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A defence of the standard conception of adversary advocacy

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A DEFENCE
OF
THE STANDARD CONCEPTION
OF
ADVERSARY ADVOCACY

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A research Report submitted to the Faculty of Humanities, University of the Witwatersrand, Johannesburg, in partial fulfilment of the requirements for the degree of Master of Arts, Applied Ethics for Professionals

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ABSTRACT

The standard conception of adversary advocacy postulates that lawyers be partisan towards clients, within the limits of law, and be unaccountable for the client's lack of integrity. Thus, lawyers owe duties to both clients and judges. Partisanship requires lawyers to conceal from judges confidential information received from clients and to advance arguments they believe are incorrect. Thus, say critics, the standard conception permits lying and cheating. This essay refutes that proposition. It is argued that truth-seeking is merely instrumental in the legal system and what is sought is 'proof.' The standard conception is defended, albeit with a corrective emphasis on balancing partisanship with duties to promote effective judicial decision-making. Counsel's role is defined as a licensed fiduciary intermediary, who by non-disclosures and insincere arguments acts morally because such practises promote the legitimacy of the legal system and uphold client dignity. The contending views of leading proponents and antagonists of the standard conception are examined.

DECLARATION

I declare that this research report is my own unaided work. It is submitted for the degree of Master of Arts, Applied Ethics for Professionals, in the University of the Witwatersrand, Johannesburg.

It has not been submitted before for any other degree of examination in any other university.

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Roland Sutherland

2 March 2016

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PART I: THE MORAL PROBLEM

Introduction

Among the imponderable mysteries of life is why and how so many people can, simultaneously, detest the legal profession and be proud when their sons and daughters become lawyers. The phenomenon derives from a warped perspective of lawyers' and their work; at once angels and devils, champions of justice and the very epitome of evil itself. Chief among the pejorative views is that lawyers are inherently dishonest and disguise their dishonesty through obfuscatory waffle. Among the more extravagant considered opinions in this vein is that of Daniel Markovits, who, in *A Modern Legal Ethics* (2008)[1]proclaims that lawyers are professionally obliged to lie and cheat to advance their clients' interests; ie the very nature of the lawyerly role in representing a client compels lawyers, against their personal moral beliefs, to assume a mantle of deceit and mendacity to be effective as lawyers. Although this view is extravagant, Markovits is not alone in propounding the proposition that legal professional norms are incompatible with personal integrity. Among others, David Luban proclaims a similar verdict. [2]

I disagree with these critics. The aim of this essay is to refute their positions, not on empirical grounds;[3] but rather, to demonstrate that what the ethical norms of the legal profession facilitates, by way of non-disclosure of facts and uncommitted or insincere arguments (both typical practises of counsel in court proceedings that excite indignation among moral observers and elicit condemnation) are not immoral. These practises

[1] Daniel Markovits, *A Modern Legal Ethics – Adversary Advocacy in a Democratic Age*. (2008). Princeton University Press, Princeton. (Hereafter, Markovits MLE).
[2] David Luban, *Legal Ethics and Human Dignity* (2007) Cambridge University Press, Cambridge. (Hereafter, Luban LE).
[3] When a lawyer does indeed, lie and cheat, that is a violation of the norms, not an expression of them. When caught out, expulsion from the Profession follows; eg, Van der Berg v GCB [2007] 2 All SA 499 (SCA).

unquestionably do involve deliberately concealing material information from a court and advancing arguments on facts and law which arguments counsel do not believe are correct, with the aim of securing a favourable judgment for their clients, conscious of the risk of injustice resulting. I agree with Markovits that counsel are compelled to act in this way and I offer a justification why these acts, ostensibly at odds with what a moral person, in a *private* role, not acting in the *role of a legal representative*, would probably do, are not deserving of criticism, and why, paradoxically, given the controversy about such conduct, these actions serve the highest moral aspirations of a democratic society.[4]

The standard conception of adversary advocacy

This essay examines the adversary advocacy system as known in the Commonwealth and the United States. This litigation process is practitioner–driven rather than judge-driven, the latter model being typical in European jurisdictions. European systems are called 'inquisitorial' to distinguish them from 'adversary' systems, owing to the European judge's prominent investigatory role, an attribute absent from the typical adversary system. An almost complete reliance by the judge on the counsel representing the litigants to decide what material to present in support of the rival propositions is a material dimension of the adversary system, a point of significance to the controversy.[5]

[4] A direct comparison between counsel and any person, not serving as counsel, is strained; only counsel are ever so placed, a significant point for the appropriateness of role morality.

[5] In adversary systems a judge is not literally bereft of any powers that trespass across the adversary/inquisitorial divide. For example, in a criminal trial, a judge may call witnesses in addition to those called by the Prosecution and the Defence 'in the interests of justice' in terms of Section 186 of the Criminal Procedure Act 51 of 1977. In foreclosures on mortgages involving execution of a writ of execution on fixed property, the judge is required to interrogate the procedure adopted and the effect of the execution on the resident of the fixed property to ascertain whether an abuse of the process has occurred; see: Gundwana v Steko Developments 2011 (3) SA 608 (CC). Moreover, adversarialism is not wholly absent from inquisitorial jurisdictions either, but these nuances play no material part in the controversies examined here.

Central to the debate between the critics of lawyers' professional norms and of their defenders, is the legal profession's self-image about how the relationship between counsel and client and how the relationship between counsel and the judge are to be managed.[6] The dynamics of the relationship between counsel and client has been captured by academic legal philosophers in the idea of the 'standard conception of adversary advocacy'. This standard conception is roundly condemned by the critics as morally unjustifiable. I contend for the contrary, albeit that I contend that the understanding of the scope of the meaning of the standard conception would benefit from a refinement to refute the critics' contentions.

The 'standard conception' of adversary advocacy, is usually formulated by most writers as being composed of three 'principles' or 'elements'. The formulations by the various writers use slightly different phraseology but the substance of the descriptions is common. The formulation of W Bradley Wendel in *Lawyers and Fidelity to Law* (2010) has the benefit of pithiness and illumination.

(1) Principle of partisanship: The lawyer should seek to advance the interests of her client within the bounds of the law.

(2) Principle of neutrality: The lawyer should not consider the morality of the clients cause, nor the morality of the particular actions taken to advance the clients cause, as long as both are lawful.

(3) Principle of non-accountability: If a lawyer adheres to the first two principles, neither third–party observers nor the lawyer herself should regard the lawyer as a wrongdoer, in moral terms.[7]

[6] The scope of Counsel's duties extend beyond the duties to clients and to judges to include the adversary counsel and litigant too; eg, neither a judge nor an adversary may be misled.
[7] W Bradley Wendel, *Lawyers and Fidelity to Law*, (2010) Princeton University Press, Princeton (Hereafter Wendel, LFL), 6.

Tom Dare, in *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyers Role* (2009) formulates the standard conception in identical terms.[8]

Luban, by contrast formulates what he calls the 'adversary advocacy excuse' as two elements, the principle of partisanship and the principle of neutrality, culminating in 'neutral partisanship.[9] Markovits takes the 'basic structure of adversary advocacy' as being composed of lawyer loyalty, client control, and legal assertiveness.[10] All three of these attributes are relevant to the first element of Wendel's formulation, ie partisanship, and indeed, the primary locus of controversy examined in this essay, ie non-disclosures of facts and uncommitted or insincere argument, is about the element of partisanship and what that implies, its proper scope being hotly contested. The core issue within that controversy is whether the client controls counsel, and if so, within what limits if any, especially as regards the keeping of confidences and in consequence, pursuant thereto, counsel is obliged to deliberately conceal material information. Moreover, it is pursuant to that partisanship that counsel advances uncommitted or insincere arguments to aid the client's cause.

The other two elements are really the flipsides of the same point; element no 2 directs counsel not to judge the client and element no 3 directs the world not to judge counsel for taking the brief or associate counsel as being complicit in the miscreant client's immorality. These considerations are relevant to the practice of counsel in every jurisdiction. [11]

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[8] Tom Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyers Role* (2009) *Ashgate, Farnham,* [Hereafter, Dare, CR] p5 ff

[9] Luban, LE 20-21, 23 ff

[10] Markovits, MLE 27,

[11] Barristers in England, and Advocates in South Africa observe the 'cab-rank' rule which embraces these latter two elements. The label originates in the obligation of a London cabby to accept a fare from whomsoever turns up, and has been transposed to describe the Bar's obligations to be utterly non-discriminatory about who they are briefed to represent. Solicitors in England and attorneys in South Africa are not bound by such a rule. This practise is really about client selection or rather, non-selection. Its application is not material to the controversial practises

The critical question is however, why, in moral terms, the standard conception of adversary advocacy can justify the practises of non-disclosure and uncommitted or insincere argument, if at all.

Generally, the academic literature in the discourse about the standard conception tends to ignore, marginalise or even trivialise the dynamics of the counsel/judge relationship, which involves counsel's duties to the court process, and as a result, the counsel/client relationship tends to be treated in isolation from the counsel/judge relationship. The standard conception as usually formulated indeed concentrates on the counsel/client relationship, and allusion to the judge/counsel relationship is implied rather than expressed. It is this narrowness in formulation, I contend, which explains, in part, why the pejorative perspectives, despite their considered formulation, result in invalid criticisms. An exception to this tendency is Alice Woolley who posits the characteristics of adversary advocacy as being moral neutrality, partisanship, and, thirdly, 'the constraint of legality, including maintaining the process of the adversarial system'.[12]

addressed in this essay because those issues arise only after the litigant has become a client.

On the cab-rank rule, see: Rondel v Worsley 1967 (1) QB CA, 52; also, in England, the Bar Standards Board, Rules of Conduct, Part VI, Para 601. In South Africa, see: GCB Rule 2.1 Duty to Accept Briefs: Counsel is under an obligation to accept a brief in the Courts in which he professes to practise, at a proper professional fee, unless there are special circumstances which justify his refusal to accept a particular brief. In particular, every person who is charged before the Court has a right to services of counsel in the presentation of his defence. Subject to what has been said above, it is the duty of every advocate to whom the privilege of practising in Courts of Law is afforded, to undertake the defence of an accused person who requires his services. Any action which is designed to interfere with the performance of this duty is an interference with the course of justice….counsel may decline a specialist brief if he considers himself not competent to accept the brief. Also, see Wendel, LFL, pp 29-31.

[12] Alice Woolley, 'If Philosophical Legal Ethics is the Answer, What is the Question?' (2010) 4 *University of Toronto Law journal*, 983 – 1001, p 992 [Hereafter Woolley]

I contend that a critical dimension of counsel's ethical responsibilities is a balancing or reconciliation of the duties owed to the client and the duties owed to the judge. No evaluation of counsel's role can ignore the origin of the role and its rationale; ie, counsel is a person with legal expertise who is a licensed fiduciary intermediary in the litigation process, who mediates the interaction between the client-litigant and the judge and mediates the interaction between the client-litigant and the adversary-litigant, in order to serve the objective of effective judicial decision-making. Thus, what is necessary is to re-appraise the place of the standard conception within a comprehensive understanding of the role of counsel in adversary advocacy.

An overview of the argument

I argue that the criticisms of these controversial practises [13] should be rejected because, broadly, the critics (1) incorrectly reject the validity of role morality for analysis of counsel's role, (2) pose inappropriate paradigms in theorising; in this regard, the gulf between divergent views by rival writers is, in part, explained by their respective reliance on distinct moral paradigms; ie virtue ethics or consequentialism/deontology, [14] (3) misconstrue the true

[13] By the term 'controversial practises' I confine myself to the non-disclosure and insincere argument issues. Critics invoke other types of supposedly immoral conduct not addressed in this essay, ie the willingness of counsel to assist a client to invoke an unjust substantive law. The favourite example is prescription of admitted debts. eg, Zabella v Pakel 42 F2nd 452 (7c (1957)) is used to illustrate the inequity: the defendant defeated a claim for the repayment of a loan made to him when the defendant was in need, and at the time of the claim the initial lender was now destitute and the defendant affluent. In this kind of case the root of the inequity is the substantive law, not any forensic decision or discretion exercised by counsel. Moreover, the immorality of substantive laws, like those in force during Apartheid in South Africa gives rise to different debates distinct from the forensic decision-making peculiar to adversary advocacy *per se*. This essay is concerned with counsel's ethical engagement with *litigation process issues* and the effect of the 'controversial practises' on that process.

[14] The writers whose views occupy centre stage in the discourse articulate views which reflect their adherence to these different philosophical traditions. By referring thereto, I allude to the virtue ethics thought derived from Aristotle about self-authorship to cultivate practical wisdom and through exercise thereof achieve personal flourishing; the chief aim in this tradition is development of personal character or integrity. The answers to practical problems of personal choice in that paradigm do not always approximate the answers offered by utilitarianism (a species of consequentialism). Utilitarians, following John Stuart Mill, adhere to the principle of utility and the pursuit of pleasure and avoidance of pain as the universal measure for human conduct, asking *what to do* rather than *what to be* and testing for the correct choice by reference to the good the choice may

nature of counsel's role in the resolution of societal conflict, and perceive the standard conception of adversary advocacy too narrowly, and (4) rely on empirical conclusions about the dynamics of types of lawyering not generic to adversarial advocacy.

I advance arguments in support of the morality of the controversial practises relying on the following propositions: (1) The appropriateness of role morality to frame the analysis; the idea of 'universal' or ordinary morality is questioned, and it is posited that all morality can be construed as role-bound, and that we should conceive of 'private' morality rather than 'universalist' morality, as our personal-role default moral value system.[15] (2) The dynamics of social conflict among people with divergent interests compels an active response from an organised community which seeks peace and social cohesion and repressing the danger inherent in unregulated social conflict requires an acknowledgement of the risk of a 'moral remainder'. (3) The functions of a dispute resolution system in a liberal democratic society includes a striving for political and social legitimacy, and in that endeavour, the protection of Human Rights and the application of the Rule of Law are given primacy; this aim, in turn, within the litigation process,[16] accords primacy to the principle of *audi alterem partem* – 'let the other side be heard'.(4) These values are in perpetual contestation with the values of truth and justice, which, despite being cherished, are instrumental values in the legal system, not its

achieve. Contrasted with these traditions is the deontological approach of Immanuel Kant who conceived of life as being subordinated to duty and that rights derive from duty, exhorting everyone to act as if all humanity were under a duty to act likewise and thus all would respect all, a person never being an instrument of another's will, but an end in itself. Kant's views on respect for others are barely distinguishable from Human Rights dogma in fixing dignity as the centrepiece for moral analysis.
See: Roger J Sullivan, An Introduction to Kant's Ethics (1994) Cambridge, Cambridge; John Stuart Mill, On Liberty in *On Liberty, Representative Government, The Subjection of Women, (*1963) Oxford University Press, Oxford; Roger Crisp, Aristotle, *Nicomachean Ethics* (2000) Cambridge University Press, Cambridge; Brenda Almond, 'Rights' in Peter Singer (ed) *A Companion to Ethics (*1991) Blackwell, Oxford, 259-269.

[15] I use the term "private morality' to encapsulate what is otherwise in the literature variously called 'ordinary', 'common', or 'universal' morality.

[16] I use the term 'legal system' to mean the constitution and the law, and as a part of the legal system I refer to 'dispute resolution systems' which means the courts for civil disputes or the courts for criminal disputes, and as regards the procedural laws and rules which regulate the conduct of cases, I refer to that as the 'litigation process'.

principal objectives. (5) Utilitarian grounds justify the institutions of dispute resolution; ie the various courts, and also the practises required of counsel to render the institutions effective and legitimate. (6) Deontological grounds justify the relationship between counsel and client and the relationship between counsel and the judge; the notion that the standard conception of adversary advocacy, as usually imagined, to address only the dynamics of the client/counsel relationship, constitutes a *comprehensive* account of adversary advocacy, is criticised and its proper place and scope, in a comprehensive appreciation of adversary advocacy, is addressed[17] (7) A definition is offered of counsel as a *licensed fiduciary intermediary of the dispute resolution system*, owing fiduciary duties to the client and to the judge, and so, counsels' role, thus defined, ought properly be located as a *public fiduciary role*, to which norms of public morality ought to adhere, (not a private or personal role, to which norms of private morality might adhere) and accordingly, within this institutional fiduciary paradigm, client/counsel confidentiality and trust in counsel to advance the client's cause is indispensable, both functionally and morally, and, no less are counsels' duties to promote effective judicial decision-making indispensable, both functionally and morally.

In furthering these arguments, the works of two avid critics of the standard conception, David Luban and Daniel Markovits are juxtaposed with two ardent defenders of the standard conception, Tom Dare[18] and W Bradley Wendel. The perspectives of Alice Woolley[19] in her critique of the theses advanced by Markovits and by Dare, in which she endorses Dare's

[17] In this regard, the neglected attributes include the efficacy of discovery rules, the duty of full disclosure of fact and law in *ex parte* proceedings, the duty to disclose adverse legal authority in all proceedings, and the cab-rank rule for advocates, though not for attorneys.
[18] Dare, CR (Supra).
[19] Woolley, (Supra)

approach, are adopted by me to justify the appropriateness of a wider understanding of the standard conception than has usually been attributed to it.

The controversial practises required or allowed by the norms of the legal profession

Our concern is to examine what the professional norms of the legal profession compel or permit counsel to do in the course of discharging their representative role in court proceedings, as regards the presentation of the 'truth' to a court. These professional norms differ marginally, but significantly, when a lawyer is in the role of confidential adviser in non-litigious matters, an aspect outside the bounds of this essay.[20] The important dimension for our purpose is counsel's intermediary role between the client and the judge and between the client and (usually) at least one adversary, in adjudicative proceedings.

To contextualise the legal professional norms observed by counsel which sanction the controversial practises, reference shall be made mainly to the code of conduct of the South African Bar. There is nothing parochial about the substance of this code of conduct, which is common to other adversarial jurisdictions. Although different jurisdictions may express the substance slightly differently, so that there are textual nuances in the codes, such aspects are unimportant to this enquiry.[21] The professional norms are not invoked as authority for the morality of the value choices inherent therein, but simply to evidence the norms. The norms, in any event, are little more than a codification of the value choices demanded from counsel

[20] The role of counsel as legal adviser and even as a negotiator on behalf of a client is governed by norms distinct from those that govern the role of counsel in court proceedings. As confidential legal adviser, there is no inhibition on what counsel believes is appropriate to advise; the only true norm is to give honest advice that is considered and within the counsel's field of expertise. When acting as negotiator, because the purpose of the engagement is to produce an agreement, duties of disclosure are extensive in terms of substantive law.
[21] See footnote 11, supra.

by the courts. The essay seeks to justify the morality of the value choices *illustrated* in the code, of which some, but not all, are captured in the idea of the standard conception of adversary advocacy.

Six examples are given of counsels' typical conduct which are controversial for supposedly evidencing a lack of integrity as regards non-disclosures and uncommitted or insincere argument.

First, a client charged with a crime confesses guilt to counsel, but wants nevertheless to plead not guilty and wants to resist a conviction. Counsel agrees to defend the client, having explained the practice that counsel shall not in any way contradict what counsel knows to be the true version of the client, or what counsel knows, objectively, to be the truth. Counsel lets the client plead not guilty, concealing from the court counsel's certain knowledge that the client has admitted guilt. Counsel cross-examines the prosecution witnesses; although never actually saying the client is innocent, counsel tries to diminish the value of their evidence by challenging the reliability of their evidence. The client does not testify. Upon conclusion of the evidence, counsel argues that the witnesses were unreliable and therefore the case against

the client was unproven and seeks an acquittal.[22] Sometimes an acquittal follows, sometimes not.[23]

Second, where counsel in cross examination seduces the witness into making damaging concessions, resulting in a poor impression by the witness on the court, the witness may either be disbelieved or the value of the witness's evidence be materially diminished. Objectively, the witness may have been clinically truthful but the effect of the cross examination has obscured that fact. Counsel is professionally blameless.[24]

Third, in a trial the client commits perjury. Counsel knows of the perjury because the client's evidence contradicts the instructions given to counsel or contradicts other inadmissible

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[22] [All references are to the rules published by the General Council of the Bar of South Africa (GCB) published at www.sabar.co.za]

GCB RULE 4.11: Position of Counsel briefed in a criminal case who is informed by his client that he is guilty of the offence charged

Where a client makes a confession to his counsel either before or during criminal proceedings, counsel should explain to the client the basis on which counsel may continue with the case, namely:

Counsel may not in the proceedings assert that which he knows to be untrue nor may he connive at or attempt to substantiate a fraud or an untruth.

He may appropriately argue that the evidence offered by the prosecution is insufficient to support a conviction and may take advantage of any legal matter which might relieve the accused of criminal liability.

He may not, however, set up an affirmative case which he knows to be inconsistent with the confession.

If the client, having been so informed, desires counsel to appear on the abovementioned basis, counsel should continue to hold the brief and act in accordance with the principles set out above. If the client desires counsel to give up the brief, counsel must do so.

[23] Obviously, when an acquittal follows, the secret of actual guilt is never revealed. The trial of Lord Haw-Haw, ie William Joyce, is a famous example of the failure of such a defence. See: JW Hall, *The Trial of William Joyce, Notable British Trials*, (1946) William Hodge & Co, London. See esp the cross examination of Inspector Hunt, pp 69-70, and the speech for the defence pp 205-210, by the defence barrister, G.O. Slade. The liability of Joyce for treason depended on proof of a broadcast made in support of Nazi Germany at a time when he owed allegiance to Britain. The evidence of the witness alleging the critical broadcast, Inspector Hunt, was not contradicted but challenged only as to reliability about voice recognition. Joyce never testified. Slade then argued that Hunt could not be relied upon. The jury convicted Joyce.

[24] In this example, the 'objective' truth is, of course, empirically unknowable to any of the counsel, including the counsel who led the witness's evidence, still less knowable by the judge. Probably, the extent of such outcomes can never be known. Counsel has 'tested' the reliability of the witness, and 'objectively' the test has been failed by the witness.

evidence known to counsel. Counsel does not expose the perjury. However, when arguing the matter, counsel does not rely on the perjured evidence to support the argument in favour of the client's case.[25]

Fourth, in a civil trial, counsel advises the client that the facts upon which the client relies for a cause of action are inadequate to make out a viable case. The client wants to try his luck anyway. Counsel presents the case. At the conclusion, counsel argues to the court that the court should find that the client's case proven, despite such an argument being diametrically opposite to his sincere, and considered, opinion which he had earlier given to the client. The argument succeeds, the court accepting an interpretation of the facts or of the law that counsel personally believes is incorrect.[26]

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[25] Incorporated Law Society v Bevan 1908 TS 724.

[26] See: Duncan Webb, 'Civil Advocacy and the Dogma of Adversarialism' (2004) 7 *Legal Ethics* 210-230, p227. In South Africa: see S v Ntuli 2003 (4) 258 (W) where in a criminal appeal, the Legal Aid appointed counsel tendered perfunctory heads of argument. He was admonished. Marcus AJ held: "[3] It is important to stress that counsel is under a duty fearlessly to represent his or her client by advancing **all arguments that can properly be marshalled** in the client's favour [in terms of] [t]he ethical standard for members of the Bar…. defined in clause 3.1 of the Uniform Rules of Professional Ethics …This is the essence of advocacy…. [4] There are, of course, **limitations to the content of counsel's argument.** Counsel may **not misrepresent the facts or the law**. At a minimum, however, counsel is required to **uphold the interests of his or her client without fear of the consequences.** There may be occasions when it is proper to make concessions. **Seldom, if ever, will there be a case in which no useful submission at all can be advanced in a client's favour**. As Megarry J pointed out in John v Rees; Martin v Davis; Rees v John [1970] Ch 345 at 402 ([1969] 2 All ER 274 at 309E - G): 'It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious," they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not: of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.' (Emphasis supplied).

GCB Rule 3.1: Duty to Client: According to the best traditions of the Bar, an advocate should, while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interests of his client without regard to any unpleasant consequences either to himself or to any other person. Counsel has the same privilege as his client of asserting and defending the client's rights and of protecting his liberty or life by the free and unfettered statement of every fact, and the use of every argument and observation, that can legitimately, according to the principles and practice of law, conduce to this end; and any attempt to restrict this privilege should be jealously watched. GCB Rule 3.2: Duty to Court: Duty to divulge to the Court material facts of

Fifth, in preparation for a trial, counsel is told that various witnesses are available to back up the client's story. Counsel interviews the witnesses; whilst backing up the client's story to some extent, they also divulge other material damaging to the case. Counsel decides not to call them, and conceals their existence from the court and from the adversary. Counsel presents a case that does not contradict what the witnesses say, except to the extent that the client denies their say-so. The omission of the damaging material eliminates consideration of an aspect that might have contributed to the client's claim failing. Had the omitted facts been adduced, the outcome could have, but not necessarily, have been different. [27]

Sixth, in cross-examining a witness, counsel seeks to destroy the credibility of a witness's account. Client tells counsel the witness is dishonest. The client's claims that the witness is a thief, and plausible details of an alleged theft in an episode totally unrelated to the current dispute are given to counsel by the client. Relying wholly on the uncorroborated allegations which the client assures counsel are true, counsel accuses the witness of being a thief. Although subsequently, the allegations are shown to be false, counsel is professionally blameless for the embarrassment and defamation of the witness, although the client is liable for a false accusation. (One may substitute for the allegation of theft in this example for an allegation of rape in a sexual harassment case, or paedophilia in a matter involving the

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which he has knowledge is governed on the one hand by his overriding duty not to mislead the Court, and on the other by his duty not to disclose to any person including in a proper case the Court itself, information confided to him as counsel. The application of this principle in particular circumstances and the question of when counsel may be said to have knowledge of facts may be difficult to resolve, and in such cases counsel should refer to the Bar Council for guidance.

[27] See: Incorporated Law Society v Bevan (supra). This practise must be distinguished from the controversy addressed by Webb (supra) p 217. In Webb's example, the evidence of a policeman was adduced without disclosing that he had been dishonourably discharged, which was considered to be misleading the court because it was material to his credibility.

suitability of the witness to have the care of children, or racism in a case about discrimination in the workplace, to illustrate the deleterious impact on the person so accused).[28]

PART II: THE CRITICS OF THE STANDARD CONCEPTION OF ADVERSARY ADVOCACY

David Luban

Luban's views are a convenient point of departure because of his negative perspective about role morality in general, a significant aspect in the debate.

Luban defines role morality to be what 'common morality' forbids.[29] He acknowledges that the concept of 'common morality' is not free from contestation. Recognising that social organisation, generically, implies social roles, eg, whether *qua* parent or *qua* lawyer, and that the concept of a universal morality is somewhat theoretical, rather than a facet of life as lived,

[28] See: Preston v Luyt 1911 EDL 298 at 320; Findlay v Knight 1935 AD 58 at 71-73; Gluckman v Schneider 1936 AD 151 at 161-162, for examples illustrating the limits of appropriate cross examination and the safeguards counsel are required to observe, pursuant to what is now framed in GCB Rule 3.3, which provides: Duties regarding Cross-examination of Witnesses. 3.3.1: Questions which affect the credibility of a witness by attacking his character, but are not otherwise relevant to the actual enquiry, ought not to be asked unless the cross-examiner has reasonable grounds for thinking that the imputation conveyed by the question is well-founded or true. 3.3.2 An advocate who is instructed by his attorney that in his opinion the imputation is well founded or true, and is not merely instructed to put the question, is entitled *prima facie* to regard such instructions as reasonable grounds for so thinking and to put the question accordingly. 3.3.3 An advocate should not accept as conclusive the statement of any person other than the attorney instructing him that the imputation is well-founded or true, without ascertaining, so far as is practicable in the circumstances, that such person can give satisfactory reasons for his statement. 3.3.4 Such questions, whether or not the imputations they convey are well-founded, should only be put if, in the opinion of the cross-examiner, the answers would or might materially affect the credibility of the witness; and if the imputation conveyed by the question relates to matters so remote in time or of such a character that it would not affect the credibility of the witness, the question should not be put. 3.3.5 In all cases it is the duty of the advocate to guard against being made the channel for questions which are only intended to insult or annoy either the witness or any other person and to exercise his own judgment both as to the substance and form of the question put. Rule 3.4 Imputations of Criminal Conduct Counsel defending a client on a criminal charge is not entitled wantonly or recklessly to attribute to another person the crime with which his client is charged, nor unless the facts or circumstances given in the evidence, or rational inferences drawn from them, raise at the least a not unreasonable suspicion that the crime may have been committed by the person to whom the guilt is so imputed.

[29] David Luban, 'Professional Ethics' *A Companion to Applied Ethics* (eds) Frey & CH Wellman (2005) Blackwell Reference online: <http:??0-www.blackwellreference.com.innonpac.wits.ac/subscriber/tocnode.hlml?id=g9781405133456_chunk_g9781`40513345645>

he poses, without committing to a view, that morality *might* be no more than a 'mosaic….of role-specific duties and loyalties'[30] and if so, there is no such phenomenon as 'universal' morality. I argue that this is a preferable view because the fact that commonality attaches to so many 'private' moralities cannot serve to privilege it above that attaching to other roles. In that context, what passes for 'universal' morality is simply a generic 'private' morality, albeit shared by many millions in their private lives, but indeed, no more than the morality of the personal role. I use the term 'private morality' in this sense in this essay.

Luban reasons that, in general, a person cannot invoke a 'role' to justify a deviation from private morality.[31] When one may invoke 'role', he says, is limited to when the institution wherein the role is located can be justified; in such a case it is the *right kind* of justification, but not necessarily enough to succeed.[32] Thus, as I understand Luban's proposition, eg, in War, to kill the enemy is justified, that being a functional necessary incidence of combat, but that 'presumption' does not extend to killing POWs.

Luban acknowledges that it is critical to a determination of whether a role is moral to evaluate that role within the context in which the role is functional. I agree, because just as the morality of a parent's role is a functional facet of the institution of family, so too must a lawyer's role be assessed in relation to the institution within which that role is functional, ie the legal system. Therefore, the role cannot be divorced from the institutional rationale for its existence.

[30] Luban, ibid.
[31] Luban, LE 23.
[32] This notion of the 'right kind of justification' is also employed by Markovits.

For Example, Luban recognises that a significant dimension of a 'professional role' is the reliance of the client upon the service and expertise of the professional person; ie doctor or lawyer. I agree, because a relationship between a professional person and a (dependent) client triggers a *fiduciary obligation* upon the wielder of the social power; ie the professional. Applied to the role of counsel, the client's dependency is a critical dimension in a holistic appreciation of the nature of counsel's *representative role,* and is at the heart of the justifiability of the element of partisanship in the standard conception. However, I contend that, just as a doctor is not a patient's mere agent in the fight against disease, neither is counsel a mere agent for a legal client. A client in litigation no more dictates to counsel *how* to present a case than a patient dictates to the doctor what drugs he *wants* to cure his illness.

Luban in *Legal Ethics and Human Dignity* (2007*),* develops his specific thesis about adversary advocacy. His ambivalence about the concept of role morality is illustrated by his remark that: 'I prefer to treat the role obligation as a *baseline presumption* which can be overridden by strong moral reasons to break the rule'.[33] This is why, to Luban, the standard conception should be understood not as justification but merely as a *presuppostion,* a perspective entertained by Luban because of his stance on the conditionality of role morality.[34]

Luban's organising principle for his treatment of adversary advocacy is the sanctity of human dignity, an *a priori* value choice.[35] To Luban, legal practice is only worthwhile because it

[33] Luban, LE,13: ftnote 20.
[34] Luban, LE 26.
[35] Luban, LE, 6.

upholds dignity of persons caught up in litigation.[36] This is a sentiment with which I agree, and which I address hereafter, but reach a quite different conclusion from that of Luban about the effect of the controversial practises in achieving or diminishing respect for human dignity.

The standard conception, in Luban's lexicon is called 'neutral partnership'.[37] Luban takes up Macaulay's famous rhetorical jibe at lawyers: '…whether it be right that a man should, with a wig on his head, and a band round his neck, do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire' and offers an answer. Believing, apparently, that counsel is a mere agent to do the client's bidding if the law permits it, and is thus a mere proxy for the client, performing a *de facto* servile function under the protection of the mantle of neutrality and non-accountability for the venality of the client, Luban asserts, predictably, the untenability of such a 'rationalisation.'[38] Although condemning thus, the standard conception, Luban grudgingly accepts that counsel must, *within the bounds of law*, maximise the client's interests, but rejects non-accountability as morally unacceptable.[39] Luban's image of the standard conception is Brougham's hyperbolic rant[40] which, apparently, he thinks, is a serious view held by the proponents of adversary advocacy.[41] Luban understands that counsel will act with zeal and this, to him, means implicitly:

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[36] Luban, LE 66.

[37] Luban, LE 9: 'Neutral partnership sees lawyers as hired guns, whose duty of loyalty to their clients means they must, if necessary , do everything the law permits to advance their client's interests - regardless of whether they are worthy or base and regardless of how much collateral damage the lawyer inflicts on third parties.'

[38] Luban, LE 9.

[39] Luban, LE 21.

[40] Brougham addressed Parliament whilst retained as counsel for Queen Caroline, the estranged wife of King George IV in respect of an action by the King to brand her as an adulteress. The King himself was no stranger to the beds of other women. Speaking in the Lords, in a masterful piece of circumlocution, alluding to the king's own skeletons, he famously said:

> An 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 amongst them, to himself, is his first duty 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 bit should be his unhappy fate to involve his country in confusion. Cited in Luban, LE 22.

[41] Luban, LE 22-23.

> …zeal at the margin of the legal, and thus well past the margin of whatever moral and political insight constitutes the 'spirit' of the law in question. The limits of the law inevitably lie beyond moral limits and zealous advocacy always means zeal at the margin. It is at this point that the adversary system excuse looms large, for it provides the institutional excuse for the duty of zealous advocacy.[42]

Despite repudiating 'zeal' Luban, paradoxically, contends that zeal is indeed appropriate in criminal matters, where the individual, accused of a crime, is to be protected from the abuse of state power. Truth is secondary in this type of case. The moral platform upon which this notion rests is that '…criminal defense is an exceptional part of the legal system, one that aims at protection rather than justice.'[43] Why protection of civil law rights is undeserving of 'protection' in this sense is not developed, presumably because Luban takes as a given, that the special status derives from personal freedom, ie a human right, being at stake, as distinct from other forms of right. This approach might not sit well with social justice considerations, eg the access of the poor to housing, or the eviction of illegal squatters with no other shelter to go to or mortgage bond holders threatened with eviction and having no alternative accommodation, might seem to be no less fraught with the same sort of human rights considerations requiring 'protection'.

Civil matters, by contrast, to Luban require 'justice', not 'protection of rights'.[44] However, although the quest for truth and justice are more important than in a criminal matter, these

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[42] Luban, LE 26. This view seems to me to be too narrow; there is no room on Luban's approach to appreciate that often litigation is about who should bear the risk of a loss, rather than an elementary dichotomy of X is right, *ergo*, Y must be wrong – why counsel should pull punches in that context is not addressed. Moreover, in every case where the Common Law has evolved to accommodate evolving social mores, zeal at the margin of 'acceptability' is the locus of progress. For example, the idea of who is a dependent for the purposes of recognising a duty of support by a deceased breadwinner was once limited to a spouse and legitimate children, but now the *de facto* if not *de jure* husband/wife relationship is sufficient, and extends to the children of one partner, even though the other breadwinner-partner was not their parent.eg, Paixao v RAF 2012 (6) SA 377 (SCA), an signal achievement for human dignity which could only have happened because counsel pushed the boundaries of the known law by zealous advocacy.

[43] Luban, LE 30-31.

[44] Luban, LE 31 (Compare Damaska, infra p58, who argues truth is not central to civil matters, rather mere 'neutral arbitration' is required).

values, he argues, are failed by the adversary system, because in the nature of that forensic contest, the process is designed to inhibit the truth coming out. His focus is on client confidentiality rights.[45] He castigates the rules about client confidentiality arguing that a '…doctrine that frustrates the truth can scarcely be defended on the ground that it is good for the adversary system'.[46] By implication, the protection of confidentiality between client and counsel must, argues Luban, be abolished. [47] Ostensibly, in a criminal matter, client and counsel may keep secrets and conceal the truth, but not in civil matters. The failure of Luban to appreciate the instrumental role of truth in *both* criminal and civil proceedings, is an aspect which I argue, flaws his account because no practical reason can support such a distinction.

Nevertheless, Luban indeed acknowledges that the primary purpose of the legal system is not truth seeking, but rather protection of legal rights. That, he reasons, would be no bad thing in itself, but again, it is the zealous counsel who spoil the picture, because, so Luban would have it, all counsel must be zealous to be competitive. To Luban, zealousness means inevitable excess:

> My legal rights are everything I am legally entitled to, not everything the law can be made to give. For obviously, a good lawyer may be able to get me things to which I am not entitled, but this…is an example of infringing my opponents legal rights, not defending mine.[48]

The intrinsic incoherence of this distinction is not lost on Luban; ie, if the law accords me a right, why am I not entitled to assert it? He tries to rescue himself from its obvious weakness by claiming that 'the law' is what a court says it is.[49] But this realist sophistry also cannot help his argument. Counsel who presents a case invokes the law as it is generally accepted or

[45] Luban, LE 36.
[46] Luban, LE 80.
[47] Marvin Frankel, a US judge, takes a similar view: his views and the controversy it spawned are addressed infra p 61.
[48] Luban, LE 42.
[49] Luban, LE 43.

if the client's case is not within well-defined legal bounds, counsel may offer a novel argument to try push the boundaries of the law. When a judge 'develops' the law by expanding it, there is no room to argue *excessive* zeal by counsel caused an 'inappropriate' outcome; and indeed, it is only inappropriate outcomes that can be the cause of an injustice. Counsel can only be causally implicated in getting a client what is not the client's legal entitlement if the judge is misled by counsel, in which case the judgment is simply wrong and can be remedied on appeal. No professional norm sanctions misleading behaviour by counsel.[50] On the contrary, the professional norms are strong on that theme.[51]

Luban ultimately concludes that the adversary system has 'only slight moral force, and appealing to it can excuse only 'slight moral wrongs'.[52] This leads Luban to claim that private morality cannot be contradicted by a professional ethical code, and if a choice needs to be made, the professional code must be defied.[53] Plainly on such a premise, a professional code that is merely a guidebook to private morality, as applied in a given context, cannot support a differentiated role morality.

Luban's argument, seems to me, therefore to render pointless the utility of role morality (even in its watered down presumptive function) because if one type of morality is a default morality that *ipso facto* trumps another, what need is there to recognise two types? Competing legitimacy, logically, is the font of the concept of role morality. Unless the

[50] On the contrary, counsel are required to draw relevant authorities to the attention of a court and by so doing prevent a court committing an error; eg Ulde v Minister of Home Affairs 2008 (6) SA 483 (W) at [36] – [42].
[51] GCB rule 3.2 (cited supra); Schoeman v Thompson 1927 WLD 282, 283: '….it is the duty of counsel to inform the court of any matter which is material to the granting of an application and of which counsel is aware.' This case related to an unopposed motion court matter, ie there was no adversary present in court.
[52] Luban, LE 63.
[53] Luban, LE 63.

legitimacy of two contending moralities is conceded there is no logical room for two. By contrast, Markovits does acknowledge two moralities, as do both Dare and Wendel.

Luban's ultimate exhortation is that counsel, outside of advancing arguments that do not depend on evidence, must '…become moral activists, using the law to further justice.'[54] Role morality is a chimera and 'lawyers must act as they would if the adversary system excuse was unavailable to them'.[55] Absent from Luban's concerns, is the effect of counsel's positive duties towards the court or the utility of partisanship to effective judicial decision–making, aspects addressed hereafter. The upshot of Luban's view is that counsel is accountable only in terms of private morality. To found that argument he has had to jettison the institutional character of the role entirely and pretend that counsel are simply generic agents, a contradiction of his own stance that context is relevant to evaluate a role.

Luban's approach, I contend is a misconception of counsels' role and unhelpful. By contrast Markovits offers a nuanced perspective provoking profound reflection on the social implications of counsel's distinctive social role.

Daniel Markovits

For Markovits, the organising principle of his thesis is the propriety of an individual living a life characterised by integrity, an aspiration articulated within a virtue ethics paradigm. Can counsel *qua counsel,* achieve that too? He is doubtful, because, according to him, the practice of non-disclosure is an example of lying, and insincere arguments are examples of cheating:

[54] Luban, LE 11.
[55] Luban, 'Misplaced Fidelity' (2012) 90 *Texas Law Review* 672 – 690, 674.

> Unlike judges and juries, adversary advocates should not pursue a true account of the facts of a case and promote a dispassionate application of the law to these facts. Instead, they should try aggressively to manipulate both the facts and the law to suit their clients' purposes. This requires lawyers to promote beliefs in others that they themselves (properly) reject as false. Lawyers might, for example, bluff in settlement negotiations, undermine truthful testimony, or make legal arguments that they would reject as judges. In short, lawyers must lie. [56]

Paradoxically, despite this harsh assessment of counsel's practises, Markovits is not, at bottom, hostile to the legal profession *per se*; rather, his thesis is sympathetic towards counsel who, as he would have it, are decent folk, doomed by their profession to be morally conflicted by having to suppress their virtuous private values in order to function as effective lawyers. The critical aspect of Markovits's thesis is that it is the very professional norms which inform the standard conception which compel the lying and the cheating.[57]

Markovits' theorising assumes the validity of the concept of role morality; ie a person *qua* lawyer and *qua* private individual are subjected to distinct moral value-systems. But despite acknowledgement of that notion, Markovits is uncommitted to the distinction being all that useful. The Holy Grail for Markovits is to tease from the nature of legal practice an intellectually satisfying basis to regard *counsel-at-work* as acting with integrity in terms of private morality norms. Ultimately he concludes that it is impossible to achieve that outcome, but an alternative possibility exists for respectability, but, for what seems to me to be empirical reasons, that proposition must fail too.

[56] Markovits, MLE 3.
[57] Markovits, MLE 4-5, 67.

Markovits, appropriately, positions adversary advocacy to be a critical dimension of the division of labour between judges and counsel. [58] He cautions against thinking of the 'court' as synonymous with the 'judge'; rather, the 'court' is a collective of actors each playing a distinct role.[59] Within that structure, counsel are bound to serve their clients as best they know how. The engagement between counsel and the litigant-adversaries is intensely competitive. The contestation plays out, supposedly, for the benefit of the rival adversaries and the decisions taken by counsel are dictated by strategies which advance clients' interests, disregarding any other person's interests, not limited to only the adversary's interests. This professional obligation imports into the role of counsel an ethical conflict with counsel's personal opinions about the client's case, and a necessary suppression of counsel's personal sensibilities. This perspective of an inner conflict, in my view, must be correct.

Accordingly, for Markovits, the key component therefore, in adversary advocacy, is client control over counsel. Counsel must reciprocate with unswerving loyalty to the client.[60] Demonstrating that required loyalty means having to commit, by the norms of ordinary or private morality, unethical acts, as illustrated by the controversial practises. The standard conception, argues Markovits, describes what counsel do and why it is functional to the litigation system, but offers no moral justification that meets the norms of private morality. Accordingly, these practises are 'lawyerly vices' from the perspective of private morality. In that context, Markovits argues that justice is not aimed at by the litigation process and

[58] Markovits, MLE 4: '….the center of gravity of my argument remains the genetic structure of adversary lawyering, and in particular the separation between advocates and tribunals that constitutes adversary advocacy's core…' See too: Markovits 'How (and how not) to do Legal Ethics' (2010) 23 *Georgetown Journal of Ethics* 1041 -1064; Markovits 'Three Issues in Legal Ethics' (2010) 60 *University of Toronto Law Journal* 1003-1010.

[59] Markovits, 'Three Issues in Legal Ethics' (supra) p1006.

[60] Markovits, MLE 3: '….the individual lawyers who shepherd clients through the legal process do not pursue truth or justice directly. Instead, the lawyer-client relationship is governed by principles of lawyer loyalty and client control that require lawyers to repress personal impressions of what is true or fair in deference to their clients' interests and instructions.'

because it tolerates injustice, counsels' complicity therein excludes the prospects of integrity.[61]

Because these lawyerly vices are calculated to 'try aggressively to manipulate both the facts and the law to suit their client's purposes',[62] Markovits claims that counsel's statements to a court create 'false belief'. He castigates the pose counsel assume of confidently asserting a position, in which counsel have (correctly) no sincere belief, which Markovits claims is an 'essential part of the adversary legal process'.[63] He does acknowledge limits to creating 'false belief'. He accurately captures the professional norms and sums up the moral predicament thus:

> All in all, lawyers may not make false claims when doubt evaporates and when the truth becomes inescapable, but they need not seek truth and should take advantage of doubts to make claims that are probably false (and that they believe privately to be false) when doing so benefits their clients.[64]

However, despite the opprobrium visited on counsel for these practises, from the vantage point of private morality, within the paradigm of the litigation process, he argues that a different set of values can be invoked, called 'lawyerly virtues'.[65] Prime amongst these values is the role of a surrogate voice for lay litigants who could not otherwise effectively articulate their viewpoints about their disputes. Thus, by relocating an evaluation of counsels' conduct within the *public institutional setting of the legal system*, it can be understood that what client loyalty achieves is to give an effective voice to litigants who, bereft of counsel's representative intermediation, would be unable to access the dispute resolution system

[61] Markovits, 'How (and how not) to do Legal Ethics' (supra) p1052.
[62] Markovits, MLE, 3.
[63] Markovits, MLE 38.
[64] Markovits, MLE 49.
[65] Markovits, MLE 5.

effectively. This activity Markovits calls 'high fidelity' to the clients.[66] The legitimacy of the dispute resolution system, he argues, is dependent on public confidence in its efficacy, tested by a fair opportunity for everyone to access the process and to be heard by authority. Counsel's ability to be a surrogate voice, at odds with counsel's private views, is called by Markovits, a 'negative ability'[67] and because of the utilitarian social benefit it brings, it is a 'lawyerly virtue'. There is, nevertheless, an inherent incompatibility between the constructs of 'lawyerly virtues' and of 'lawyerly vices'; they are located within different moral paradigms.

This incompatibility prevents lawyerly virtues from vesting counsel with integrity. The reason is that integrity is a *first person phenomenon* [68](ie, a virtue–ethics attribute) and remains outside any public morality paradigm.[69] However plausible an *impartialist* (ie, deontological) institutional rationale may be, it cannot satisfy first person or virtue-ethics values. The lawyerly virtues shall, despite that attribute, still hurt others and consequentialist arguments that the lawyerly vices produce the best overall results for the litigation process does not count for anything when measured within a first person or virtue-ethics framework for identifying integrity. [70] Thus, counsel, at best, are usefully vicious.

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[66] Markovits, MLE 5.
[67] Markovits, MLE 11, 94-95.
[68] Markovits, MLE 9. Markovits contrasts the notions of 'impartialist arguments' and of 'first person arguments'. '[There is] a distinction between two fundamentally different forms of moral argument: impartial argument, which concerns a *person's duties to others* in light of their equal importance as sources of free-standing moral claims; and first personal argument, which concerns *a person's interest in achieving her own (suitable) ambitions* and emphasizes the special relation of authorship that a person has to her own actions and life plans.' It seems to me this description can be translated to contrast virtue ethics paradigm from a deontological paradigm.
[69] Markovits' rather complex distinction is usefully redescribed by Dare in a review of Markovits *Modern Legal Ethics:* 'Can Lawyers Have Integrity'(2010) 13 *Legal Ethics* 244 – 249, p 244: 'Markovits' [perspective] rests on a distinction between two 'fundamentally different forms of moral argument', one impartial, concerning an individual's duties to others and premised on equal moral value of all, and the other 'first personal' emphasising the special relationship of authorship that a person has to her own actions and life plans. Institutional level justifications are of first sort, and according to Markovits, such arguments cannot secure personal integrity."
[70] Markovits, MLE 8-9; also Markovits, 'Three Issues in Legal Ethics" (supra) p1008.

Markovits is alive to the constraints or limits on the controversial practises in the forms of discovery rules, and duties of full disclosure but regards them as excuses,[71] rather than, as Alice Woolley would regard them as 'additional and independent legal obligations'.[72] This is an important and flawed aspect of Markovits' thesis. I adopt Woolley's stance and develop it, hereafter, as part of the argument that counsel is a licensed fiduciary intermediary of the dispute resolution system.

Markovits is not content to leave the vain quest for integrity there. He tosses up a skittle. The 'negative capability' argument, apparently, has legs after all and (reminiscent of Luban) is the 'right kind of argument' to inject some credible morality into the lawyers' role and ease the yoke of the allegation of viciousness. Of the 'negative capability' and 'lawyerly fidelity' to the client, he says:

> ….the argument, employing the analogy to the democratic political process, connects the fidelity that adversary advocates display to the legitimacy of adjudication. These reflections, which embed legal ethics in political theory, make it possible to supplement the formal support for lawyers' integrity identified by the purely moral argument concerning the ethics of role with a rich substantive account of the characteristically lawyerly virtues through which integrity-preserving role based re-description might proceed. Lawyerly fidelity is a high calling, I argue, both in its intrinsic merit and in its central role in sustaining social life more broadly in the face of the disputes that threaten, at every moment, to tear society apart. And the opportunity to cultivate and exercise lawyerly fidelity therefore renders the lawyers professional life worthy of commitment, even in the face of the fact that, in the eyes of non-lawyers, this life requires lawyers to lie and to cheat. [73]

Again, he argues:

> …the good lawyer, acting in her professional capacity, adopts the first personal moral ambition to take her client's part and steadfastly suppressing her own ego, to

[71] Markovits, MLE, 4-5
[72] Alice Wooley, 'If Philosophical Legal Ethics is the Answer, what is the Question?' (Supra) p 991.
[73] Markovits, MLE 12, also 248,: lawyers are 'specialists in political legitimation',

> speak her client's mind. The good lawyer aims to address the world negatively, through her client's eyes.[74]

But there is a condition necessary for this outcome, a phenomenon which Markovits calls 'authoritative insularity'.[75] This means that were lawyers able to live their professional lives and function in a hermetically sealed sub-community, genuinely free and independent of other social influences, pressures and connections, they could construct a moral world appropriate to its functions. One is provoked to imagine the Amish. But as such a relationship, distinct from the rest of modern society in impossible, at least in America, the quest is doomed.

This particular claim, as I understand it, is an empirical claim which Markovits invokes about American lawyers, more especially their practice of specialisation so that there are plaintiffs' attorneys, defendants attorneys and often in the corporate sector, attorneys who have a single client.[76] I do not interrogate this empirical claim. What I do challenge is that the fact (if it be true) that American lawyers sell their souls in that way, is not *an inevitable result* of the adversary advocacy model and is not, as Markovits asserts *a necessary attribute* of the standard conception of adversary advocacy. Certainly, American legal practice, if Markovits is be taken at his word, may be a special case in which there is an habitual and accepted practice of counsel imbedding themselves into a client's affairs. That abomination, as a norm, has yet to infect every other jurisdiction. It is a valid observation that the adversary system is a pre-condition for the hired-gun style of practice, but that is not evidence in support of such

[74] Markovits, MLE, 94.
[75] Markovits, MLE 12-13.
[76] Charles Fried, in 'The Lawyers Friend'1976 (85) *Yale Law Journal* 1060 -1089, p1087ff, lamented the evolution of this fragmentation of the American legal profession into institutionalised camps, something he believed the cab- rank rule, absent in USA, inhibited. See too: Duncan Webb (supra) p1041-1042 on the cab-rank rule. Also see footnote 11 (Supra).

an abuse being an attribute of the system *per se.* The absence of such 'embeddedness' in other places where adversary advocacy is practised demonstrates that assertion.

Markovits has, in his various writings, emphasised that his intellectual project is to examine legal ethics in a fresh way. The heart of his approach is to start with the private morality of the person who is also a lawyer. Because lawyering is but one facet of this person's whole life, compatibility must be sought with the private self. Accordingly, to Markovits, a virtue-ethics point of departure dictates all the rest. By and large, the defences of the controversial practises invoke consequentialist and deontological perspectives. [77]As a result, the debate between Markovits and the defenders of the standard conception of adversary advocacy is, in a sense, at cross purposes. This has been recognised by Wendel who describes a 'fault line' in fundamental approaches between protagonists and antagonists of the standard conception. He posits the differences to be between those who ask what should counsel *do* and others who ask how counsel should *be*.[78] This is doubtless correct, and explains why Markovits, an exponent of the virtue–premise view rejects institutional justifications for the controversial practises. This point is the fundamental explanation for the divergence between Markovits and the defenders of the standard conception, ie, Markovits' refusal to take role morality seriously in relation to personal integrity. By positing that first person morality and impartialist morality exist in parallel universes, there is logically, no room for a reconciliation, a feat which Dare claims he has achieved, as dealt with hereafter. For Markovits, however:

[77] Wendel recognised this in 'Methodology and Perspective in the Theory of Lawyers Ethics: A Response to Professors Woolley and Markovits*'* (2010) 60 *University of Toronto Law Journal* 1011 -1019.
[78] Wendel, ibid, p1011.

> …the impartialist justification of adversary advocacy presented by the adversary system excuse deprives lawyers of an *ethically significant authorship* and undermines their integrity. [79] (Emphasis supplied)

That stance puts his position beyond reach of any engagement with rival views. Grasping what Markovits believes lawyers should do is difficult. Perhaps, all he wants is that lawyers live with self-recrimination. Markovits, it seems, would like counsel to be persons of integrity but concludes they cannot; they are a caste apart, the latter-day 'untouchables' doomed to ignominy while continuing to serve as useful villains. Markovits tries to have his cake and eat it: in the first person paradigm it is lying and cheating but in the impartialist paradigm it is not. Alice Woolley advances an argument that cuts across this untidy outcome, which she says 'makes the first-person problem go away'.[80] She argues that:

> The practice of law does create a first–person problem for lawyers, but it is one that is neither created by an immorality inherent in legal practice nor eliminated by demonstration of the moral justification for legal practice. The challenge to a lawyers ability to lead a well lived life exists independently of the morality (or immorality) of the lawyers role and should not be what motivates our enquiry into the morality of the lawyers role nor affect the conclusions that follow from that enquiry.[81]

Accordingly, she argues it is Markovits' moral *conclusion* that is at stake rather than his *description* of counsel's conduct; thus:

> ….the moral conclusion is what is at issue, and as Dare demonstrates, the justification for the lawyer's role as advocate, and the Rawlsian point about the application of morality to institutional roles and rules, *simply makes the application of ordinary morality to the lawyers acts inapposite. Ordinary morality applies, but not in that way, and when ordinary morality applies properly – to the lawyers' institutional role in a democratic system of laws* – its conclusion is that what lawyers do is good, not bad. And for that reason, there is nothing to excuse, and the lawyer can feel as personally committed to advocacy as she is otherwise to impartial moral principles such as honesty and fair play.[82] (Emphasis supplied)

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[79] Markovits, MLE, 111.
[80] Woolley, 995.
[81] Woolley, 994.
[82] Woolley, 995.

Thus it is a societal dimension which informs Wooley's view and, as shall be shown, other defenders of the standard conception, like Wendel and Dare, whilst Markovits and Luban reject that institutional perspective. By shying away from the unavoidable implication that in a private role you do not represent other people in adjudicative proceedings, and that the institutional context cannot be unravelled from the moral assessment, in my view, Markovits and Luban impoverish their accounts of adversary advocacy.

PART III: THE DEFENDERS OF THE STANDARD CONCEPTION OF ADVERSARY ADVOCACY

Tom Dare

A leading defender of the standard conception as a morally justified position is Tom Dare. He acknowledges, with Markovits, the ostensible contradiction between private morality and the role morality of counsel, but argues that this contradiction can be overcome. In his *The Counsel of Rogues* (2009),[83] he seeks to reconcile the idea of role morality with the idea of private morality by arguing that the norms of private morality ought to look beyond the apparent contradictions with role morality and recognise that the norms of the role are indirectly justified by the norms of private morality because of the function that the role of counsel serves in the dispute resolution system, itself a morally justified institution. Based on an indirect justification, Dare argues that:

[83] Dare, CR.(Supra)

> If the moral defence of the standard conception is successful an adequate ordinary morality will encourage respect for the demands and permissions of professional roles.[84]

Dare argues that moral obligations attach to social roles; eg mother, employer, lawyer etc. The discharge of the controversial professional duties; ie to conceal facts and to pretend to believe, when acting in the role of an adversary advocate ought not to cause any 'essential conflict between role-obligation and personal integrity' the very opposite to the positions taken up by Markovits and Luban.[85] Critical to Dare's argument is (1) his location of the standard conception within the role of law, *per se,* which, so Dare argues, serves to mediate between adversaries in order to achieve social cohesion in a pluralistic society,[86] and (2) a re-definition of the scope of the standard conception to distinguish mere-zeal from hyper-zeal.[87] Dare candidly confesses that he seeks to defend a *modified* form of the Standard Conception. The modification he introduces is a brake on what legitimately can be done for a client by counsel. This brake is his answer to certain of the critics, especially Markovits, whose position is that an intrinsic attribute of adversary advocacy is unbridled subservience to the client's interests and to the client's control, requiring lying and cheating. To define the qualification, Dare distinguishes 'mere-zeal' and hyper-zeal' in the professional obligations of counsel. The counsel who resorts to mere-zeal eschews the idea that he is required to 'pursue every collateral advantage the law can be made to give', rather, ethical counsel are

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[84] Dare, CR 159.
[85] Dare, CR 158, and 151 where he attacks the 'autonomy view of integrity' as ill conceived.
[86] Dare CR, 59: '…the fundamental function of law in modern constitutional democracies is to mediate between the range of views to be found in such communities on fundamental questions such as what constitutes human flourishing, what basic goals are intrinsically most worthy of pursuit, and what is best way for individuals to live their lives. The law allows the advocates of very different views on these matters to live together despite their differences. The nature of the roles occupied by lawyers within the institutions of law is settled to large extent by this mediating function of law.' It might be thought this exposition is too high minded; more generally, the contending views are about whether the Accused should go to jail, and if, so for how long, or whether the creditor can get the money the debtor allegedly owes, or which parent should have the children, or whether a tender has been corruptly awarded: however they are all matters of moment for the people directly involved.
[87] Dare CR, inter alia, 76- 83, 159 on the 'mere-zeal' and 'hyper'-zeal' distinction.

required to 'zealously pursue their clients' legal rights'.[88] The choice of words by Dare is significant: mere-zeal pursues 'legal rights', hyper-zeal pursues 'interests'.[89]

Dare's thesis is built up in layers; he locates adversary advocacy within the litigation process, which, in turn, is itself located within the dispute resolution system, which is located within the legal system of a democratic society. His model is founded on what he calls the 'role of law' in a broadly democratic society. His claim is that he:

> …[makes] use of John Rawls' distinction between constitutive and practice rules to explain how role-differentiated obligations [are] possible, and ….show how an institution and the roles it supports might be designed with reference to the resources of broad-based morality and yet it be the case that the occupants of those institutional roles were not at liberty to appeal to broad-based morality from within their roles.[90]

As a result, he argues that it must follow that:

> …lawyers have moral grounds for regarding themselves as having duties to their clients which may allow or require them to act in ways which would be immoral were they acting outside of their professional roles.[91]

He argues that the standard conception has utility as a component of that democratic social order.[92] Duncan Webb, in reviewing Dare's argument, observes that the role of counsel serves to preserve stability, rather than to promote change.[93] In that context, Dare identifies vulnerable individuals as important beneficiaries of the standard conception.[94] Also, its utility is evidenced in its support of social stability by making an effective dispute resolution system available to those who have disagreements requiring 'authoritative resolution'.[95] Self-

[88] Dare CR, 159.
[89] This textual distinction between 'rights' and 'interests' is more than a semantic coincidence.
[90] Dare CR, 149.
[91] Dare, CR, 148.
[92] Dare, CR, 159.
[93] Duncan Webb, 'A Review of T Dare, The Counsel of Rogues? A Defence of the Standard Conception of the Lawyers Role'. (2009) 12 *Legal Ethics*, 249-257, p 255.
[94] Dare, CR 148.
[95] Dare, CR 152.

evidently, dispute resolution capability is the core pillar of law as a social phenomenon. Dare's consequentialist rationale for the dispute resolution system is the platform upon which counsel's role can be explained and justified in deontological terms. The duties that are intrinsic to the role are, thus, conduct that *per se* cannot lack integrity.

Candidly adopting an exclusivist positivist stance[96] to describe law itself, Dare draws attention to the existence in society of the plethora of sincerely held views, moral or otherwise, that are perpetually in a state of contestation. If co-habitation in a given community is to be attainable, the community must achieve a consensus about how disputes can be resolved in a way that the losers accept the outcomes as binding. This requires acknowledgement of a system that hands down authoritative decisions. Typically, this is a legal system that enjoys legitimacy.

However, apart from all the usual paraphernalia associated with the apparatus of the law, what is necessary is that the *mechanics of accessing the system* in order to achieve ventilation of one's grievances is possible through an effective methodology of participation. That methodology, at the micro-level, means that individual litigants can, on rational grounds, be confidant that their voices are heard and that their positions, regardless of how much or how little those positions have objective merit, will enjoy serious attention from the ultimate decision makers, ie, the judges. Because of the complexity of the legal system, and the litigation process in particular, intermediaries, ie lawyers as representatives, are necessary to engage, at one remove from the litigants themselves, to do for the litigants what they would do for themselves were they only possessed of the expertise to do so. Especially important, is

[96] Dare, CR 63-73.

the need for vulnerable persons to enjoy such representation.[97] Thus, the thrust of Dare's position is that, pursuant to the standard conception, counsel must, in order to serve these ideals, confine their interactions to a dispassionate marshalling of the tools of the law to present, within the best of their abilities, their clients' cases to a judge. Because the lawyerly role is axiomatically one that is deeply involved in 'wrongdoings' (ie of the clients) a degree of maturity about how to act *qua* intermediary in a dispute is indispensable and some 'distance' from the litigants is crucial to preventing one's own persona from being submerged by that of the client.[98] In that context, counsel, acting within the paradigm of the standard conception, performs, at the individual or micro-level, a role which is supportive of the social cohesion, sought after at the institutional or macro-level of society.

Once Dare has thus located the standard conception, he turns to deflect the attack on the standard conception from the critics who, like Markovits, contend that the standard conception licenses advocates to lie, cheat, and thwart just outcomes through immoral championing of their client's causes. Dare seeks to achieve this deflection by the distinction, which he has invented, between what he calls 'mere-zeal and 'hyper-zeal'. The image conceived by the critics of the standard conception, like Luban and Markovits, is of the hyper-zealous counsel who is bent on advancing the clients' interests by squeezing dry the law and its processes to win any dispute, using artfulness and manipulation without regard to fairness. Dare concedes that if the standard conception permitted that pattern of conduct (indeed, as we have seen Markovits' argues it compels such conduct) then his differentiated zeal thesis fails. Implicitly, if ultra-zeal behaviour means abuse of the litigation process, it follows that it would be irreconcilable with a social cohesion rationale for the legal system.

[97] Dare, CR 148.
[98] Dare, CR 20.

However, Dare argues that 'hyper-zeal' is neither appropriate nor necessary for the standard conception to operate. Dare's moral or modified form of the standard conception imposes restraints on counsel to be 'merely' zealous in their partisanship. By this Dare means that the noble advocate is zealous in achieving for a client all legal rights and entitlements due to the client but no more than that. It may be that the substantive law, properly interpreted and applied, yields outcomes that ordinary morality would baulk at, but because of the reliance on the legal positivist distinction between law and morality, unfair outcomes cannot be attributed to counsel who helped the client to that end.[99] Indeed, about the substantive law's several injustices, Dare offers two thoughts. First, assuming a broadly democratic society, these 'injustices' are sanctioned by the legitimate social order, and social cohesion requires acquiescence, although not deference. Secondly, the noble advocate may, therefore, outside his representative role in legal proceedings, but still within the scope of his more general legal professional role, freely rail against the injustices by pursuing the path of a reformer.[100] This could be the sort of 'moral activism' favoured by Luban, but, unlike Luban's brand of activism, Dare's reformism takes place outside of the litigation itself.

Dare's redefined standard conception in which mere-zeal is the norm therefore imputes to the proponents who define the standard conception by hyper-zeal, the error of attacking a straw man. I agree, but Dare's very distinction is in danger of failing too, albeit without thereby reinvesting the critics with a re-established case. Both the theoretical and the practical application of the mere-zeal/hyper-zeal distinction are problematic. Can there really be a

[99] See Dare, CR 2; also see footnote 13, supra.
[100] Dare's view is that the ability of an advocate to hold private views distinct from that of his client and, in addition, by engaging in a reflection within the paradigm of universal morality about the challenges of the professional role, counsel manifests integrity. Dare CR, 143, 145.

useful distinction between 'legal rights' on one hand, and on the other hand 'interests' which lie *inside* the realm of 'legal rights'? [101] It seems to be a semantic joust. How can one persist in this distinction without construing 'interests' to be *unlawful* desires; ie *outside* the ambit of legal rights? In my view, if behaving with 'hyper-zeal', as conceived, counsel remains within the law, how can that be distinguished from mere-zeal? If hyper-zeal is construed as behaving unlawfully, the norms of the profession cannot and do not, *per se* approve of such conduct, and the distinction serves no purpose. Indeed, I argue that empirically, the Bar's professional codes can only be properly read to mean what Dare calls mere-zeal.[102]

In Dare's terms, 'the role of law is to allow clients to avail themselves of rights allocated to them by social institutions.'[103]In such a context, the distinction, it seems to me, is unnecessary, perhaps even impossible to apply in practice. To move this discussion from theory to practicality, the example of a custody dispute illustrates the problem. If both parents want custody, what can be done that is hyper-zealous that is within the law but ethically inappropriate? If one parent is an ex-drug addict but is now clean, is it hyper-zealous to bring it up? This is often condemned as a dirty trick, but how is such a character attribute not relevant? And if the assertion is that the parent will not backslide, why and indeed how and why should counsel, rather than the judge, make a judgment call on that conclusion?

[101] See: Duncan Webb, 'A Review of T Dare, The Counsel of Rogues?' (Supra) p 25, Webb questions the utility of the distinction between mere-zeal and hyper- zeal and argues that in reality the proper question is not what a client is entitled to but rather *who gets to decide*. He cites the laws about client/counsel privilege as an example to good effect. It is counsel who has to make a decision about whether a document is discoverable or privileged, and thus an opportunity to cheat exists; but, by definition, that would be a violation of professional norms.
[102] GCB rule 3.1, (supra, ftnote 26).
[103] Dare, CR 78.

Dare contends, contrary to Markovits, that the standard conception of adversary advocacy, understood within the mere-zeal paradigm, does indeed enable counsel to act with integrity because ordinary morality ought to have a place within it to appreciate that the role performed within the system is justified by the legitimacy and moral justification of the system itself.[104] He therefore posits that the specific *moral consequentialist considerations* which justify the institutions of the law are compatible with a *set of deontological rules within the system*[105] that are, ostensibly, at odds with norms justifying the system itself. [106] Thus, locating Dare's thesis with the range of philosophical traditions, it seems evident that Dare rejects virtue ethics as a viable paradigm within which to treat legal ethics, a diametrically opposite view to that of Markovits. Plainly, critics of the standard conception, like Markovits, have grounded their positions firmly on a virtue ethics premise. Dare argues, drawing on a remark by Gerald Postema[107]that because a practical application of a virtue-ethics approach is 'complex' and 'difficult to characterise,' it is therefore an unsuitable paradigm to be applied to the issues of advocacy. Bolted onto that stance, is Dare's view that the utilitarian rationale for a mediating role in the legal system, justifies, from outside of the rules of the role, the 'internal' deontological rules that govern the role of counsel towards the client.

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[104] Dare, CR 133, 147.
[105] Dare, CR, 31.
[106] Dare, CR, 147: '…lawyers have moral grounds for regarding themselves as having duties to their clients which may allow them or require them to act in ways which would be immoral were they acting outside of their professional roles. The fact that lawyers act within their professional roles, I have claimed, makes a moral difference.' Also, Dare, CR149: '…an institution and the roles it supports might be designed with reference to the resources of a broad – based morality and yet it be the case that the occupants of these institutional roles were not at liberty to appeal to broad – based morality from within their roles.'
[107] Dare, CR 152. See too: Gerald Postema, 'Moral responsibility in Professional Ethics' (1980) 55 *New York University Law Review* 63-89, 68. Postema's stance is that counsel ought to bear moral responsibility for their professional conduct, thus rejecting the view that the counsel's moral standing can be determined by institutional considerations; rather he argued it ought to be the other way around; P88. Further, he argues that the opportunity for an Aristotelian approach is compromised by the role counsel must fulfil.

It follows that the key question of 'client control', and counsel's corresponding subservience, so important to Markovits, is absent from Dare's conception. Dare argues that: 'Lawyers are not passive recipients of professional norms or instruments of client preferences.'[108] This view accords with professional norms. I argue that counsel is not a mere tool of the client but has to exercise independent judgment about how to present a case. Loyalty to the client does not mean capitulation to the client's whim. This perspective is elaborated hereafter in defining counsel as a licensed fiduciary intermediary in the legal system.

The upshot of Dare's views is that the controversial practises are justified by their functionality in adversary advocacy which in turn gives efficacy to the dispute resolution system whose function in turn is to channel conflict towards outcomes perceived as legitimate, and that because that system is morally justified, the inner rules of the litigation process are also justified despite their contradictions with private morality. Thus integrity is possible. [109]I adopt this model to frame the argument about counsel's systemic intermediary role.

It is notable that Dare, no less than Markovits, gives slim attention to counsels' positive duties to the judge, which are at least latent in the standard conception. Although not dismissive of them, Dare seems to suppose that the mere-zeal paradigm suffices to acknowledge that balance. This is really a matter of articulation rather than substance, but the very debate on the scope of meaning to attribute to the standard conception suggest to me that an express articulation of the duties towards the judge would be preferable. The vulnerability of the mere-zeal distinction in my view amplifies such a need. By contrast, the emphasis put

[108] Dare, CR 123.
[109] Dare, CR 143.

on a balance of duties by counsel to the judge and to client by Alice Woolley in my view, affords an appropriate holistic appreciation of counsel's role.

W Bradley Wendel

Wendel's point of departure in *Lawyers and Fidelity to Law* (2010)[110] is to question whether 'ordinary' morality is the correct context within which to critique the controversial practises of non-disclosure and insincere argument. He is critical of the conceptualisation of standard conception,[111] but, in reality he seeks only a modification,[112]in a manner similar to Dare; ie subject to the caveat that a client's 'entitlements' be pressed, not the client's wider 'interests', assuming a practical distinct can be made.[113] Wendel distinguishes morality and legal ethics, contending that:

> Morality is about justifying the praise and blame we ascribe to others on the basis of their actions or their character…

However, what legal ethics is about is the:

> ….concern of lawyers seeking a justification for their actions which appeals to standards of right and wrong that can be shared by the people whose interest s are affected by lawyers and the legal system. [114]

In this, there is a necessary implication that a virtue ethics perspective belongs to the realm of ordinary morality, but deontological considerations characterise and dominate 'professional' morality, ie the applied or practical ethical realm, a point made forcefully by Wendel in his critique of the work of Markovits and of Woolley. [115]

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[110] Wendel. LFL (Supra)
[111] Wendel, LFL 39.
[112] Wendel, LFL 49.
[113] Wendel, LFL 31.
[114] Wendel, LFL 17.
[115] Wendel, 'Methodology and Perspective in the Theory of Lawyers Ethics:' (Supra).

The thrust of Wendel's thesis is that adversary advocacy must be adjudged as a distinct social role which is a component of a *political normative system*[116] (ie the litigation or court system) and is not suitable for appraisal in terms of the norms of ordinary or private morality. Wendel proclaims that the:

> ….best justification for the duties of lawyers, as we understand them, is grounded in the value of legality, or the rule of law. That is, legal ethics is not fundamentally an application of ordinary ethics in a particular context; rather, it is a political normative system that is informed by the capacity of the law to enable people to treat one another as equals, live together, and cooperate, despite deep and persistent disagreement about morality and other matters.[117]

Wendel goes on to argue that a 'political morality' may be developed to 'adapt' in a 'unique' way to deal with social life, and as such, he draws on ideals 'such as citizenship and communities'. What this adds up to is that legal ethics is:

> …concerned, fundamentally, with the problem of how social conflict can be resolved and cooperation made possible through legal procedures and institutions.[118]

Among the basic value choices Wendel argues must be made, is the sanctity of the clients' autonomy to which counsel must show deference. Drawing on Pepper's notions of 'first class citizenship' which prizes autonomy, Wendel modifies that notion to argue that:

> … instead of relying on the ordinary moral notion of autonomy, the political reconstruction of the argument from client autonomy emphasises the value in not having one's freedom of action limited in the name of society as a whole, except on the grounds of publically available, impartially applied rules. [119]

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[116] Wendel, LFL, 12.
[117] Wendel, LFL 18.
[118] Wendel, LE 18-19.
[119] Wendel, LE 35.

The conduct which Markovits' would brand as lying and cheating is pronounced by Wendel to be acceptable, given its function within the 'legal/political system.' The divide between ordinary morality and political morality makes room for a hierarchy in which political morality within the political system trumps ordinary morality, for purposes within the political sphere.[120]

Within that 'public morality' context, Wendel's principal tool of analysis is the concept of 'fidelity to law'. The core of this idea is that counsel understand that their role is to serve the law faithfully. Wendel contends that legal institutions have 'moral properties' and this attribute is the font of a justifiable role-distinguished morality.[121] The nomenclature provokes a comparison with Markovits' use of the word 'fidelity: to Markovits, the core idea in the standard conception is 'fidelity to the client (as distinct from fidelity to the law) and the obligatory excessive enthusiasm of counsel to fulfil that objective is the root of Markovits' principal criticism of lawyers' professional norms. This contrast does not mean that counsel's duty to the client is undervalued by Wendel, rather, the duty to client is part of the function of counsel in behaving with fidelity to law. Like Dare, whose notion of mere-zeal implies a restraint on the devotion of counsel to the clients 'project', Wendel's idea opens up space to conceptualise the role of counsel as one in which the client's cause and the cause of the system are to be balanced. With this perspective I agree, and which I address directly elsewhere.

[120] Wendel, LFL 21.
[121] Wendel, LFL 43.

Anterior to the controversy is the lurking spectre of injustice and why, if at all, the risk of unjust outcomes is not something for which counsel should be accountable. Wendel claims that although counsel ought to care about 'legal justice' they have no obligations to care about 'substantive justice'. [122] Building on that distinction, Wendel goes on to claim that legal ethics is:

> ….not primarily an excuse for immoral behaviour but a higher duty incumbent upon occupants of a professional role.[123]

This idea finds purchase by counsel advancing the 'legal entitlements' and not the 'interests' of the client.[124] Because of the different roles assigned to judges and to counsel *qua* adversaries, it must follow that the duties of counsel have also to be 'context specific'.[125] In Wendel's scheme, the critical context-specific aspect is the procedural law, within which the forensic decisions by counsel have to be made.[126] This is the location of the practises on nondisclosures and uncommitted or insincere arguments. Upon that premise, Wendel is bold to assert that:

> ….there is a *moral justification* for what seems like an exclusion of morality from professional life. Political actors are not 'subverters of morality' but display allegiance to a *conception of moral responsibility with procedural justice at the foundation*. This is a different moral standpoint - one that takes large scale communities and institutions as the basic objects of analysis using evaluative concepts like legitimacy that do not have clear counterpoints in ordinary morality - and it overrides what would otherwise be the morality of ordinary life, with its ideal of personal integrity and moral innocence. (Emphasis supplied)[127]

Luban [128]condemns Wendel's thesis on epistemological grounds. The proper grasp of what it is to have 'fidelity' towards another, says Luban, is that it can exist as between people but not

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[122] Wendel, LFL 48.
[123] Wendel, LFL 50.
[124] Wendel, LFL 54ff.
[125] Wendel, LFL 82.
[126] Wendel, LFL 87.
[127] Wendel, LFL 158.
[128] Luban, 'Misplaced Fidelity' (supra) p 677-678, 681ff.

between a person and an idealised or inanimate concept like the law. On top of that, Luban pillories Wendel for a naïve faith in the beneficence of legal institutions.[129] Moreover, says Luban, Wendel's idea inappropriately privileges 'procedural law' over 'substantive law, and save for the exercise by counsel in interpreting the law, there is no room to conceive of counsel owing fidelity to law. Luban identifies Wendel's subliminal premise as being devoted to the idea of moral pluralism, which, in an applied setting, would justify counsel's scrupulous non-judgmental stance towards the client. It is not apparent why these quibbles by Luban, the first semantic and the others derived from *a priori* perspective of public institutions dents Wendel's thesis.

Ultimately, Wendel's thesis and that of Dare, albeit by different routes, both approve of the same practises, subject to the caveat that there is a risk that counsel may abuse the social power of the role. The client's 'entitlements' v 'interests' distinction seems to replicate Dare's mere-zeal and hyper-zeal distinction and suffers from the same fragility.[130]

Wendel is expressly aware of the problem of the moral remainder for his construct of legal ethics. Markovits' approach leaves the issue incapable of amelioration. I address this aspect hereafter, and offer an argument how it might be morally assessed.

PART IV: COUNSEL AS A LICENSED FIDUCIARY INTERMEDIARY IN THE LITIGATION PROCESS

Society, conflict and social role

[129] Ibid, 687.
[130] See supra.

A proper moral evaluation of the practises of non-disclosure and uncommitted or insincere argument by counsel in court proceedings requires an adequate appreciation of the context within which this conduct occurs, at both macro-level (institutional) and micro-level (Individual). The broad context is of course societal, but more significantly, it is crucial that the moral assessment to be made is about a social service in a real life situation, not about an esoteric thought experiment. It is an enquiry into *how to apply* moral principles in that practical context. [131]

The place to begin must therefore be the acknowledgement that conflict among people within a community is inevitable and enduring. When humans live in proximity to one another under feral circumstances, conflicts are resolved by violence. In organised communities, in which there is an acceptance of the need for social cohesion, eventually, a polity comes into existence that exercises authority over individuals. That authority is exercised through rules and enforced by institutions created to apply the rules; eg courts. Acquiescence by the populace in the authority of the rules and institutions we call an acceptance of the legitimacy of that authority.[132] Specialised social roles are invented to administer the institutions, of which, for our purposes, the courts must have judges. As society becomes complex the rules or laws do so too, until the body of laws and the procedures to invoke them are beyond the reach of ordinary people. When that occurs, a need arises for a new social role to serve as an intermediary between the litigants and the judges. This intermediary role is not lopsided; ie an exclusive boon to the litigant, because the intermediary role is only marginally less critical to the judge. The litigants need counsel to organise their grievances into a coherent account and the judge is dependent on a coherent account being presented. The symbiosis between

[131] See the observation of Wendel, LFL 91.
[132] Wendel, LFL 4.

counsel and client is matched by a symbiosis between counsel and the judge. This intersection of institutional roles ought not to deflect attention away from the underlying basic dynamic, ie it is the individual citizens who seek to assert their rights and have their disputes resolved, and who are the 'market' for a social service to accomplish these aims. This dynamic is a part of asserting personal dignity.

In a liberal democratic society, which is the sort of society with which we concern ourselves, a sophisticated legal system exists of mesmerising complexity. As part of that legal system, there are dispute resolution systems. There are few, but nonetheless, material distinctions between the criminal court system and the civil court system, and although the conduct of counsel is only marginally distinct when operating in these two systems, the controversies about moral conduct by counsel in the two systems can be distinguished, as does Luban. Personal liberty and the risk of state sponsored oppression distinguishes the dynamics in a criminal court from that in a civil court in which citizens quarrel over money, property and children. However, the controversial practises are applied indistinguishably in both.

Dare and Wendel are, in my view, correct to begin their assessments of the standard conception by emphasising the role of the law itself, and moreover, by examining the institutions which exist in order to give practical effect to the law. Anyone, in any capacity, who becomes involved in the litigation process is not free to act as they choose in accordance with a private set of moral values, however pure or virtuous those values might be. The very act of engaging in social intercourse requires a practical accommodation to the needs and demands of other people, subject to the caveat that such needs and demands are perceived by society as legitimate. Those legitimate needs and demands shall nevertheless often be

contested by others at the micro-level, and moreover, the very institutions of dispute resolution shall have their own demands, dictated by what is functional to the purposes for which they were conceived and established. Social cohesion requires a balancing of these contending interests and the more pluralistic a community is, the greater the range of contestation.

A critical dimension of macro-level balancing of these interests is the acknowledgement of different social roles and of the different responsibilities and entitlements attached to the roles, rather than to the occupants of the role. A soldier may with approval of society learn how to kill people with efficiency; a policeman may not. A parent is expected to prefer a child over all others, but not when that parent is a bureaucrat exercising a public power. It must follow, in my view, that 'morality' is not usefully understood as a single coherent free-floating system of values, but rather finds expression by being attached to social roles, amongst which roles is the private role where an individual is largely free of authority or of social expectations and may frame a private moral code in accordance with that person's unfettered moral value choices. (ie, what is otherwise called universal morality) Whether a person prefers Kant to Pol Pot[133] is not relevant for present purposes. However, as all social roles, especially public roles must be functional to some or other purpose, the functions of the role, within the institutions within which the role exists, must frame the scope for the moral values with which the occupants of the roles ought to act.

The failure of Luban to be serious about the institutional dimension for analysis and the failure of Markovits to give primacy to the institutional dimension are features of their approaches that distinguishes their approaches from that of Dare and of Wendel. The

[133] Pol Pot was the infamous Khymer Rouge dictator of Cambodia, who butchered dissidents.

explanation is their choice of a virtue ethics model to analyse the conduct of counsel as private persons, whereas Dare and Wendel put the institutional context at the centre of the analysis and frame the enquiry in consequentialist and deontological terms.

What are dispute resolution systems for and what are the needs of the litigation process?

I contend that what a legal system is for in society, is to provide a source of reference for people to organise their lives. When people know what their legal rights are and that they can be asserted effectively, the legal system enjoys legitimacy. In a given community the conditions necessary for a perception of legitimacy may vary slightly from another community, but the core elements must be that the system produces more benefits than detriments; ie a perception that the system is fair. We are concerned in this essay with the conditions under which a community would perceive the litigation process to be fair and thus legitimate.[134]

At the heart of this perception of legitimacy, in my view, is the assurance that the dispute resolution system is accessible and that one's story can be told to an unbiased judge. These are 'process' concerns, rather than a view about the fairness of the substantive law. What are the conditions to achieve that assurance upon which legitimacy is founded? In my view, the condition at the heart of that assurance and the perception of legitimacy is the right to counsel, ie a counsel who will respect the litigants' confidences and argue the best case possible, in accordance with legal principle. People who are vulnerable, without social power, and ignorant of the law's ways really need such a social service. Moreover, so do

[134] See: Wendel, LFL 3-4.

affluent people or juristic entities, who despite being well informed and legally insightful wielders of social power, still require assistance from counsel to coherently and effectively ventilate, within the system, their points of view. Both categories of litigant have dignity[135] and autonomy and both categories are entitled to enjoy, to the fullest, the benefit of *audi alterem partem* – the duty on a court to hear both sides of a dispute. The litigation process is built on that principle and deviations from it are rare and closely circumscribed.[136] In my view, the principle of *audi alterem partem* is the font of the role of counsel in the litigation process.

But in order to grasp fully the role of counsel in the litigation process, it is first necessary to understand the role of the judge who is the *consumer of counsel's advocacy*. The judge's role as consumer of advocacy cannot be exaggerated. In an adversary system, the judge maintains a remote psychological distance from the litigants. That distance is not ritualistic, but rather, it is functional, and enhances the perception of the judge's independence and impartiality. Two aspects of the litigation process make the distance substantive. The first aspect is the dependence of the judge on counsel to present their clients cases in a coherent manner, including what material to present, consistent with expectations reasonably held about the core legal principles relevant to the issues articulated. The second aspect is the legal barrier to what material may legitimately be communicated to the judge in evidence or in argument, by the laws governing what facts are admissible and the laws governing the preservation of the confidences that client and counsel may have shared. These laws establish a veritable 'filter' of the possible information relevant to the dispute and what, in its filtered or sanitised

[135] One may quibble about whether or not a juristic 'person' can have dignity. I regard that as a sterile debate. Juristic identity is a mask real people wear.
[136] Rule of Court 6(12)(c) which affords a party that is absent when an adverse order was granted to have it reconsidered urgently.

version, reaches the judge. A major responsibility of counsel is to ensure that the membrane of this filter is not breached. It is in this context that counsel withholds material information, of a particular kind, about the dispute, from the judge. The examples given of the controversial practises illustrate the position.

The 'end-point' of the litigation process is a 'judgment' by a judge. Indeed, nothing that occurs in the litigation process has any useful purpose, other than to prepare and organise information and construct arguments to facilitate the judicial decision-making process itself. All else is superfluous. What then does a judge require to effectively make decisions perceived as legitimate? I contend that the controversial practises of non-disclosure and uncommitted or insincere argument are wholly consistent with the requirements of effective judicial decision-making.

The evidential filter enables the judge to deliver a judgment in 'accordance with the evidence'. Among the legitimate expectations of all who participate in court proceedings is that only what evidence the rules allow will be admitted. The obligation of counsel not to reveal what was learnt in confidence must be understood in such a context. Kant recognised that although lying was forbidden, not everyone had a right to extract from you the knowledge that you possessed or insist on the truth. [137]In this context, the judge has no legitimate claim on the confidential secrets that a litigant chooses not to disclose, and on Kantian principles *per se*, the judge has no right to such information. On that premise, it follows that the litigant's counsel ought to have no right to choose for the client whether to make disclosure. Indeed, a judge assiduously avoids exposure to facts not 'on record'.

[137] See: Sullivan, (Supra), 96-97.

The arguments heard from counsel offer rival viewpoints from which the judge may draw heavily or not at all. The disparities that the rival contentions may manifest are understood by the judge to be aimed at the best construction of each adversary's case that the imagination of counsel can produce. Provided they are plausible, they contribute to the judicial thinking, if only to clarify the issues in dispute and possible outcomes. What the judge does not require, still less want, is to rely on the sincerity of counsel who advances the submissions; all that is of concern is the *plausibility* of the arguments. The notion that a judge is swayed because counsel's personal opinion endorses a view is an anathema.

Were a judge to receive irregularly admitted evidence of confidential client communications with counsel, the fairness of the trial would be vitiated. Were a judge to seek a personal assurance from counsel, that conduct would be a betrayal of the impartiality required for the judicial function.

The basket of values at societal level that the system must support are complex; ie protection of human rights, perceptions of fairness, and systemic efficacy. What this account demonstrates is that a dispute resolution system, with these attributes, is instrumental to the societal needs, as described, which is, by reason thereof, justifiable on utilitarian grounds, the outcome producing the 'consequential good' of legitimacy and obviating an incentive to resort to private violence.

Proof and Truth in the litigation process

The moral observer might, in response to this account, ask, where is ‘justice’ founded on ‘truth’ in all of this? The short and brutal answer is that ‘truth’ is greatly overrated in the litigation process. The morality of keeping material information from a judge on the grounds of client confidentiality has be assessed in this context. This is a terrain that is uncomfortable to traverse for the moral person, and no less for the moral judge and the moral counsel. But cherished as the value of truth may be, the pursuit of truth is a secondary concern of the litigation process, and remains of instrumental value only. When justice is accomplished because the truth is really revealed, such an outcome is a welcomed by-product. The diminution of truth, from an ultimate value to an instrumental one, is part of a price paid for the polity’s engagement in real life by offering a social service in real life. Although the diminished value of truth in the litigation process is to be regretted, whether an apology is called for is a different question and whether this outcome means that there is what has been called the ‘moral remainder’ is addressed discreetly hereafter.

I argue that this result derives from systemic attributes of the legal system rather than the conduct of the participants, whether judge, counsel or litigants. The dispute resolution system, in order to achieve legitimacy within the community is not designed, and indeed cannot be designed to *ensure* that truth shall be revealed, although sometimes it is, but alas, only those who knew the truth to begin with, are adequately equipped to know that for certain. Paradoxically, ‘justice’ is sometimes accomplished precisely because the truth is suppressed, as Luban senses in his account of adversary advocacy in criminal cases.

The filters, described above, that sanitise the evidence adduced in proceedings are designed to produce ‘proof’ not ‘truth’. This is a critical distinction between fact-finding in an adjudicative process and fact-finding in a scientific enquiry. In science, ‘facts’ are explored to

determine what inferences can be drawn. In court proceedings, secondary accounts given by witnesses of alleged occurrences, which accounts usually differ in degree or are diametrically opposed to one another. The intellectual exercise is to decide whether any one version is to be 'believed' as an accurate account of the 'facts' by reference to the plausibility of the accounts, and factors which might fortify or diminish the credibility of the witnesses.[138] The reliance on analogy to reach decisions is a marked characteristic of judicial decision making,[139] principally because the central tool of analysis is a resort to the probabilities, an inherently experience–based premise, not without its own drawbacks. Even independently of the deliberate non-disclosures by counsel, 'truth' is in principle illusive.

Once the effect of the filter is appreciated, what justifies its use? What moral values inform the erection of barriers to truth seeking?

Marjan Damaska identifies the core impediment to the idea that truth could (not to mention, should) be an objective of the litigation process, by posing the question whether the demand for objective knowledge is feasible at all, in an adjudicative process.[140] Doubting the efficacy of adjudicative fact-finding to reveal real truth, Damaska remarks that:

> …accuracy is not the sole measure of the value of adjudicative fact-finding; social needs and values are recognised that constrain the pursuit of truth. But the more the feasibility of attaining objective knowledge is questioned, the more truth-values are discounted in trade-offs with competing considerations.[141]

[138] See: Doron Menashe 'Is Judicial Proof of Facts a Form of Scientific Explanation? A Preliminary Investigation of the 'Clinical' Legal Method' (2008) 12 *International Journal of Evidence and Proof* 1-14.
[139] Menashe, ibid, p 9.
[140] Mirjan Damaska, 'Truth in Adjudication' (1998) 49 *Hastings Law Journal* pp 289 -308; at 289.
[141] Damaska, 289.

He identifies the competing considerations as including: '....'privacy and human dignity, the demand for stability in decision-making, and cost…'[142] The presence of these values in competition with the value of truth-seeking, lays a foundation for the moral explanation of the instrumental status of truth in adjudication.

Damaska points to the need to distinguish whether proposition X is 'properly justified' from a belief that X is 'true'.[143] The business of proof falls squarely into the concept of 'justified' claims. Damaska observes that the idea of vigorous debate, the most prominent rationalization for adversary advocacy, is an attractive justification in respect of controversies over value choices, but the value of that method to '…determine the truth of factual claims' is uncertain, because:

> … the exaltation of the power of discourse to generate the truth from multiple perspectives seems justified only to the extent that the discourse can persuade some participants that their perspective leads to erroneous factual claims and should be abandoned. Failing this apostasy, the agreed-upon decision is more likely to reflect compromises aimed at breaking deadlocks rather than the truth in any meaningful sense.[144]

In consequence, opines Damaska, there is:

> Small wonder that many procedural and evidentiary institutions, including most legal remedies, depend for their coherence on the separation of truth from justification.[145]

There are, says Damaska, distinct procedural doctrines aimed at fact-finding accuracy and other procedural doctrines aimed at 'considerations of fairness'[146] These are often confused. Lawyers, he says, jumble up questions of *what happened* with questions of *why it*

[142] Damaska, 301.
[143] Damaska, 294.
[144] Damaska, 295.
[145] Damaska, 295.
[146] Damaska, 296.

happened.[147] Damaska offers a diagnosis of the spectrum of litigation that suggests that the value of truth differs in different types of litigation. Among the more obvious differences are civil and criminal proceedings. In a civil trial, aimed at disposing of a private dispute, he argues that the value of truth is minimal, rather, what is prized most is a 'neutral arbitration'.[148] By contrast, in a criminal trial, the 'truth' though often trumpeted as the objective, in reality, plays a distinct second fiddle to protecting the accused individual from the risk of abuse by state power. Damaska concludes that:

> ….factual accuracy in adjudication is sensitive to procedural environments and thus unstable.[149]

Fundamental to Damaska's thesis is that an adjudicative system is premised on a hybridised set of values of which some are in a state of tension with one another. Truth, and indeed, proof, jostle with other values for a place in the litigation process. Ultimately, all values are instrumental to the real aim of the litigation process which is political and social legitimacy.

These perspectives reveal the fragility of the process of evidence-taking and the ephemeral nature of truth in that process. The judge who has to choose between two versions or concoct a third explanation or a hybrid of two or more versions can authoritatively establish what the legal system will call 'proof' but not really 'truth' in any scientifically recognisable way.[150]

However, surely, it must nevertheless be asked as Luban indeed does, why and how can deliberate non-disclosure be morally justified? One answer is that the utility in the

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[147] Damaska, 299.
[148] Damaska, 304; contrast Luban's view in criminal trials and civil trials.
[149] Damaska, 308-309.
[150] See Tom Bingham, *The Business of Judging* (2000) Oxford University Press, Oxford, p 4

client/counsel confidentiality outweighs the supposed advantage of the alternative. The debate on the merits of client confidentiality often muddles two distinct issues. On one hand, it may be asked whether there is there a moral reason why a litigant should be entitled to lie? In short, nobody thinks so. But on the other hand, the egregious conduct by the litigant must be distinguished from the duty on counsel not to share information obtained in secret from the client. As has convincingly been pointed out by Albert Alschuler, if there was a rule obliging counsel to divulge all communications made by a client, no client, informed of that, would ever divulge anything worth divulging.[151] In other words, a reversed rule would produce no more information to a judge than at present. Accordingly, the present rule comes with no price attached because the result would remain that nothing a client did not want to be disclosed would be disclosed. Yet, could it argued that if that be so, why allow a practice in which counsel can learn of the secrets at all? The answer is that prior to litigation, the client has need of advice, and needs be, can only get it if a candid version of events is given to counsel in the role of confidential adviser. Were it otherwise, a client would have to decide, before taking advice, what the legal position was ─ a predicament of self-evident absurdity.

The justification for client/counsel confidentiality, among lawyers, has achieved a status of sanctification. In the House of Lords, Lord Hoffman said this:

> [Legal Professional Privilege] is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice.' [152]

[151] Albert Alschuler, 'The Preservation of Clients' Confidences: One Value Among Many, or a Categorical Imperative? (1981) 52 *University of Colorado Law Review* 349-355, p 350.
[152] Special Commissioner & another, Ex P Morgan Grenfell & Co Ltd v R [2002] UKHL 21 at [7].

And Lord Scott has remarked that:

> ….if a communication or document qualifies for legal professional privilege the privilege is absolute. It cannot be overridden by some supposedly greater public interest.' [153]

In my view, it seems plain that what is at issue is not a cynical disregard for the truth, but rather a deep moral concern about *how the pursuit of truth is managed.* The process of fact-finding must be fair. The value of dignity, which is a very broad idea, including personal freedom and autonomy are central to this thinking. The Kantian concept of respect for all permeates this sort of thinking. In consequence, the duty on counsel to respect confidences plainly follows in its train. The litigation process must be fair and the role of counsel is inextricably bound up with what is perceived as being fair; this perspective occurs within an *inherently process-bound dimension.*

Sissela Bok argues that all professional confidentiality is justified on four premises:

> ….human autonomy regarding personal information, respect for relationships, respect for the bonds and promises that protect shared information, and the benefits of confidentiality to those in need of advice, sanctuary, and aid, and in turn to society[154]

This rationale latent in Bok's summation seems to be a blend of utilitarian and Kantian precepts. Utility clearly requires secrecy to obtain advice, and the dependent stance that a client assumes towards counsel imposes duties of regard for the client's dignity. None of these considerations are premised on any intrinsic virtue of the claimant, who may in all respects be an underserving person, a matter of unimportance in terms of Kantian thought as

[153] Three Rivers District Council & Others v Governor and company of the Bank of England [2004] UKHL 48 at [25].
[154] Sissela Bok, 'The Limits of Confidentiality' *The Hastings Center Report* (1983) February, 24 – 31 pamphlet.

the client *qua* person must be respected unconditionally. This perspective does not imply a lack of a desire for truth and justice, but more simply, a recognition that practicality in taking human rights seriously requires pragmatic moral compromises.

This pragmatic view has not been a universal view held by all lawyers. By contrast with the cited views of Lords Hoffmann and Scott, in the United States, Judge Marvin Frankel in his book, *Partisan Justice* (1980)[155] precipitated a debate by proposing, in essence, the abolition of the client/counsel confidentiality rule and compulsory disclosures by counsel to advance truth seeking. The ripostes have been strong. Albert Alschuler argues in refutation:

> The central question is not whether this means [ie absence of a confidentiality rule] of gathering information to promote accurate adjudication might sometimes be effective – whether it might sometimes aid the search for the truth – *but whether it is fair to induce a person to part with information in this fashion*. To obtain information by implicit or explicit deception ordinarily cannot be justified simply by showing that the information is useful. Nor only does deception in any form pose a clear ethical issue, but an attorney's representation serves important functions that make it especially inappropriate for him, to serve as a governmental information-gathering agent.[156] (Emphasis supplied)

Alschuler says further that: 'the privilege [of counsel/client confidentiality] may not seriously impair the search for truth' but there is a better reason, he says, to preserve the rule on non-disclosures by counsel:

> …the value served by the preservation of a client's confidences is not merely the promotion of effective representation. Apart from this instrumental value, fundamental ethical values of *loyalty, honesty and fair treatment* are at stake – values that cannot properly be 'balanced' against truth determination on an unweighted utilitarian scale.[157] (Emphasis supplied)

[155] Marvin E Frankel, *Partisan Justice* (1980) McGraw-Hill Ryerson, Toronto, cited by Alschluler
[156] Alschuler, 351.
[157] Alschuler, 350.

These remarks by Alschuler, expressly disavowing a utilitarian premise to test the justifiability of a confidentiality rule, and conceding that the absence of such a rule might better serve to get at the truth, are rooted in a Kantian sense of obligation to respect the client as a person. As such he posits an *a priori* dignity premise to justify rules about counsel/client confidences, even if those rules have the effect of inhibiting the discovery of the truth. In my view this approach is compelling. It is illustrated in the South African Constitution which is built on the premise of dignity as an organising principle. [158] The litigation process ought to accommodate human dignity because the very rationale for courts and a process of adjudication is to preserve the well-being of the populace by channelling conflict towards rational resolution methods. Moreover, the principle of *audi alterem partem*, which is so critical to the litigation process, cannot be unravelled from the premise that a person has dignity, no less than can dignity be separated from the categorical imperative that every client on Earth enjoy the privilege of confidentiality. The preservation of a sacrosanct inner sanctum which the litigant alone has autonomy to forgo is a justifiable brake on the reach of public authority.

Ultimately, the rationale for a judge being satisfied to reach conclusions, knowingly based on filtered proof rather than unvarnished truth, is a pragmatic acceptance that in an 'applied setting' the exercise being undertaken in the litigation process is a social service. The social service is intended to benefit society at large, whose matrix of interests have to be accommodated, pragmatically, in a process that enjoys legitimacy. Moreover, the ultimate judicial decision itself is dependent for its own legitimacy on the legitimacy of the process

[158] Article 10, SA Constitution: 'Everyone has inherent dignity and the right to have their dignity respected and protected'. A reading of each of the 27 other articles in the bill of rights is unintelligible if dignity was not implied therein. See too, Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Juta) Cape Town, (2014) esp pp 95 ff.

which produced it. 'Truth' obtained outside the realm of publically acceptable legitimate bounds cannot found a legitimate judgment.

It follows, in my view, that non-disclosures based on counsel/client confidentiality by counsel are not morally compromised. They are justified on utilitarian, deontological and human rights grounds.

Does 'uncommitted or insincere argument' serve the judicial decision-making function?

Damaska's observation that legal argument has a limited usefulness in the fact-finding leg of a case has already been mentioned. The 'spin' that counsel puts on what 'facts' are adduced to argue what is 'proven' is the locus of the criticism that it is cheating to try to convince a judge of a position of which counsel is personally unconvinced. This perspective is a fundamental misconception of what judges require from counsel.

A judge who relies on the eminence or reputation of counsel (sometimes called the 'halo' effect) to persuade the court to adopt a particular view would be acting dysfunctionally and in violation of the norms of proper judicial conduct. What a judge needs is help to reach a decision, not assurances. Rival theories are presented, and those that are plausible are seriously considered. What is demanded of counsel by a judge is to put up what it is feasible to argue. The decision in *State v Nkosi*[159] illustrates exactly that obligation; ie recognising that often the case of a litigant is weak, but what is required is the *best weak argument* possible. It is the desire to avoid an injustice that requires a judge to demand of counsel to

[159] See supra, footnote 19, for details about S v Nkosi.

advance whatever can be said on behalf of a weak case. The aim is to avoid overlooking a point that might favour a litigant. David Ipp,[160] in his treatise about counsel's duties to the court, deals specifically with a duty on counsel to take all available legal points.[161] This means points that are thought to have some merit, not nonsense.[162] The discretion counsel exercises is to identify what is 'arguable', admittedly a vague yardstick, and no less important, requiring a degree of reflection and circumspection by counsel. Argument in a court room, ideally, evolves into an active debate in which rival propositions are dissected and weighed. Ipp cites the mantra of the legal profession in such a matter, as given by Lord Denning in the Court of Appeal:

> … when it comes to his speech, [counsel] must put every fair argument which appears to him to help his client towards winning his case. The reason is that he is not the judge of the credibility of the witnesses or of the validity of the arguments. He is only the advocate employed by the client to speak for him and present his case, and he must do it to the best of his capability, without making himself the judge of its correctness, but only of its honesty. Cicero makes the distinction that it is the duty of the judge to pursue the truth, but it is permitted to an advocate to argue what has only the semblance of it.[163]

Why ought this approach to legal argument be *morally* justified? What is not articulated in this and several other similar exhortations is the common sense premise that the judge cannot be expected to think of everything, and more especially the judge cannot be expected to know all the law. In the adversary system the dependence of judges on counsel is real, and the reliance of judges to have points of importance drawn to their attention cannot be exaggerated. The function of argument is to prevent injustice through ignorance or plain lack of imagination on the part of the judge. Accordingly, far from 'insincere' or 'uncommitted' argument being deserving of condemnation, it serves the moral objective of diminishing the

[160] David A Ipp, 'Counsel's Duty to the Court' (1998) *Law Quarterly Review (*1998) 63 – 107
[161] Ipp, 98.
[162] Ipp, 100.
[163] Ipp, 99, citing Tombling v Universal Bulb Company Limited [1951] 2 The Times LR 289.

risk of injustice and it promotes a pattern of judicial decision-making that is comprehensive and calculated to provide tangible support for the legitimacy of the legal system. The conduct of counsel can, again, be justified on utilitarian, deontological and human rights grounds.

What exactly *is* Counsel in the litigation process?

In my view, critics like Markovits and Luban have misconceived the role of counsel in the litigation process. They seem to believe that the litigation process requires counsel to be a mere agent of the client, like any other agent, selling birdseed on behalf of a principal, and by reason thereof, subordinate to the client's whim. This perspective, I contend is plainly wrong and at odds with professional norms and the needs of the litigation process. An examination of the Bar's code shows that it is replete with provisions which contradict the perspective that counsel subordinate their role to the will of the client. That is not to say that counsel thereby dictates to the client; certain strategic decisions remain in the province of the client, not least whether to make or deny a claim and whether to assert or waive confidentiality. But counsel is not obliged to keep secret what is discoverable in terms of the Rules of Court, even if the client wants that, nor is counsel obliged to argue that the moon is made of green cheese even if the client sincerely believes it is. Rules of court and professional ethics govern what to disclose, not the client, who at best, may not disclose what the law (not counsel) says needs the client's consent. No choice is involved.

I contend that counsel's role ought to usefully be defined as a *licensed fiduciary intermediary in the litigation process.* 'Licensed' because admission to the profession is rigorously regulated both as to academic credentials and as to character. 'Fidiciary' because of the responsibility counsel assumes to care for a dependent client. 'Intermediary' because that is

the systemic or functional location of the representative role. Indeed, the role of counsel is created to serve the litigation process. The functions of the litigation process, as described elsewhere in this essay, implicitly confer powers and impose constraints on counsel. The role is morally justified by the utility it produces for the litigation process, the legitimacy of which process is grounded in the upholding of the blend of values already described. In this regard, Dare's view of indirect justification is most apt.

A grasp of the intermediary character of counsels' role is critical to a proper appreciation of the ethical environment in which counsel works. Counsel is foremost a servant of the litigation system; it is this attribute that justifies counsel to perform the representative role, and it is as an 'operative' of the legal system that counsel functions. Counsel is, as such, an 'insider' but is not a subordinate, but rather an independent interrogator of the workings of the process itself, a sort of internal auditor keeping a check on adherence to the rules that are designed to ensure fair hearings. The client is dependent on counsel to see to it that the rules are obeyed, and the judge is dependent on counsel to adhere to and safeguard the rules of the process. That is why it is apt to call counsel an 'officer of the court', a description which is more than just a pretty affectation.

The norms by which counsel operate must, logically, be functional to the effectiveness of the system. The scope of that systemic effectiveness must include the perceived integrity of the system too, otherwise the lack of the necessary public confidence in the litigation process would undermine its efficacy. The role performed by Counsel within the litigation process is to do for litigants what they, but for want of relevant expertise, would do for themselves. Thus, counsel must represent their clients without submerging their personal identities with

that of their clients.[164] Counsel do not become ordinary agents beholden to the whims of the clients. Rather, the role of counsel is to mediate the client's legitimate needs with the legitimate needs of the legal system. The critical need of the legal system is to have effective judicial decision-making facilitated, and to that end, achieve rational judicial fact-finding and convincing judicial declarations interpreting the applicable principles of law.

The substantive laws that are made by parliament may be good or bad and either ill-received or well-received by the populace. But 'process'; ie access to the court, viable presentation of one's case, the assistance of counsel steeped in the intricacies of that process, and impartial decision-making are the stuff of courts' credibility and legitimacy.

The *a priori* foundational value choice of a legitimate litigation process is the sanctity of the maxim *audi alterem partem – let the other side be heard*. It is also, I argue, the *grundnorm* of adversary advocacy. It must therefore follow that the role of counsel *qua* adversary advocate is enveloped in duties to both the judge and to the client. The ostensible contradictions between the duties of full disclosure to the judge on the one hand and the duty to conceal certain information or the allowance to be less than sincere when arguing a position fall to be reconciled within this paradigm.

In such a paradigm, the role of counsel is bifurcated, not one sided. In this respect, the standard conception of adversary advocacy, as usually understood as relating to client/counsel dealings, whilst correct insofar as it goes, is inadequate to properly capture the full spectrum of the role. The usual formulations contains no express articulation of the

[164] Markovits' concept of 'negative capability' is an apt capturing this dimension of counsels' role.

counsel/judge relationship, albeit that the caveats about acting 'within the bounds of law' express a muted allusion thereto. In my view, it is this deficiency in articulation which has opened the door to much of the criticism advanced by Markovits. Markovits, is not unaware of the dimension of the duties to the court, but dismisses those aspects as superficial and ineffective. However these duties are substantial; Ipp sums them up thus:

> (1) the general duty of disclosure owed to the court,
> (2) the general duty not to abuse the court process,
> (3) the general duty not to corrupt the administration justice and
> (4) the general duty to conduct cases efficiently and expeditiously[165]

Alice Woolley has challenged Markovits on this very point. She implies that Markovits' emphasis on the division of labour in the litigation process between counsel and judge frames his dismissiveness of the duties counsel owes to the judge. By excluding or being dismissive of the constraints on misleading a court and the obligations to facilitate rational judicial decision making, regarding them as mere 'qualifications', rather than as 'additional and independent obligations' Markovits produces a lopsided account of adversary advocacy. By contrast, Woolley adopts a view that is both contextual and holistic about the 'law' and it applications. From that vantage point, she states:

> ….the overarching duty to act as an officer of the court, the duty to provide the court with relevant adverse legal authority, the duty to ensure the court is not misled, the prohibition on assisting a client to act unlawfully, and the power of lawyers to determine the means through which a client's ends are pursued. These doctrines must somehow be accounted for in a description of the form of the law governing lawyers. When they are, I would argue that the form of law governing lawyers has three 'characteristics' in the Weinribian sense, the first two of which align with the characteristics identified by Markovits, but the last of which he misses entirely:
>
> (1) client determination of ends (neutrality and moral non-accountability)

[165] Ipp, 113.

(2) lawyer advocacy for, or representation of, client ends (partisanship)

(3) the constraint of legality, including maintaining the process of the adversarial system.[166]

Markovits response to this criticism is to retort with the empirical claim that the duties to the court alluded to '….do not sufficiently constrain lawyerly partisanship to bring the lawyers professional obligations into line with ordinary morality'.[167] He says that Woolley's view is at too high a level of abstraction to dent his thesis that lawyers are obliged to lie and cheat. His counter argument invokes the division of labour perspective which Woolley rightly identified as the font of Markovits' chain of reasoning. Markovits then defines the 'court'[168] as a composite of counsel and judge and jury, each component having no common aim. Thus, divorcing counsel from the judge, Markovits assigns a truth-seeking aim to the judge and a truth-supressing role to counsel. Thus, says Markovits, because counsel are disconnected from 'truth and justice' their work in 'the court' is no more than *not to undermine* the 'courts' legitimacy which qua 'court' is not the attainment of truth, that aspiration being the sole preserve of the judge. Woolley, he says misses this point because she conflates counsel's role with the judge's role when imagining the 'court'.

I contend that Markovits' response is unconvincing. It is no answer to say that Woolley is wrong because the actors in the court have different aims. Insightful as Markovits' 'polycentric' conception of a 'court' may be, the thrust of Woolley's argument is that the

[166] Woolley, (Supra) p 991.
[167] Markovits, 'Three Issues in Legal Ethics' (Supra) p1005.
[168] Markovits, ibid, p1006, uses the term 'court' in this context to mean sometime quite distinct from the actors who play parts in it: 'The court, that is, constitutes a system of dispute resolution that aims to generate agreement about which resolutions of disputes to obey in the face of disagreement about which resolution to adopt; it aims to generate agreement, moreover, without resolving the disagreement, which the system treats as entrenched. One might even say that the court aims to achieve legitimacy without producing justice.' See too: Markovits 'How (and how not) to do Legal Ethics' (Supra) p1057.

litigation process as a whole manifests an organisational coherence in which the parts played by the several actors are compatible with the overall purpose of the process; ie the promotion of effective judicial decision making. The oppositional aims of the actors are not definitive of the structure; rather, the oppositional aims are functional to the purpose of the structure; ie a fair ventilation of contending views.

As alluded to earlier, Wendel, steps into this debate between Woolley and Markovits to offer the telling insight that what their differences of opinion reveal is a 'fault line' in thinking about legal ethics between what a lawyer should be (ie, Markovits-espousing a virtue ethics perspective) and what a lawyer should do (ie, Woolley – espousing a deontological perspective). [169]

The upshot of these considerations is, in my view, that no lack of integrity is manifested by counsel by engaging in the controversial practises. By assuming the duties described, to client and to the judge, counsel affirm the basket of values that is the rationale for the legal system itself.

Where does this leave the standard conception as a tool of understanding and analysis of counsel's role? A partial reformulation along the lines conceptualised by Woolley seems appropriate to avoid a lop-sidedness. Whether one describes Woolley's third characteristic as a 'constraint', which hints at an underlying negative connotation, or phrases it as a positive role in advancing the litigation process, the critical point to be made is that partisanship is not a free-floating idea, but is married to the notion of a commitment to the needs of the judge

[169] Wendel, 'Methodology and Perspective in the Theory of Lawyers Ethics' (Supra).

within the process. An equilibrium is critical. Instead of imposing ethereal limits on partisanship as expressed in notions of mere-zeal and the like, the role of counsel as a licensed fiduciary intermediary needs to enjoy more emphasis.

Is there a moral remainder?

As alluded to, the litigation process does not take place in a utopian environment. I contend that the basic rationale for a dispute resolution system presupposes a compromise. Conflict at its most extreme level is war. If you are Attilla the Hun you can eliminate conflict by extermination of the enemy. But if you address conflict by creating an institution of adjudication, you mean to build on a premise of tolerance, diversity, and submission to authority. What is possible for a polity to create to resolve conflict peacefully is better than the alternative of anarchy, but cannot be utopia.

It is thus no moral embarrassment to acknowledge that a utopian result does not follow from the workings of the legal system. In battle, killing the enemy is the aim. But battle leaders also have to order their kith and kin into harm's way in certain knowledge that some must die along with the enemy; in a paradigm that recognises context, that decision which includes a conscious sacrifice, is a moral one, however much regret attaches to the implications. The same approach is, less dramatically, applicable to the decisions counsel make in litigation.

For example, when counsel cross-examines a witness who collapses in the face of the onslaught, it is not immoral to persist, because counsel is privately convinced that the witness is accurate in the testimony given. To stop would be a betrayal of the process, not an example of snatching at a bargain for a client. The very process of cross-examination is to test the very proposition whether the witness is reliable. It is a valid and moral proposition

that counsel not prejudge issues. Moreover, counsel's view can, logically, never be more than an opinion. What the critics omit to weigh adequately is that cross-examination cannot include insinuations of what counsel knows to be untrue; there is no room for trickery. The same constraints apply to leading evidence; counsel may not present evidence which contradicts 'facts' that the client has instructed counsel are true. Similarly, when arguing the client's case, the subordination of a privately held opinion, serves an effective judicial decision making process aimed at avoiding injustices.

The ethos of the litigation process is that the party who alleges a fact must establish proof within the law and rules. No moral expectation of more can be entertained. Litigation is a contest. The community has sanctioned 'legal contests' to be the approved method to resolve disputes. Those who are responsible for 'operating' the community's 'dispute resolution system' have no need to apologise for their competitiveness, provided the practises they adopt are within the rules.[170]

The fact that justice is not always attained is to be lamented in the same way that not every birth produces a live child. The risks of failure are inherent. The social necessity to carry on and hope for the best is a banal thought, but not any less true for that. Wendel rightly says:

> The ethics of lawyering does not depend on ideal conceptions of justice; rather it is all about doing the best we can, through legal procedures, to respond to the situation of people who disagree but nevertheless need to live alongside one another in conditions of relative peace and stability.

[170] Wendel, LFL 91.

The non-disclosure practises and the uncommitted or insincere argument practises addressed in this essay are not morally wrong contradictions of the dispute resolution process because they contribute to the suppression of relevant facts or persuade a judge of a novel rationale to grant or refuse deserving relief. These practises are part of the matrix of factors that makes the role of counsel worthwhile, rendering to a client effective representation, preserving dignity, contributing to the legitimacy of the dispute resolution system and to the promoting of social cohesion within a community. It is apparent that these are attributes of what has been called earlier a 'social service' rendered to facilitate the ability of people to effectively organise their lives according to law, which, unavoidably, sometimes causes collateral damage. However, the litigation process is not an embarrassment, and nor ought the actions of those who are the operatives, within the system, be a source of embarrassment.

PART V: CONCLUSION

This essay embarked on an exploration of why non-disclosures of relevant evidence by counsel and insincere or uncommitted argument from counsel in court proceedings could be morally justified. The criticism that such conduct amounts to lying and cheating has been disputed on the grounds that that perspective misconceived the rationale for such practises in the adversary litigation process, a misconception informed by an unwillingness to accord role morality recognition as an appropriate framework for analysis and by a reluctance to see the practises, and more broadly, the role of counsel as a public rather than as a private one.

When the role of counsel is understood as a licensed fiduciary intermediary in the litigation process, the functionality of the controversial practises can be appreciated, and adopting

Dare's model that the legitimacy and moral justification for the dispute resolution system is sanctioned by society on consequentialist grounds in terms of private morality, the arcane rules of engagement within the institutions of the legal system establishing a set of duties by counsel to clients, to adversaries and to judges which impose a differentiated code of morality on the actors, is indirectly justified in terms of private morality. Because applied legal practice occurs in the real world and is a social service that cannot yield utopian results, the warts on the system are not a basis for a principled rejection.

The scope of the intellectual debate is largely dictated by the different moral paradigms chosen by the contending protagonists and what is illustrated is that virtue ethics approaches offer an impoverished perspective of an applied ethical issue. Ultimately, it is the societal paradigm which is important and the consequentialist and deontological perspectives deal better with the problems of the legal profession's mission to make the dispute resolution system legitimate, to promote effective judicial decision-making and to protect the dignity of litigants.

Accordingly, counsel do not lie and cheat. Rather, they ensure that evidence, in accordance with the rules of evidence, are adduced, that clients' confidences are respected, and that judges are provided with uncontaminated material which affords a legitimate factual finding about what has been 'proven'. Rather than commit to an unattainable ideal of revealing the 'truth', they work towards 'proof'. Moreover, they advance arguments that traverse the full spectrum of what is plausible, on both fact and law, the purpose of which is to prevent, as best they can, that an injustice befalls their clients, for want of a consideration relevant to the issues. By such means, the ultimate value of the litigation process is upheld, ie, the value

which is the foundation of the litigants' dignity and of legitimate adjudication – *audi alterem partem.*

The standard conception of adversary advocacy, understood to embrace a balancing of obligations to client and to the judge is an appropriate model to justify these controversial practises. The 'modifications' to the standard conception put forward by Dare and Wendel to emasculate the Markovits perspective are in their own ways, a variant of the Woolley reformulation to adjust understanding of the standard conception to acknowledge an equilibrium between counsel's duty of partisanship towards a client and counsel's duty of institutional servanthood towards the litigation process and the judge. This is what the standard conception ought to be understood to mean.

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