to bring about an unjustifiable result, only in a few situations will provision of zealous service out-

> weigh avoidance of an unjustifiable result. Conscientious refusal should thus be adopted as a course of action when the risk and gravity of harm are of greater importance from a moral point of view than providing unqualified access to the adversary process.

These four questions, it should be noted, do not hold advocates accountable for all harmful consequences of the adversary system. According to the general principle underlying the questions, advocates are accountable only for the risk, foreseeable at the time service is provided, that an unjustifiable result will be obtained. Laypersons who object to the defense of the guilty or to some other type of service open to moral challenge often fail to recognize this point, and so hold advocates accountable for any and all results favorable to a client when these are actually obtained. Accountability is warranted, however, only for what it seems likely professional service will produce. Thus, if good reason exists for an advocate to believe a result sought will receive careful arbiter scrutiny, then the advocate can be held accountable only for conduct which carries a low risk of an unjustifiable result—with this latter risk subject to counterbalancing by the value of providing access to the adversary system and zealous service within it. This point holds true regardless of the outcome of the adversary process on a given occasion, although if advancement of a certain type of claim unexpectedly produced an unjustifiable result on one occasion, then risk assessment for similar claims would have to be different on subsequent occasions.[37]

The same argument underscores as well, though, the gravity of advocate accountability when it is clear at the time service is provided that significant advantages do in fact accompany a questionable claim. Once these advantages are discerned, one can no longer say that a division of moral labor prevails in the adversary process, nor can one reasonably expect effective screening when a claim is advanced. The significance of rendering service is transformed under these circumstances, for advocates then stand out as critically important facilitators in achieving clients' desired ends and not merely as providers of access to the adversary process. Given this role, it is of course important that advocates consider the justifiability of what they are requested to achieve—important, in other words, that advocates take on the point of view normally as-

37 The principle of accountability could also shield from blame the advocate who in a given situation seeks more than is justifiable because he has learned from experience that this effort is necessary to achieve what is justifiable. This is a special problem of bargaining accountability. If on a given occasion the advocate unexpectedly obtains the entire amount sought by his client, it would not be fair to hold him accountable on that occasion for the amount that exceeded justice. However, for the reasons just stated in the text, the advocate would be on notice in the future about excessive demands in similar situations.

sumed by arbiters, but which arbiters cannot be expected to assume under these circumstances. Advocates may choose *not* to assume this point of view. Many criminal defense attorneys, for instance, go out of their way not to inquire into the guilt of clients with strongly advantaged claims.[38] Deliberate ignorance does not affect accountability, though, for once it is clear that a claim is strongly advantaged (and it would be professionally improper for an advocate to fail to inquire into this question), moral culpability arises for failing to ask whether a likely result might be unjustifiable as well as for readiness to risk a known unjustifiable result. In either case, important problems of accountability arise once it is clear that the advocate could be providing more than mere access for a litigant.[39]

As for the significance of the sequence of questions just posed, it should be noted that the most difficult questions are placed at the end of the sequence, and so need only be raised if positive answers are given to the earlier ones. The first question, for instance, functions merely as a warning device for advocates. Given the kinds of threats legal actions can pose to the interests of opposing litigants, only rarely will a claim not involve the possibility of a result that is open to moral challenge on some score. Advocates (understandably) prefer not to confront the problem of determining the justifiability of questionable claims, and if they worked in a legal system that functioned perfectly in preventing the occurrence of unjustifiable results, they could always leave this question to arbiters. But while it would be reckless for advocates in the current system never to consider this issue, it is still preferable—given the broader perspective available to arbiters—that advocates assess the justifiability of results sought only on those occasions when arbiters cannot be expected to do so for themselves. It is partly for this reason that the second question is included in the sequence. It is included as well, though, because of the limited factual knowledge advocates possess at the time they can permissibly refuse service. Given the difficulties that can arise in determining the justifiability of a result sought, it is preferable for advocates to address themselves initially

38 Richard Haynes, a prominent Texas trial lawyer, has stated that a criminal defense attorney should avoid asking a client whether he did what he was accused of and should also avoid asking what his client plans to do next. Taylor, *A Reporter's Notebook: The Case of the Guilty Client*, N.Y. Times, Aug. 1, 1981, at 16, col. 4. The tendency of criminal defense lawyers to avoid the question of guilt is discernible as well in Edward Bennett Williams's response to the question of whether he believed Alger Hiss to be guilty of perjury. Williams's answer was blunt: "He [Hiss] should have been gotten off." *See* Abrams, *On Law School and the Law: Some Observations of a Practicing Lawyer*, 27 U. CHI. L.S. REC. 2 (1981).

39 The principle of accountability just outlined would hold an advocate accountable for risking an unjustifiable result even if one were not achieved. Accountability is grounded in the unconstrained decision to create a risk and cannot be avoided merely because a likely result did not occur.

to the issue of the likelihood of achieving a specific result. The second question, then, functions as a warning device; for if the likelihood of success is low (or if the result sought is not open to moral challenge), then the more difficult third and fourth questions need not be posed.

How the second through fourth questions should be approached will be considered in the section on conscientious refusal. What should be noted now, though, is that all the questions posed take on special significance because of the interplay of advocate and arbiter authority within the legal system. As I have suggested, the most important problems of accountability arise in situations where strong formal and informal advantages exist and where arbiters are thus likely to grant a result if it is sought. In some of these situations, reform measures—modifying the content of specific rules, limiting the scope of arbiter discretion, and so on—should of course be considered. It can be taken as a given, though, that no matter how much reform is undertaken, some per se rules will continue to constrain arbiter choice and some discretionary rules will allow for wide exercise of arbiter preferences. Furthermore, it is also likely that advocate discretion to accept or reject employment will continue to complement the distribution of constraint and discretion in arbiter authority. Given this relationship between the different roles within the adversary system, the power to initiate claims will make advocate accountability an issue of perennial importance in those situations in which it cannot reasonably be expected that arbiters will be able (in the case of formal advantages) or willing (in the case of informal ones) to deny the results sought.

When viewed in this light, advocate authority either to refuse service altogether or to offer only qualified access functions as a final equitable safeguard for the legal system. Where, for instance, per se rules are desirable because of possible abuses of arbiter discretion, situations will arise in which advocates can best act by either not acting or by conditioning service on the waiver of a formal advantage accompanying a claim. And where arbiters are vested with discretion, inaction or qualified access may also be the preferred course once the likelihood of unjustifiable harm is clear. Advocate discretion need not be exercised frequently in this way. If the legal system regularly produces unjustifiable results with respect to a given type of claim, then legislative or judicial reform of the rules of law would be desirable. If, however, a rule usually produces justifiable results but can be predicted not to do so in a given situation, advocate exercise of discretion concerning the kind of service to be provided would be preferable to law reform. When used sparingly, this equitable discretion would leave intact the structure of generally desirable rules, while mitigating the inflexible

effect of formal rules and promoting avoidance of unjustifiable results when arbiter discretion is likely to be used in an objectionable way.

II. Conscientious Refusal

Even if one were to agree that some claims should not be advanced or some advantages forgone, the question would still arise whether claims fitting this description can be identified with sufficient precision to prevent rejection of others deserving advancement. This point takes on particular significance in light of the positive values realized by providing access. For if the adversary process provides generally effective screening mechanisms, then an advocate should pursue all justifiable results and some unjustifiable ones. In fact, in a generally effective screening system, conscientious refusal would apply only to strongly positioned claims that also seek unjustifiable results.

The problems surrounding identification of strongly positioned, unjustifiable claims are perspectival in nature. For while it may often be apparent *after* action has been taken that refusal of some kind[40] would have been warranted, this does not mean it would have been feasible to make this determination *at a time when refusal was possible.* In particular, two perspectival difficulties deserve consideration in this context. One, which focuses on tactical considerations, relates to the reliability of advocate assessments of the advantages accompanying a claim. The other, which focuses on the fallibility of moral judgment, deals with the possibility of harm to litigants if an advocate mistakenly determines a result sought is unjustifiable and so refuses to take the steps needed to reach it.

No defender of conscientious refusal could argue that these points are always without force. Perspectival difficulties arise so frequently in the course of advocacy that some caution is of course needed in considering conscientious refusal. The issue to be confronted, though, is whether chronic doubt must always accompany attempts to answer the four questions of accountability. Given the perspectival difficulties just mentioned, it seems only fair to assign to proponents of conscientious refusal the burden of showing that situations actually do arise in which advocates can entertain strong convictions about the positive answers they give to the four questions. Furthermore, this burden should apply to refusal at a time when it is professionally permitted. That is, it might be possible to

40 It should be recalled that "refusal" here includes not only complete refusal to provide access to the adversary process, but also qualification of access on condition that the litigant forgo objectionable legal advantages accompanying a claim. *See* text at page 40 *supra.* Thus, "refusal" in this part of the article does not mean that when refusal is warranted, access to the adversary process should be completely denied.

show that perspectival difficulties are not severe during a trial or when an appeal is pending. However, given the harm refusal in the midst of a trial can cause litigants, this kind of refusal should be treated only as an option of last resort and should not be used in inquiring into the feasibility of overcoming perspectival difficulties. Instead, the goal should be to identify situations without severe perspectival problems when advocates can permissibly refuse service. If the features of such situations can be identified, then refusal, it can fairly be said, can correct screening defects in the adversary process. If, on the other hand, no such situations can be identified, then refusal could still be considered worthwhile in theory but would have to be deemed unworkable in practice given the perspectival problems that arise in the course of providing service.

Because of the special importance of the perspectival difficulties just mentioned, attention will be given primarily to them—and to the second and third questions of accountability that are relevant to them—in the analysis that follows. We should begin, though, with the first question, which only asks whether the results of advancing a claim would be open to question, and so does not involve the perspectival difficulties that arise with the second and third questions. As was noted earlier, the first question is designed merely to trigger further inquiry, for it is the rare claim that falls below the warning threshold the question establishes. To be certain a claim or at least one of the results it seeks is not open to some kind of moral objection, an advocate would need good reason to believe that the facts alleged are true and that no morally significant interest could be jeopardized by pursuing any of the results that could be achieved in advancing the claim. These conditions can, on occasion, be met. Generally, though, morally significant interests are ranged on each side of a dispute. When this is so, an advocate must inquire further into the implications of providing service for a litigant.

A. *Calculating Advantages*

The second question of accountability hinges, at least in part, on a value-neutral assessment of outcomes that is a routine aspect of advocate-client relations. Advocates regularly counsel clients, for instance, concerning the likelihood of success of their claims.[41] Plea bargaining proceeds on the basis of calculations of advantages,[42] as do settlement negotiations.[43] If there were no doubt

41 An advocate acts as an adviser when he offers his opinion concerning the likelihood of a successful outcome for a claim. *See, e.g.*, MODEL CODE EC 7-5: "A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand . . . ."

42 *See, e.g.*, Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652 (1981):

about the reliability of these calculations, the second question could be quickly disposed of, and what most advocates ask in only a value-neutral sense could provide the basis for further inquiry into the justifiability of seeking a given result.

The tactical version of the perspectival objection serves as a reminder, though, that what, in everyday law practice, is only a matter of educated guesswork is itself open to question. This objection, it might be suggested, can best be framed as an extension of skeptical doubts the legal realists raised two generations ago about the accuracy of rule-based predictions of legal results. For the realists, predictability itself was not necessarily in doubt. Many of them, such as Karl Llewellyn, cited what have here been called "informal" advantages to supplement what they believed to be deficiencies in the predictive value of formal rules of law.[44] By considering these informal factors in conjunction with formal ones an advocate, according to Llewellyn, can achieve reasonable reliability of prediction.[45] It is in this sense that a more profound skepticism is required if the entire enterprise of calculating advantages is to be called into question, for one would have to ask whether the facts relevant to the calculation of any kind of advantage can ever be determined with sufficient accuracy to generate reliable conclusions concerning the achievement of desired results. This deep skepticism can serve as the basis for a challenge to the reliability of any answer to the second question of accountability.

Before considering an argument for the accuracy of at least some calculations of advantages, it would be wise to point out that uncertainty about advantages casts doubt on only one element

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"Criminal defendants today plead guilty in overwhelming numbers primarily because they perceive that this action is likely to lead to more lenient treatment than would follow conviction at trial." *See also* Shin, *Do Lesser Pleas Pay? Accommodations in the Sentencing and Parole Processes*, 1 J. CRIM. JUST. 27, 32 (1973) (statistics presented show that the average sentence for defendants charged with robbery in New York County in 1968 to 1969 was 3.9 years following guilty plea and 8.2 years following trial).

43 *See e.g.*, Sindell & Sindell, *Formulae to Evaluate Injury Cases*, in SETTLEMENT AND PLEA BARGAINING (M. Edwards & K. Meyer ed. 1981) (Settlement Value = Probable Jury Verdict/100 × Case Point Value (with case point value determined by considering various formal and informal advantages, such as the defendant's liability and the characteristics of the plaintiff and defendant involved in the case)).

44 There is, Llewellyn remarked, "less possibility of accurate prediction than the traditional [i.e. formal] rules would lead us to believe." Llewelllyn, *Some Realism about Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1241 (1931).

45 Llewellyn offered the following summary of his later position:

> The fact is that the work of our appellate courts all over the country is reckonable . . . on an absolute scale, quite sufficient for skilled craftsmen to make usable and valuable judgments about likelihoods . . . . [There is] a way of reckoning the forthcoming results which is not only that used by the ablest and most successful appellate and drafting counsel, but is also available to any lawyer of ordinary intelligence.

K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 4, 6 (1960).

among the considerations bearing upon refusal. Uncertainty does not make refusal itself unacceptable. Two concessions can thus be made without jeopardizing the argument for conscientious refusal, even when deep skepticism prevails concerning the calculability of advantages. One is that uncertainty about the strength of advantages is common with respect to many claims. Rule-skepticism (the branch of realism developed by Karl Llewellyn, among others[46]) is often warranted, for instance, when a novel legal issue is raised or when well-established legal rights conflict. Fact-skepticism, the version of realism championed by Jerome Frank,[47] can be warranted when the facts of a dispute are closely controverted or, even when they are not, on a matter concerning which community sentiment is in flux and over which a jury can have the final say. Second, it must also be conceded that uncertainty concerning an outcome can serve as a reason for claim-advancement above and beyond the value of providing access. As long as the legal system in which an advocate works produces justifiable results more often than not, there will then be a good reason, in the absence of reliable predictions as to the outcome, to seek a questionable result (i.e. a result whose moral justifiability is uncertain) and so to defer to the judgment of the arbiter charged with passing on it.

However, important as this deference principle (as it might be called) can be, it still cannot be considered strong enough, even when considered in conjunction with the values realized by providing access, to warrant rejection of conscientious refusal in all situations where uncertainty exists about the likelihood of reaching a result. Concededly, the deference principle should sometimes be used to resolve doubts in favor of service. In particular, it should be used when an advocate is uncertain about the likelihood of a result *and* uncertain about its justifiability, for then the fact that the legal system produces justifiable results more often than not ought to tip the scales in favor of providing service.

Two variations illustrate, though, why the deference principle cannot always be decisive when there is uncertainty about the likelihood of a result. In one variation, uncertainty about likelihood could be accompanied by a strong conviction that achieving a result

46 For an analysis of realism in terms of the distinction (first proposed by Jerome Frank) between rule- and fact-skepticism, see W. RUMBLE, AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS, Chaps. 2 & 3 (1968).

47 Frank summarized his approach to fact-skepticism in the following way:

> What is the Fact? Is it what actually happened between Sensible and Smart? Most emphatically not. At best, it is only what the trial court—the trial judge or jury—thinks what happened. What the trial court thinks happened may, however, be hopelessly incorrect. But that does not matter—legally speaking. For court purposes, what the court thinks about the facts is all that matters.

J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 15 (1949).

would be unjustifiable, thus requiring an advocate to balance the value of providing access against the negative value of taking an uncertain risk of harm to others. In the other variation, uncertainty could surround calculation of the likelihood of a specific result, but an advocate could determine that whatever the legal system's pattern of dispositions in general, its pattern for the type of result at stake is more often unjustifiable than justifiable. If this were so, an anti-deference principle would apply. In either case, an uncertain answer about the chances of a claim's success would not necessarily provide a conclusive reason against conscientious refusal, even when considered in conjunction with the benefits of providing access. On the contrary, while uncertainty can yield to a deference principle, it need not always do so.

In any event, one would concede too much by allowing for invariable uncertainty in the calculation of advantages, for while doubts must arise with respect to novel claims or for those in which the facts are closely controverted, other kinds of claims are sufficiently routine to make reliable prediction possible. A brief inventory of calculable advantages is provided below. Before turning to it, though, some general points about the calculation of advantages and conscientious refusal should be noted. The first is that empirical studies prompted by the realists have confirmed the qualified skepticism they have adopted, but have not provided support for a deeper skepticism that casts doubt on the reliability of all predictions of outcomes.[48] In this context, one must distinguish between routine claims for which formal and informal advantages, when considered separately or in conjunction, can serve as reliable predictors and nonroutine ones which require greater caution. Jurimetric studies of the United States Supreme Court have allowed for the possibility of some predictability even for the generally nonroutine cases heard by that court.[49] The kind of routine trial

48 An indication of the continuity between the programmatic statements of the realists and the conclusions reached by later generations of empirical researchers may be found in the penultimate chapter of the Kalven-Zeisel study of the American jury. The authors cite Herman Oliphant's skeptical suggestion, first advanced in 1928, that while formal rules of law may not, by themselves, offer a sound basis for prediction, a science of law can nonetheless be developed by fusing a concern with formal rules with what Oliphant called "non-vocal" judicial behavior. "The predictive element" in the legal process, Oliphant argued, "is what the courts have done in response to stimuli of the facts of concrete cases before them. Note not the judges' opinions but which way they decide cases, will be the dominant subject matter of any truly scientific study of law." "Our study of the jury," Kalven and Zeisel conclude, "emphasizes the non-vocal behavior of juries. At least with respect to the decisions of juries, we are inclined to think that this early view [i.e., Oliphant's] is correct." H. KALVEN & H. ZEISEL, THE AMERICAN JURY 490-91 (1966).

49 *See, e.g.*, Kort, *Predicting Supreme Court Cases Mathematically: A Quantitative Analysis of the "Right to Counsel" Cases*, 51 AM. POL. SCI. REV. 1 (1957); Nagel, *Predicting Court Cases Quantitatively*, 63 MICH. L. REV. 1411 (1965).

and appellate cases that provide most of the candidates for conscientious refusal allow for even greater predictability of result.[50] In fact, the considerations advocates usually take into account in calculating advantages—formal rules such as evidentiary privileges and jurisdictional regulations and informal ones such as known arbiter attitudes—have been cited by students of the trial process as key determinants of results achieved.[51]

Second, it should also be borne in mind that the perspectival difficulties advocates encounter are usually less severe when advantages must be calculated than when other facts of a case need to be discovered. This is because, in most instances, advantages do not arise by surprise but instead can be determined via preliminary interviews and research. The question of a defendant's guilt might, for instance, require access to facts the defendant would be unwilling to provide even his lawyer, while the legal advantages accruing from an improper search or interrogation could well be determined on the basis of information a defendant would gladly provide. Issues such as the applicability of a statute of limitations or the need to join an indispensable party can also be determined through interviews and research, thus reducing the perspectival difficulties that underlie the tactical objection.

The inventory of advantages provided below reviews those that can arise in the course of advancing routine claims and that can be calculated at a time when it is professionally permissible to refuse service. For the sake of convenience, the inventory (which does not pretend to be exhaustive) covers formal and informal advantages separately, although in many instances the combined effect of these advantages must be considered in determining the likelihood of reaching a litigant's desired result. Also, within each category, discussion begins with the strongest kinds of advantages, which can be said to provide paradigm situations for conscientious refusal, and moves from these to advantages that are strong, though rarely decisive.

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50 For a discussion of the predictability of the outcomes of relatively routine appellate cases, see Kort, *Content Analysis of Judicial Opinions and Rules*, in JUDICIAL BEHAVIOR (G. Shubert ed. 1963) (showing significant degree of predictive value when the 38 workmen's compensation cases decided by the Connecticut Supreme Court between 1927 and 1938 were used to predict the next 38 cases to be decided by the same court).

51 In their study of the American jury, for instance, Kalven and Zeisel concluded that the evidentiary privilege most likely to aid criminal defendants is the one forbidding disclosure of a defendant's criminal record. Other formal rules that can influence criminal trial outcomes are juror ignorance of the fact that a guilty plea has been withdrawn, that a blood test was refused or suppressed, and that other charges were pending. KALVEN & ZEISEL, *supra* note 48, at 131. Kalven and Zeisel also offer an inventory of factors that can provide informal advantages for criminal defendants. While their detailed list is a lengthy one, they group possible informal advantages under three headings: disparity of counsel, jury sentiments about the individual defendant, and jury sentiments about the law. *See id.* at 106-07.

1. Formal Advantages

The unifying feature of the strongest formal advantages is that they enable advocates to determine in advance the necessary and sufficient conditions for reaching a litigant's desired goal. If an advocate knows through interviews and preliminary research that these conditions can be satisfied, then the legal system can serve as a highly reliable means to a desired end.

a. *Side Effects of Claim-Advancement*

The result a litigant seeks does not have to be the final disposition of a claim; instead it can be a side effect brought about by an advocate's exercise of his discretionary power to initiate a claim. Under the rules of professional responsibility, an advocate may advance a claim as long as there is a legally reasonable basis for doing so.[52] Furthermore, the rules do not prohibit claim-advancement even if one of its foreseeable side effects will be to deplete the resources of an opponent with a justifiable case, or to delay an event, or to achieve publicity for a cause.[53] Arbiters in turn possess only limited power to prevent advocates from exploiting opportunities to initiate suits and motions.[54] In all likelihood, little harm is intended or accomplished on many occasions when these opportunities are used. There can certainly be some occasions, though, when

52 *See* MODEL CODE DR 7-102(A)(1):

> In his representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of a client when he knows or where it is obvious that such action would serve *merely* to harass or maliciously injure another.

(emphasis added). *See also* MODEL RULES 3.1: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a reasonable basis for doing so, which includes a good faith argument for extension, modification or reversal of existing law."

53 Some jurisdictions impose restrictions beyond those contained in professional codes on attorneys' power to initiate suits or motions. An example of a recent attempt to impose relatively strong limitations on attorneys can be found in the 1983 revision of Rule 11 of the Federal Rules of Civil Procedure. The new rule states that an attorney must certify, first, that a pleading or motion "is well grounded in fact and is warranted by existing law or a good faith argument for its extension" and second, that the pleading or motion "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." FED. R. CIV. P. 11. Even this modified rule, however, would not prohibit an attorney from initiating a suit or a motion likely to bring about the side effects mentioned in the text.

54 In amending Rule 11 (*see* note 53 *supra*), the Advisory Committee for the Federal Rules of Civil Procedure conceded that "experience has shown that in practice the Rule has not been effective in deterring [litigation] abuses." In order to combat these, the new rule not only prohibits harassment and so on, it also authorizes courts to sanction attorneys and parties engaging in the prohibited practices. Two difficulties remain, however. First, as indicated at text and note 53 *supra*, many morally problematic practices continue to lie within Rule 11's range of acceptable behavior. Second, even when conduct is defined as legally unacceptable, the opportunities for judicial detection of it are limited given the pretexts available to attorneys and litigants when initiating suits and motions.

side effects loom large. Given the often passive role of arbiters in this context, advocate power to take the initiative with respect to suits and motions can thus become a matter of critical importance.

b. *Final Dispositions*

In situations involving final dispositions, decisive formal advantages are usually preclusive in nature: that is, an advocate can know prior to providing service that, given the law of the jurisdiction, the court will have to accord priority to some issues that can guarantee a favorable disposition over other issues that could lead to an unfavorable disposition. The fourth amendment exclusionary rule provides an example of this, since arbiters review questions of police misconduct in pretrial hearings before reaching the question of a defendant's guilt.[55] Eviction statutes often use the same approach, with the issue of nonpayment of rent receiving attention apart from a landlord's maintenance of an apartment.[56] Numerous procedural rules and jurisdictional requirements have the same effect since they too are grounded in preclusions which prohibit arbiters from considering factors morally relevant, yet damaging, to a claim.[57]

Criminal and civil defendants and civil plaintiffs can avail themselves of decisive formal advantages, although they are more frequently used by both kinds of defendants than by civil plaintiffs. Defendants most commonly exploit these advantages via motions to dismiss—for lack of evidence (as when the exclusionary rule is applied in a case involving a possessory offense),[58] or for lack of jurisdiction (as when a court lacks the power to rule on the subject matter of a suit).[59]

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55 Under Mapp v. Ohio, 367 U.S. 643 (1961), state courts are constitutionally prohibited from considering evidence police have gathered in violation of a defendant's fourth amendment rights.

56 A statute that has received considerable attention in this context is the Oregon Forcible Entry and Wrongful Detainer Statute, OR. REV. STAT. §§ 105.105-160 (1984), which was upheld against due process and equal protection challenges in Lindsey v. Normet, 405 U.S. 56 (1972).

57 Procedural rules having this effect include (1) those that imply waiver when, because of inadvertence, a timely objection was not made to a court ruling, (2) evidentiary privileges that bar courts from hearing probative evidence, and (3) rules that prohibit splitting of causes of action and thus prevent parties with just claims from recovering if such claims were not included in the initial suit. Jurisdictional rules having this effect include (1) those that prohibit a court from proceeding with a claim because of a defect in service of process, (2) those in the federal courts requiring compete diversity of citizenship between parties (a particularly harsh rule if a state forum is unavailable), and (3) those that require a plaintiff to relitigate a money judgment in a state court where a defendant's property is located after winning a judgment in another state's court.

58 *See, e.g.*, Sibron v. New York, 392 U.S. 40 (1968) (conviction for heroin possession reversed because the officer had not engaged in a reasonable search for the heroin).

59 Rule 12(h)(3) of the Federal Rules of Civil Procedure, for example, requires dismis-

Two mutually reinforcing devices are needed for a plaintiff to be certain of success: favorable substantive law (the necessary and sufficient conditions for which the plaintiff's advocate must be certain of satisfying) and a device for overriding a jury verdict if the defendant were to possess and choose to exercise a right to a jury trial and if a jury were to find for the defendant despite the strength of the evidence against him. Civil plaintiffs can, at least on some occasions, meet both conditions. Landlord-tenant laws, for instance, often allow for summary eviction procedures and are buttressed by devices, such as the motion for a directed verdict and the motion for judgment notwithstanding the verdict, which limit the power of civil juries to exercise their preferences in opposition to the law.[60] As a criminal plaintiff, the state can sometimes satisfy the first of these conditions but, because of the criminal jury's power to nullify the law, never the second.[61] Criminal plaintiffs can thus enjoy strong formal (and informal) advantages, but never decisive ones.

This said, the possibility of decisive formal advantages is clear enough. Whenever they are encountered, the advocate's world is turned upside down, for advocates enjoy unconstrained authority in deciding whether to initiate such claims and, in doing so, can be certain that arbiters will be constrained to grant their claims. Under these circumstances, an advocate, while still employing the precatory language characteristic of his profession, will stand out as the decisive figure in bringing about a final legal result.

Decisive formal advantages are significant not only in themselves, but also because they provide a benchmark for considering the far commoner advantages that are strong but not decisive. Many of these less than decisive advantages are also preclusive in nature, since they effectively foreclose arbiter attention to issues morally relevant yet damaging to a claim. Thus, if an advocate knows he is likely to succeed in a motion to exclude a murder confession obtained under a slight variation of the *Miranda* warnings, he would also know that if other evidence of guilt exists, a motion

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sal of a claim at any time prior to final appellate judgment if the court lacks jurisdiction over the subject matter of the claim.

60 Thus, to use the example already cited at note 56 *supra*, if a tenant-defendant were to insist on a jury trial, as permitted by OR. REV. STAT. § 105.150 (1984), an advocate for the landlord-plaintiff could still determine, on the basis of the limited range of issues that may be considered in a summary eviction proceeding, that the defendant would be unable to meet the requirements set by the statute. *See* OR. REV. STAT. § 105.125(1) (1984). Even if the defendant prevailed with the jury, the landlord could nonetheless prevail on the law by making a motion for a directed verdict and, following the jury verdict, moving for a judgment notwithstanding the verdict.

61 For a discussion of the criminal jury's legal power to nullify the law, see M. & S. KADISH, DISCRETION TO DISOBEY 45-66 (1973).

to dismiss might not succeed, but the chance of either success on such a motion or of an acquittal would at least be significantly enhanced.[62]

Other variations on decisive formal advantages are different in nature since they do not involve foreclosing arbiter attention to issues but instead involve prescriptions of the weightings arbiters must apply in evaluating a claim. A weighting is inescapable whenever an arbiter is directed to apply a burden of proof.[63] Advocates in turn must consider the likely impact of a burden of proof when defending clients whose wrongdoing, although a matter of certainty for them, is not necessarily demonstrable given the relevant rules of evidence and the burden placed on the opposing party. Substantive law contains weightings as well since it provides directions for arbiters as to the relative value to accord competing goods. In constitutional law, for instance, the Supreme Court has given priority to property interests over interests in decent shelter;[64] local control over education has been accorded greater value than equal funding of school districts;[65] and state discretion in devising welfare schemes has received higher priority than equal funding for children protected by such schemes.[66] In tort law, property interests can be accorded priority over the interests of trespassers in their

62 This does not mean a defendant will always prevail once a confession is excluded. In widely-publicized cases, for instance, the state has often pressed successfully for a conviction on retrial following a Supreme Court determination that a confession was improperly admitted at trial. Thus, following the Supreme Court's exclusion of his confession, Ernest Miranda was convicted again of rape and kidnapping. *See* Miranda v. Arizona, 384 U.S. 436 (1966); State v. Miranda, 104 Ariz. 174, 450 P.2d 364 (1969). On the other hand, the defendants whose confessions were excluded in the Supreme Court's first two applications of *Miranda* appear to have benefitted from their appellate victories. No appellate report can be found for the retrials of Robert Mathis and Reyes Orozco, indicating that each may have been able to plead to a lesser offense than the one originally charged. *See* Mathis v. United States, 391 U.S. 1 (1968); Orozco v. Texas, 394 U.S. 324 (1969).

63 Wigmore, for instance, analyzes the burden of proof in terms of the risk of nonpersuasion it places on one of the parties in a suit. *See* 9 J. WIGMORE, EVIDENCE § 2485 (Chadbourne rev. 1981). It may be desirable as a matter of policy to create such risks for certain types of litigation. This does not mean, though, that lawyers should always exploit the advantages created by assignment of the risks to the opposition. The legitimacy of exploiting these advantages is particularly worth considering when an advocate represents someone who will probably engage again in harmful conduct. Such questions can arise when the evidence is weak with respect to landlords charged with harassment, individuals charged with drunk driving, thieves with long arrest records for the crime they allegedly committed, and so on.

64 *See* Lindsey v. Normet, 405 U.S. 56 (1972) (upholding the summary eviction procedures of the Oregon Forcible Entry and Wrongful Detainer Statute against equal protection and due process challenges based on the argument that the Constitution establishes a fundamental interest in decent shelter and possession of one's home).

65 *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (rejecting an equal protection challenge to interdistrict inequalities in a Texas school financing scheme).

66 *See* Dandridge v. Williams, 397 U.S. 471 (1970) (rejecting an equal protection challenge to a Maryland Aid to Families with Dependent Children program that imposed a maximum grant of $250 per month per family regardless of family size or need).

bodily security;[67] under the Uniform Commercial Code, a holder in due course can take priority over the victim of a fraud;[68] and so on. Value weightings of this kind influence outcomes; only on some occasions are they strong enough to be decisive by themselves. Even this influence can be significant, however, given advocate freedom to advance claims accompanied by such advantages and the foreseeability of constraints on arbiters if the claims are advanced.

2. Informal Advantages

In contrast to formal advantages, informal ones can never be so powerfully arrayed as to warrant certainty that an advocate will obtain his client's desired result. This is attributable partly to the fact that informal advantages depend not on arbiter fidelity to legal obligations, but instead on arbiters' known proclivity to exercise discretion in a certain way. Lower reliability is attributable as well, though, to the fact that these advantages usually arise in the context of reviewable discretion, in which case a higher court can reject the discretionary decision made by the arbiter (whether judge or jury) in a lower court. There are numerous instances, though, in which the exercise of discretion is at least relatively predictable and in which higher court review of its exercise is either forbidden or unlikely.

a. *Side Effects of Claim-Advancement*

While formal advantages are more important for a side effects strategy than informal ones, occasions do arise when informal advantages can supplement a strategy based primarily on formal ones. Thus, while parties usually are able to initiate motions as of right, leave to renew a motion—and so further delay an event—will depend on the discretion of a court,[69] in which case a judge's known preferences concerning motion renewal can loom large. Similar points apply to the scope of pre-trial discovery,[70] where a judge's

67 *See, e.g.*, Smith v. Delery, 238 La. 180, 114 So. 2d 857 (1959) (after giving warning but before waiting for retreat, homeowner was entitled to fire a shot at a newsboy who had entered homeowner's bushes to retrieve a dog that accompanied the newsboy on his route).

68 The Uniform Commerical Code states that the victim of a fraud can prevail only if he had no reasonable opportunity to obtain knowledge of the contents of the fraudulent instrument. *See* U.C.C. § 3-305(2)(c) comment 7 (1964). Comment 7 is cited with approval in Burchett v. Allied Concord Financial Corp., 74 N.M. 575, 396 P.2d 186 (1964) (defendant was tricked into signing a document different from the one he had read; plaintiff prevailed).

69 *See, e.g.*, FED. R. CIV. P. 60(b)(6) (vesting judges with discretion to relieve parties from orders already entered in the course of a trial).

70 The scope of discovery is usually left to the discretion of the trial judge. *See* FED. R. CIV. P. 26(b)(1) (establishing criteria for the exercise of discovery). The limiting terms contained in these criteria—"unreasonably cumulative and duplicative" and "unduly burdensome"—are evaluative in nature, and advocates will often be able to determine, on the basis of a trial judge's past performance, how he will apply them in a particular case.

preferences can be critical to successful furtherance of a side-effects strategy. In neither instance would a higher court be likely to review a trial judge's discretionary decision concerning these matters.[71]

b. *Final Dispositions*

In situations where informal advantages are particularly strong, advocates present claims to arbiters who have unreviewable discretion and who are known to be favorably disposed to the causes advanced. This can occur before initiation of the adversary process, as when an advocate knows he has a good chance of persuading a prosecutor or an investigator in an administrative agency not to proceed with a case.[72] It can also occur within the adversary process itself, as when a criminal defense attorney knows that, because of community sentiment, he might well be able to persuade a jury to nullify the law and find for his client.[73] Two variations on this, which occur more frequently, should be considered as well. In one, arbiters can exercise their preferences because the highest court of the jurisdiction has authority to resolve disputed questions of law.[74] It is the fact of finality that creates some similarity between this and jury nullification;[75] differences arise because the range in which preferences are exercised is usually narrower at the appellate than at the juror level. The second variation offers the

71 This is because most jurisdictions follow a final judgment rule—and so rarely allow interlocutory appeals of matters such as pre-trial discovery. *See* 28 U.S.C. § 1291 (1982). American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 280 (2d Cir. 1967), contains an inventory of the reasons courts cite in strongly disfavoring interlocutory appeals of discovery orders.

72 The discretion of prosecutors and officers of administrative agencies not to proceed with a case is discussed critically in K. DAVIS, DISCRETIONARY JUSTICE 162-214 (1969).

73 In their sample of 3,567 trials, Kalven and Zeisel found that the jury was more lenient than the judge with respect to final disposition in 920 instances, or about 26% of the time. Within these 920 instances, juror sentiment about the law accounts for about one-fourth to one-third of the disagreements. Laws particularly likely to provoke juror nullification include those dealing with gaming, liquor, and gambling. *See* KALVEN & ZEISEL, *supra* note 48, at 109-115, 286-97.

74 A dramatic example of this power of finality can be found in a decision of the South Dakota Supreme Court, following a remand from the United States Supreme Court, that the warrantless inventory search of an illegally parked car violates the South Dakota Constitution. The sequence of decisions in South Dakota v. Opperman is as follows: (1) 89 S.D. 25, 228 N.W.2d 152 (1975) (holding by South Dakota Supreme Court that such a search violates the fourth amendment of the United States Constitution); (2) 428 U.S. 364 (1976) (holding that such a search does not violate the fourth amendment); and (3) 247 N.W.2d 673 (S.D. 1976) (holding that such a search violates article VI, section II of the South Dakota Constitution).

75 Justice Robert Jackson offered the following comment concerning the finality of the United States Supreme Court: "There is no doubt that if there were a super Supreme Court, a substantial portion of our reversals of state courts would be reversed. We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

most frequently encountered instances of exploitable informal advantages. Here, an arbiter's preferences are predictable (as was true before), while his exercise of discretion, although reviewable, will likely receive deference on appeal. Instances of this include juror attitudes that can be exploited by prosecutors,[76] preferences of sentencing judges on which either prosecutors or defense attorneys can capitalize,[77] preferences of members of intermediate panels when these panels are authorized to affirm trial judgments without opinion,[78] and the preferences of officials of administrative agencies when they exercise their power to determine facts or make technical judgments about the feasibility of a project.[79]

76 "Pro-prosecutor equities," as Kalven and Zeisel call them, can involve certain kinds of crimes (sex crimes, for instance) and certain kinds of defendant-complaining witness pairings (black defendants v. white female complaining witnesses, for instance). *See* KALVEN & ZEISEL, *supra* note 48, at 395-410.

77 Numerous researchers have found consistency within a judge's sentencing decisions but disparity between the decisions of judges serving in the same jurisdiction. *See, e.g.*, Gaudet, *Individual Differences in the Sentencing Tendencies of Judges*, in JUDICIAL BEHAVIOR (G. Shubert ed. 1963) (individual consistency among six New Jersey judges over ten-year period but wide disparity between them in treating similar crimes); Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. CRIM. LAW & CRIMINOLOGY 333 (1962) (50% difference for black as opposed to white defendants convicted of similar crimes even when prior records of defendants are held constant); Cargan & Coates, *The Indeterminate Sentence and Judicial Bias*, 20 CRIME & DELINQ. 144 (1974) (for defendants convicted of robbery, more than a 200% difference in imprisonment rates among judges within a single jurisdiction).

78 For example, the circuit courts may affirm judgments without opinion, an option they exercise with considerable frequency, as can be discerned by consulting any volume of the second series of the Federal Reporter. *See* FED. R. APP. P. 36. This power can be, and sometimes is, used to dispose of convictions which, if confronted directly, would pose difficult questions about the legal propriety of a trial judge's determinations of law. There may well be occasions when prosecutors should capitalize on this discretionary "black hole" in the criminal justice system. However, given the advantage this creates for them, they must devote special attention to the justifiability of what they seek.

79 An exposition of the standards to be employed in according deference to the actions of administrative agencies can be found in Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981). In certain instances more than deference is required. For example, courts do not have jurisdiction to review the decisions of the Veteran's Administration concerning benefits for veterans and their dependents and survivors. 38 U.S.C. § 211(a) (1982). This rule has been criticized because of the burden it places on those unfairly denied their claims. *See* Davis, *Veterans' Benefits, Judicial Review, and the Constitutional Problems of "Positive" Government*, 39 IND. L.J. 183 (1964) (absence of judicial review as allowing administrators to deny benefits for improper reasons); Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veteran's Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905 (1975) (loyalties within a bureaucratic system as creating opportunities for arbitrariness that can be checked only by judicial review). Even if the majority of the decisions made by a given agency are proper, advocates for the government are still placed in a position where they, rather than the courts, have a decisive voice concerning the justifiability of specific claims. In situations such as these, advocates are arbiters by default in claims against the government. This does not mean they will assume the perspective of arbiters; but if they do not, it is certain no one else will.

B. *Determining Moral Justifiability*

As was noted in the course of reviewing advantages, whenever the first two questions of accountability yield positive answers, then advocates rather than arbiters stand out as the decisive figures in the adversary process. Role-expectations are reversed in these situations, requiring advocates to modify their attitudes toward claim-advancement. Thus, while the calculation of advantages requires an instrumental approach to advocacy, a broader approach that takes into account intrinsic moral values is needed once it is clear that arbiters cannot be expected to act on such values on their own.

Even in situations where effective arbiter screening is unlikely, conscientious refusal remains open to two final perspectival objections. First, it can be argued that the facts bearing on the justifiability of a result are more difficult to determine than those relevant to the calculation of advantages. Second, it can also be argued that because arbiters enjoy a broader perspective than do advocates, the latter should not attempt to assess the justifiability of results sought but instead should defer to arbiters even under the imperfect conditions that prevail when a questionable claim is strongly advantaged. Access values, it could be pointed out, are always sacrificed because of conscientious refusal; furthermore, access values are sacrificed on the basis of a limited perspective that makes suspect advocates' moral judgments of the justifiability of the results that might be achieved.

These final objections should be treated as conclusive arguments against refusal, though, only if *in the subset of claims* at stake it is more likely that worse results will flow from advocates' exercise of moral judgment than from no exercise of moral judgment at all. Because we are concerned with questionable, strongly advantaged claims, one can concede that arbiter exercise of moral judgment is generally preferable to its exercise by advocates without conceding that advocates should not exercise such judgment in the special kinds of situations at stake here. Thus, when arbiters have an opportunity to become acquainted with the facts surrounding a claim and can be relied on to assess the claim without moral bias, it is preferable for advocates to defer to their judgment of the issues raised. When strong advantages are present, though, at least one of these deference-creating factors will be missing, and advocates must then choose between advancing a claim when effective arbiter moral judgment is unlikely and exercising judgment about a claim on their own.

When framed in this way, it seems wiser to treat perspectival objections relevant to the determination of justifiability as cautionary warnings about the fallibility of moral judgment, not as insuper-

able objections to its exercise by advocates. Consider first the problems surrounding discovery of the facts relevant to the justifiability of a claim. In normal circumstances, arbiters can discover these better than advocates. Here, the reverse is the case, although it is better to characterize advocates' positions as a least-worst, rather than a strong, one. That is, in this context, arbiters are often prohibited from considering information morally relevant yet damaging to a result, while advocates can consider this information and can take the initiative on their own to discover other facts bearing on justifiability. Even with further inquiry, an advocate could well be uncertain about justifiability because of a scarcity of information in a specific situation. However, only a chronic scarcity in all instances would warrant a prohibition of advocate inquiry into justifiability. The better approach is to caution advocates to resolve doubts in favor of service but to allow for refusal in situations where arbiters cannot be expected to act on information advocates reliably possess.

A similar approach can be taken to moral assessment itself. One can thus concede not only that mistakes in advocate judgment are possible, but also that moral judgments are open to a broader range of objections than are factual ones. The question to be asked, though, is whether these reasons establish a rebuttable or conclusive presumption in favor of service. If a conclusive presumption is established, then situations will arise in which neither advocates nor arbiters will meaningfully scrutinize the results sought. If a rebuttable presumption is established, the problem to be confronted involves advocate moral fallibility. Two factors, however, make it unlikely that litigants seeking justifiable results will be denied access to the adversary process. One is the doubt-resolving procedure just mentioned. As long as advocates treat the existence of substantial doubt concerning the justifiability of a result as a reason to seek it, few litigants will be mistakenly denied representation on this ground. Assuming some are nonetheless denied service, the size and decentralization of the market for advocate services provides a second safeguard. Even if one advocate refuses representation for a result falling within the range of substantial doubt, it is unlikely all others would do the same. Heavy-handedness by advocates would hardly seem to be a danger given these safeguards. In fact, since advocates may tend, because of the pressure of market forces, to adopt a lowest-common denominator view of justifiability, it is important to encourage advocates to realize that in these situations they must make the principled assessments arbiters cannot be expected to make. Assuming this encouragement is offered with the requisite caution, clearly objec-

tionable results will then be identified while those whose justifiability is uncertain will receive the benefit of the doubt.

If determination of the justifiability of a result requires advocate assumption of an arbiter's perspective, the final question to be asked—concerning the justifiability of actually providing service—involves an incorporation of that perspective into the one traditionally associated with advocacy. If a result is clearly unjustifiable and likely to be achieved, only in unusual circumstances can one then discover countervailing considerations of sufficient strength to warrant pursuing the result. Two such circumstances deserve attention. First, the risk of producing an unjustifiable result can be strong but not decisively so, in which case emphasis might be given to access in the hope that effective screening will occur. And second, the strength of access values can vary. In some situations—when a cause becomes particularly notorious, for instance—vindication of the principle of access can become so important that it outweighs the negative value of contributing to the risk of unjustifiable harm. The two exceptions are not mutually exclusive. If, however, neither is appropriate, then conscientious refusal must be the preferred course of action.

As has been suggested, conscientious refusal need not involve complete refusal of service. On the contrary, given the countervailing significance of access values, the scope of refusal should be limited to what is necessary to avoid a significant risk of unjustifiable harm. In some situations, the advantages surrounding a claim may make complete refusal necessary. In other situations, though, full refusal need only serve as an option of last resort in order to gain a litigant's consent not to press an objectionable advantage. Thus, if a litigant indicates a willingness to consider qualified access, an advocate might propose any of the following as alternatives to complete refusal: waiver of an advantage if a case actually goes to trial, avoidance of a side-effects strategy prior to trial or during one, or development of a justifiable offer for a settlement or a plea (thus making exploitation of an objectionable advantage unnecessary). If the litigant accepts one or more of these proposals, his lawyer would, by providing qualified access, make possible the partial realization of access values and would at the same time safeguard against use of the adversary process to reach unjustifiable results.

In spite of the attractiveness of qualified access, some lawyers might argue for avoiding it on principle because it involves an unfair exercise of advocate power vis-a-vis the lay public. The point is important and can actually be stated in two different ways: that this kind of bargaining is improper in itself and that, even if proper,

qualified access is illegitimate for indigent litigants given their limited options in seeking representation.

As far as the first version of this objection is concerned, it is hard to see why bargaining should be rejected as a matter of principle. Bargaining over the terms of representation would be improper if full refusal were improper as well. However, while litigants have a morally significant interest in obtaining access to the adversary process, this does not mean they have a moral right to use advocates to achieve wrongful ends. Assuming an advocate can justifiably refuse service altogether in a given situation, no reason exists for him not to "bargain" by offering qualified service as an alternative to full refusal. The bargaining at stake involves no more than a statement that the advocate will provide service if a litigant modifies the objectives he has set for his case. The litigant may resist the proposed modifications, but an advocate is under no obligation to revise *his* own position because of a litigant's determination to reach a wrongful result.

Whether advocates can legitimately offer qualified access to litigants with limited prospects for finding other lawyers is another matter. If replicating the bargaining power of prosperous litigants were of critical importance, then refusal of those with less leverage would be open to serious challenge. To argue in this way, though, would be to treat equality as more important than harm-avoidance—to suggest, in other words, that because the prosperous are more often able to use the legal system to reach wrongful results than the indigent, the latter should be put on the same footing as the former. Equality is a more specific and limited good than this, one that assumes priority in moral reasoning only when what is to be distributed is itself worthwhile. An argument from equality can carry no weight, then, when opportunities to harm others are at stake.

C. *Blanket Justifications for Advocacy*

One further objection to the thesis presented here remains. According to the article's argument, advocates are accountable for the service they willingly provide and must be prepared to offer justifications on a case-by-case basis for the balance they strike between access and its undesirable consequences. The point is certainly appealing, but a critic of conscientious refusal might note that the argument presented so far begs an important question concerning the value of providing access. In the comments on conscientious refusal, the critic could note, it was taken for granted that only a rebuttable presumption can be established in favor of access—taken for granted, in other words, that the tension between

providing access and avoiding harm must sometimes be resolved against access. To the critic, though, access might well have a higher value than has been suggested so far. The critic might, for instance, offer a blanket justification for advocacy per se. That is, he might cite any one of a number of possible arguments which hold that it is always morally preferable to provide zealous service than to qualify its provision or to deny it altogether.[80] Alternatively, the critic might advance a blanket justification limited to one of the specialities within the law; in particular, he might cite one of the many arguments advanced to justify the invariable provision of zealous service for criminal defendants.[81] Neither approach, however, proves to be convincing when examined carefully. Nonetheless, blanket justifications for advocacy in general do constitute a last line of defense against conscientious refusal in all situations and so merit attention on that ground alone. Furthermore, because of the importance that representaton of criminal defendants has in discussions of the ethics of advocacy, there are strong reasons for examining blanket justifications which are confined to that specialty. This subsection is thus devoted to justifications for advocacy in general, and the concluding subsection to justifications for representing criminal defendants.

The first justification for advocacy in general deals with the value of realizing legal rights, for it could be argued that vindication of the expectations engendered by legal rights always out-

80 Lord Brougham argued, for example, that it is justifiable for an advocate to use "all means and expedients" in promoting his client's interests:

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

2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed. 1821). *See also* Thode, *The Ethical Standard for the Advocate*, 39 TEX. L. REV. 575, 580-86 (1961) (while advocates should, as citizens, seek modification of unjust laws, their sole duty when representing clients is to maximize, within the bounds set by law, the advantages available to their clients).

81 Monroe Freedman has, for instance, offered the following justification for criminal defense advocacy:

> Are there no limits (short of violating criminal law and rules of court) to the partisan zeal that an attorney should exert on behalf of a client who may be a murderer, a rapist, a drug pusher, or a despoiler of the environment? Is the lawyer never to make a conscientious judgment about the impact of a client's conduct on the public interest and to temper the zealousness of his or her representation accordingly? I believe that the adversary system is itself in the highest public interest . . . and that it is, therefore, inconsistent with the public interest to direct lawyers to be less than zealous in their roles as partisan advocates in the adversary system.

Freedman, *Are There Public Interest Limits on Lawyers' Advocacy?*, 2 J. LEGAL PROF. 47 (1977). *See also* A. DERSHOWITZ, *supra* note 11, at 414-17, discussed *infra* at text accompanying notes 86-87.

weighs the negative value of creating a significant risk of an unjustifiable result. In order to defend this claim, however, one would have to defend the further proposition that lawmakers (legislators, judges, delegates to constitutional conventions, and so on) invariably determine the correct valuations to be placed on everyday life. The proposition is a chilling one—and remains so even when defended in the context of a generally just legal system. One can agree, for instance, that the legal system of nineteenth-century America was generally just without agreeing that it was justifiable for advocates to provide zealous service for the return of runaway slaves under the Fugitive Slave Act. Similarly, one can agree that the Constitution today offers a worthwhile framework for achieving a just society, but still express skepticism about Supreme Court decisions that make it possible for property interests to eclipse interests in decent shelter[82] or that give community control over education priority over equality of school funding.[83] Rather than allow for the invariable propriety of vindicating rights such as these, it is preferable to suggest that legal rights create morally significant expectations but that these expectations must be weighed against other moral interests which, for a variety of reasons, lawmakers sometimes fail to take into consideration.

A modified version of this blanket justification should be noted as well, for it might be argued that litigants are at least always morally entitled to due process of law. If "due process" is said to refer only to procedures designed to guarantee that deprivations of liberty and property are morally justifiable, then one can of course agree that zealous service is warranted on this score. However, if the term is given the broader meaning accorded it in case law—that is, if due process is said to mean that even when a deprivation is morally proper, a person may use all legal advantages available to avoid that deprivation[84]—then invocation of the term can function as a smokescreen to obscure the fact that aid has been provided to help a person secure an unjustifiable result. When due process is defined in this broader sense, a blanket justification framed in terms of due process is grounded in the mistake noted in the previous

82 *See* Lindsey v. Normet, 405 U.S. 56 (1972).

83 *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

84 Due process, the Supreme Court has stated, requires that an individual be accorded the legal rights available to him in the settled course of judicial proceedings of his jurisdiction. *See* Duncan v. Missouri, 152 U.S. 377, 382 (1894); Caldwell v. Texas, 137 U.S. 692, 697 (1891). If the rights a jurisdiction accords an individual are deemed insufficient under either the fifth or fourteenth amendments, due process may then require more than the minimum just stated. "Due process" thus has at least two normative meanings: it is designed to vindicate expectations generated by already existing laws, and is designed as well to provide a benchmark for determining the procedural fairness of those laws. While both meanings are implicated here, it is the first that is of primary concern.

paragraph in that it confers on lawmakers the authority to determine moral valuations that advocates must then realize. The legal rights created by lawmakers may be desirable more often than not. But to suggest that realization of these rights is invariably justifiable ignores the significance of the distinction between legal and moral justifiability. Thus, while due process, when narrowly defined, can provide a blanket justification for advocate attempts to prevent unjustifiable deprivations of liberty or property, it offers no such protection when it is said to include the opportunity to exploit all legal advantages accompanying a claim.

Alternatively, a blanket justification might focus on the desirability of encouraging individuals not to resort to self-help remedies. One might argue that an effectively functioning legal system is necessary for providing morally justifiable results, that such a system is possible only if laypersons are sufficiently confident about realizing their legal rights that they will foreswear self-help remedies, and that advocates thus promote the possibility of justifiable results in the long run by pursuing unjustifiable ones in the short run. If, however, resort to self-help results from a breakdown of confidence about realizing legal rights, why has this not happened in the large number of cases in which poor and middle class litigants have been denied access on financial grounds?[85] Refusal of service for this reason is far more common than refusal (whether qualified or complete) is ever likely to be because of the prospect of ineffective screening. Yet the consequences of financial refusal have hardly been calamitous in this respect. This is not to suggest that financial refusal is itself desirable. Arguably, service should never be refused on financial grounds, although the possibility of greater social friction because of increased litigation should not be ignored. Only the consequences of financial refusal are at stake here, though, and since this kind of refusal has not triggered massive resort to self-help, it is hard to see why conscientious refusal would.

Finally, it might be argued that claim-advancement is justifiable as long as some other advocate would be likely to pursue a harmful result. Two objections apply to this kind of lowest-common-denominator justification. One is that this approach makes it impossible to test the efficacy of conscientious refusal. Admittedly, some refused litigants will always succeed in finding less scrupulous advocates for their claims. Many others, however, while initially shocked by a lawyer's exercise of conscience, might ultimately agree to the

85 The American Bar Association's survey of the legal needs of the public has documented a wide range of civil law problems that individuals do not take to lawyers. Some of these are resolved via discussion among the interested lay parties; many, however, are simply allowed to lapse. *See* B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC (1974). *See also* Project, *The Legal Problems of the Rural Poor*, 1969 DUKE L.J. 495.

qualifications the lawyers they consult propose for service—a point that can be investigated only by avoiding a lowest-common-denominator approach to representation. Second, even if litigants could always find more accommodating lawyers, the fact that they could do so would not by itself provide a moral justification for offering service on the same terms as less scrupulous advocates. A distinction is needed in this context between pursuit of lesser evils and pursuit of equal ones. That some advocates might accept the risk of harm by providing unqualified access to the adversary system does not justify a conscientious advocate's willingness to take the same risk. If conduct is wrong for one advocate, then it must, barring some morally relevant distinction, be wrong for others as well.

This said, it should be noted that while an equal-evil justification must be rejected, instances sometimes arise in which a lesser-evil approach can be persuasive. That is, if it were certain a litigant would seek and find an advocate willing to exploit all the advantages accompanying a claim, it might be justifiable to agree to exploit only some of these advantages in order to make sure others were not exploited. To argue for this, though, simply endorses one version of qualified access, since "equal evil" would have to be defined in terms of results less scrupulous advocates would pursue and "lesser evil" would involve a qualification of access by comparison with that. A lesser evil approach thus cannot provide a blanket justification for zealous advocacy while an equal evil one lacks merit as a moral justification.

D. *Blanket Justification for Criminal Defense Advocacy*

Even if one were to agree with the points made so far—with the theory of accountability, with the proposition that perspectival difficulties are sometimes superable, with the rejection of blanket justifications for advocacy—one might nonetheless argue that conclusive reasons can be provided against refusal *within* certain specialties practiced by advocates. The distinction at stake here involves the justifiability of an advocate's conduct as an advocate, as opposed to its justifiability in the context of some substantive branch of law. A distinction such as this could serve as the basis for a specialty-limited claim of blanket justifiability, one that avoids the unconvincing reasons just mentioned for advocacy in general and instead points to features of a branch of law that could justify never refusing service to litigants with claims falling within that special area. Most branches of law, however, lack unique features that could support reasons for always representing individuals with claims within those branches. In any case, given the harmful side effects that can flow from zealous advancement of a claim, it would

be particularly difficult to justify unqualified provision of service within most branches of law.

The possibility of a limited blanket justification need not occasion concern, then, as a means of generating a piecemeal attack whose cumulative effect justifies the unqualified provision of service in every specialty of law. There is, however, one specialty—criminal defense advocacy—for which the possibility of a blanket justification does deserve serious consideration. One can plausibly maintain that special features of criminal trials—in particular, the twin threats of unjustifiable deprivations of liberty and abuses of government power—are of such critical importance that they can generate blanket moral justifications for zealous criminal advocacy. This kind of advocacy, one might argue, does not run counter to the principles advanced in this article. Instead, defense advocacy could be said to stand apart from these principles in that unique features of the criminal process offer conclusive reasons for providing zealous service for defendants even though such reasons cannot be found for advocacy in general. It is on the question of whether the special factors just cited provide grounds for zealous service in all criminal cases that careful analysis is required.

This question is best posed in light of a type of situation that has long troubled critics of criminal defense advocacy—one in which an advocate exploits all legal advantages available to a client when the advocate knows or has sound reason to know that the client is guilty of at least one of the crimes (or one of its lesser-included offenses) charged. The argument developed in the previous sections of this article allows for the possibility that zealous advocacy can be appropriate in such situations. In considering the justifiabilty of his conduct in a context such as this, an advocate might decide, for instance, that the state had engaged in conduct so wrongful as to warrant dismissal of charges against his client; he might consider morally unacceptable the severity of the punishment likely to be imposed on his client; or he might conclude that only by zealously contesting the top charge (concerning which he might reasonably doubt his client's guilt) would his client be convicted and punished fairly for the lesser charge of which his client actually was guilty. Careful consideration of the third question of accountability (the question bearing on the justifiability of likely results of zealous service) could certainly produce any one of these conclusions, in which case zealous advocacy would be compatible with conscientious service.

The question that has been raised, though, is whether zealous advocacy is always justifiable or whether it is only sometimes so, for if the latter approach is adopted, case-by-case discriminations must be made concerning the appropriateness of zealous advocacy. The

question is best approached by considering two kinds of justifications mentioned earlier. One of these—protecting defendants from unjustifiable deprivations of liberty—falls under the more general heading of defendant-based justifications. The other—which focuses on the threat to the public of oppressive action by government officials—can be treated as citizen-based justifications (that is, as justifications that retain their force even when convincing moral reasons cannot be found for arguing the causes of individual defendants).

The first kind of justification raises critical problems of definition. If, for instance, advocates are said to act justifiably whenever they try to protect defendants against deprivations of liberty, then all criminal defense advocacy can be said to fall within the scope of this justificatory rule. When defined in this way, though, the justification lacks moral force since the key moral issue with respect to a deprivation of liberty is not whether it is threatened, but whether the threat and actuality are deserved. If, on the other hand, the justification is framed in terms of protecting defendants against unjustifiable deprivations of liberty, then it of course should be given blanket effect when relevant. However, one has to note that this justificatory rule is unlikely to be relevant in all situations where criminal defendants are represented.

Limitations in the covering power of justifications are encountered in other formulae that can be proposed in defendant-based justifications. Criminal defense advocates sometimes try to justify their conduct, for instance, by arguing that they protect individuals against indignities that might be inflicted during the criminal process, or that they protect individuals who might otherwise be convicted because of popular prejudice against them. The presence of these factors warrants zealous advocacy. However, as with the unjustifiable deprivation of liberty standard, these rationales for zealous service are fundamentally limited. Far from providing justifications for zealous service in all instances, they actually point in the opposite direction—that is, toward qualified access in which an advocate agrees to offer zealous protection of the basic human interests at stake (protection against unjustifiable punishment, and so on), but declines to exploit advantages that carry a high likelihood of yielding results that benefit defendants but are morally indefensible. Defendant-based justifications, it can thus be suggested, can be viewed in one of two ways. On the one hand, they can produce standards that allow for the exploitation of advantages without regard to moral considerations, in which case they cover all instances of zealous advocacy but lack moral force. On the other hand, they can produce standards that are morally convincing, in which case they have moral force but cannot cover all in-

stances of zealous advocacy. Given this difficulty, they cannot provide blanket moral justifications for criminal defense advocacy.

Citizen-based justifications, by contrast, at least appear compatible with the invariable zealous exploitation of advantages on behalf of guilty clients. Since the touchstone of justification in this context is the benefit the public realizes by virtue of advocacy, questions about the justifiability of results obtained for specific defendants need not occasion concern. Rather, attention must focus on the deterrent effect that zealous advocacy can have on future government conduct. Given the importance of deterrence for this approach, it could be suggested that the more wrongful a defendant's own conduct (and thus the more government officials are tempted to cut procedural corners to convict him), the more important it is to challenge the government to deter oppressive government conduct toward future suspects. An argument along these lines would lack persuasive force when applied to advocacy for defendants in civil cases. The diversity of civil plaintiffs is too great and their power too slight to make a deterrence rationale credible as a blanket justification in that context. When applied to criminal law, though, a challenge-the-plaintiff (i.e. the government) rationale does have some persuasive power, given the government's monopoly of the use of legitimate force, and thus the possibility that officials will abuse this power.

While a citizen-based justification can account for some instances of zealous service on behalf of guilty clients, it can offer a blanket justification only if zealous service of clients *invariably* requires challenging the government. A coincidence of identity between zealous criminal defense advocacy and challenging the government may at first sight seem attractive when zealous advocacy is defined in terms of exploitation of the advantages accompanying a claim. In fact, though, there is a potential for tension between these two factors, a potential that Alan Dershowitz—inadvertently—makes apparent in his reflections on the nature of defense advocacy. On the one hand, Dershowitz presents the citizen-based, challenge-the-government deterrence rationale just outlined:

> The zealous defense attorney is the last bastion of liberty—the final barrier between an overreaching government and its citizens. The job of the defense attorney is to challenge the government; to make those in government justify their conduct in relation to the powerless; to articulate and defend the right of those who lack the ability or resources to defend themselves.[86]

On the other hand, Dershowitz offers the following guidance (on

86 A. DERSHOWITZ, *supra* note 11, at 415.

the preceding page) to the lay public for selecting defense attorneys:

> The first and most important rule in selecting the best defense attorney is to be certain that he or she is interested *only* in achieving the best legal result for the client and not in serving some other personal or professional interest . . . .[87]

Considered together, these passages show the potential for tension between zealous service on behalf of a client and challenging the government. If a zealous attorney is "interested *only* in achieving the best legal result for [a] client," occasions will arise in which this can best be accomplished by *not* challenging the government but instead by striking a bargain with it that does not require it to "justify [in court or elsewhere its] conduct in relation to the powerless." It is in this sense that Dershowitz's consumer criterion—find a lawyer "interested *only* in achieving the best results" for you—stands in tension with his citizen-based justification for zealous advocacy. The tension will not arise on every occasion. For instance, particularly strong formal advantages can best be exploited by direct challenges to the government, since these are likely to result in a dismissal of charges. When, however, advantages are somewhat strong or of uncertain strength, a risk factor must be taken into account in deciding whether to challenge the government or whether instead to seek a plea bargain, the effect of which would be to forgo challenging the government.

From the standpoint of a deterrence rationale, a challenge would be preferable even when advantages are only somewhat strong, since the cost to the government of a full-scale challenge (pre-trial hearings, trial, appeal, collateral attack) would be significant no matter what final outcome might result. From a client's standpoint, on the other hand, zealous advocacy might require a compromise in which case somewhat strong advantages are exploited not by challenging the government but by discounting their value (according to the perceived likelihood of their success in open court) in reaching a plea bargain. Since this kind of compromise is frequently reached, zealous advocacy often does not coincide with the demands of the challenge-the-government rationale. Instead, even though the public might benefit from a challenge to the government, defense attorneys frequently act zealously by forgoing this and reaching a settlement that reflects their clients' risk preferences.

Given the tension just noted, a more modest version of the challenge-the-government rationale might be suggested. According to this, one would have to concede that challenging the govern-

87 *Id.* at 414 (emphasis in original).

ment is sometimes not in the interest of criminal defendants. Nonetheless, one could argue that whenever these interests do coincide, an advocate acts justifiably when he does challenge the government. Even this, however, is unconvincing, for it overlooks two difficulties raised by the suggestion that the public always benefits from challenges to the government. The first is that challenges are available when government misconduct is minor and defendant conduct, by contrast, profoundly wrongful. Since the public has an important interest in seeing individual wrongdoing punished and in deterring such wrongdoing in the future, a citizen-based justification that appeals to the public interest would seem to require not a challenge to the government in situations such as these, but instead a forgoing of advantages to insure the punishment of a serious wrongdoer.

Second, not all challenges to the government, it should be borne in mind, involve misconduct by government agents; in some instances, challenges are instead aimed at the credibility of witnesses the government must summon in order to satisfy its burden of proof. Thus, if a defense attorney challenges a complaining witness he knows to be telling the truth but who nonetheless lacks credibility, such cross-examination can have a deterrent effect on the government only by discouraging prosecutors from presenting cases whose key witnesses will testify truthfully but who lack credibility. Deterrence of prosecution can actually occur in such instances; rapes of prostitutes, for instance, are frequently rejected for prosecution before they reach the indictment stage.[88] What is deterred, though, is not government misconduct, but instead prosecutorial effort that would fulfill a legitimate public interest.

One final point about challenging the government should be noted. The term itself, it should be clear, expresses the core concept of due process when this is applied in a criminal context, so one would have to conclude that by rejecting the justifiability of invariably challenging the government, the claim that it is always justifiable to provide criminal defendants with due process of law must also be rejected. This conclusion will occasion concern, however, only if the distinction, developed earlier, between "protective" and "advantage-exploiting" due process is not borne in mind. If due process is defined (in a way it is not in the case law) solely in

88 For a survey of prosecutors' attitudes concerning the significance of a complaining witness's prior contact with a defendant accused of rape, see National Institute of Law Enforcement and Criminal Justice, *Forcible Rape: A National Survey of the Responses of Prosecutors* 26-27 (1977) (74% of prosecutors responding to questionnaire believed that evidence of victim's previous sexual contact would have considerable impact on jury). *See also* H. FEILD & L. BIENEN, JURORS AND RAPE 103 (1980) (no variable more likely to have a decisive effect in a rape trial than belief of fact finder that complaining witness has a history of unchastity).

terms of protecting defendants against morally unjustifiable harm, then it is of course justifiable always to act zealously to provide due process. If, however, due process is conceived in terms of the exploitation of advantages that can produce unjustifiable results, then no moral rationale exists to legitimate its invariable provision to criminal defendants. Even when advantages can be used to avoid deserved punishment altogether, there may be good reasons in a given case to seize them to gain an acquittal or dismissal of charges. When given its legal meaning, however, due process cannot provide such a justification. Instead, the justification must be developed in the context of the facts at hand in a given case. It is in this sense that moral considerations must be brought to bear on advocacy, and this can occur only when advocates forgo their claims to special dispensations from moral reasoning by virtue of their role.

III. Conclusion

The final dispensation reviewed here has involved a blanket justification for advancing claims within the adversary process. Consideration began, though, with dispensations of an even broader kind, dispensations designed to shield advocates from even the possibility of censure for professionally proper conduct. Given the many steps that were needed to move from one kind of dispensation to the other, it might be helpful by way of conclusion to offer a schematic overview of the argument that has been advanced concerning accountability and conscientious refusal. Four specific points were made in developing the argument, and they will be summarized below in an order slightly different than the one in which they were presented in the article.

(1) *Advocates are accountable for the reasonably foreseeable consequences of their unconstrained decisions to render service, and so must be prepared to offer moral justifications for decisions made under these conditions.* This must be the starting point for analysis of advocates' moral accountability. As was noted at the outset, many of the lawyers who have written their memoirs in a confessional mode and even some of the philosophers who have commented on the ethics of advocacy have taken it for granted that advocates' conduct must be justified on a case-by-case basis. In doing so, they have argued past the legal commentators who have insisted on immunity from moral censure for professionally proper conduct. Much of this article has thus involved careful analysis in which arguments designed to provide advocates with across-the-board dispensations from moral reasoning have been tracked down and, when examined, found wanting. It is in this sense that there is an important congruence between denials of accountability and blanket justifications for ad-

vocacy. For while the structure of these claims is different, the effect of each is to make it unnecessary for advocates to consider the moral implications of their professional conduct on a case-by-case basis.

(2) *If the adversary system could always prevent the realization of unjustifiable results by functioning as a perfect screening device for claims advanced, there could be no objection from the standpoint of harm-avoidance to providing litigants with zealous advocacy.* Zealous advocacy, it has been argued here, is prima facie desirable for two reasons: first, knowledge of its availability induces laypersons to resolve disputes peacefully; and second, such advocacy involves a course of conduct (in particular, exploitation of the legal advantages accompanying a claim) that most laypersons would undertake for themselves if only they possessed the skills to do so. These cannot confer more than prima facie desirability on zealous advocacy, however, in the current adversary system its provision can often contribute to morally unjustifiable harm. In a perfect screening system, by contrast, no such harm could occur. Thus, while it might be morally preferable for advocates operating in a perfect screening system to devote themselves to one kind of claim rather than another, there could be no objection, from the standpoint of harm-avoidance, to advocates in a perfect screening system offering zealous service for any claim they are asked to advance.

(3) *Because common-law adversary systems do not function as perfect screening devices, advocates must determine the justifiability of their conduct by resolving the tension that can often arise between the value of providing zealous service and the undesirable consequences that can result from this service.* This tension does not arise on every occasion. When an advocate can expect the adversary system to function as an effective screening device, the tension need not be considered. However, when no such expectation can reasonably be entertained—that is, when an unjustifiable result is likely to be achieved—the tension becomes unavoidable. Arbiters within the adversary system cannot be expected to consider this tension; in fact, it is because arbiters can on occasion be either unable or unwilling to prevent the occurrence of an unjustifiable result that the tension arises in the first place. Advocates stand out in such circumstances as critically important moral agents within the adversary system and must decide for themselves how to strike the balance between access and avoidance of unjustifiable harm.

(4) *If it would be morally indefensible to provide zealous service given the kind of result likely to be produced, advocates should then refuse to provide such service.* By refusing service, conscientious advocates can offer a final equitable safeguard against litigants' use of the adversary process to achieve unjustifiable results. Advocates have two options, it

has been suggested, when refusal is warranted. One involves provision of qualified access to the adversary process (and so requires a litigant's agreement to waive exploitation of some or perhaps all of the objectionable advantages accompanying his claim). The second, and more drastic, option involves refusal to provide access of any kind. Since at least something of value results whenever service is provided, complete refusal must be considered the less desirable of the two options. It should nonetheless be adopted as a remedy if a litigant does not agree to an advocate's proposed limitation of zealous service, or if waiver of the advantages accompanying a claim would still not make it justifiable to advance the claim. If, however, a litigant agrees to forgo advantages, then qualified access will offer the best possible means of resolving the conflicting considerations relevant to advocacy. It will promote the values realized by providing access and reduce the risk of producing an unjustifiable result as a consequence of providing access.