

1992

The Ethics of Criminal Defense

William H. Simon
Columbia Law School, wsimon@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1992).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/883

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

ESSAYS

THE ETHICS OF CRIMINAL DEFENSE

*William H. Simon**

A large literature has emerged in recent years challenging the standard conception of adversary advocacy that justifies the lawyer in doing anything arguably legal to advance the client's ends. This literature has proposed variations on an ethic that would increase the lawyer's responsibilities to third parties, the public, and substantive ideals of legal merit and justice.

With striking consistency, this literature exempts criminal defense from its critique and concedes that the standard adversary ethic may be viable there.¹ This paper criticizes that concession. I argue that the reasons most commonly given to distinguish the criminal from the civil do not warrant a more adversarial ethic in criminal defense. However, I also suggest that another, less often asserted argument might provide a more plausible ethical basis for aggressive criminal defense. A truly plausible case, however, would require substantial modifications of both the argument and the practices associated with that defense.

INTRODUCTION

At the outset, we should focus the inquiry. I take it for granted that lawyers can appropriately plead not guilty on behalf of clients they in fact believe to be guilty and defend these clients in a variety of ways. One reason, of course, is that, where the client denies guilt, it is more desirable to have disputed questions of guilt determined by the court at trial than by the lawyer unilaterally and in private. Thus, the lawyer can contribute more by assisting the trier of fact in making the determination than by making it herself. In addition, the law explic-

* Professor of Law, Stanford University. A.B. 1969, Princeton; J.D. 1974, Harvard. — Ed. I am grateful for advice and help from many, including Joe Bankman, Dan Barton, Robert Post, Deborah Rhode, Steve Schiffin, Bob Weisberg, Bob Gordon, Guyora Binder, and participants in seminars at the American, Cornell, Northeastern, and Stanford law schools. I am distinctively indebted to Barbara Babcock and Tom Nolan, two great defense lawyers who — in the best spirit of the adversary system — improved the article by arguing vigorously against its conclusions.

1. See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 58-66 (1988); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 *STAN. L. REV.* 589, 605 (1985); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *HUM. RTS.* 1, 12 (1975).

itly gives many rights to criminal defendants based on values independent of guilt or innocence; these "intrinsic procedural rights" include the right of a defendant who concedes guilt privately to plead not guilty and put the prosecution to its proof, the right to exclude unlawfully obtained evidence, and the right not to be subjected to cruel and unusual punishment.

The issues with which we are concerned involve tactics that cannot plausibly be viewed either as assisting the trier in making an informed determination or as vindicating specific intrinsic procedural rights. It will be convenient to focus on tactics over which lawyers have some discretion in the sense that the tactics are neither clearly, at least effectively, prohibited nor clearly required by norms of effective assistance of counsel. For example:

- Defense lawyers sometimes have opportunities to draw out and delay cases, for instance, by deliberately arranging their schedules to require repeated continuances. This can have the advantage of exhausting prosecution witnesses and eroding their memories.²
- Defense lawyers are sometimes asked to present perjured testimony by defendants. They sometimes find they can benefit their clients by impeaching the testimony of prosecution witnesses they know to be truthful. And they sometimes can gain advantage by arguing to the jury that the evidence supports factual inferences they know to be untrue. For example:

My client Norman, and his co-respondent, Steve Thomas, were charged with receiving stolen property. The police happened upon Norman and Steve in an alley transferring a stereo and TV from a junked car into the back seat of a white Pontiac.

The case hinged on whether our clients knew (or should have known) that the property was stolen. . . .

When Norman borrowed his cousin's Pontiac, he told us, he was given only the ignition key, not the trunk key. But when all the evidence was in, no mention had been made of that fact. At Steve Thomas's lawyer's suggestion, we made what was to me, at that time, a novel and shocking argument: *obviously* Steve and Norman had no idea that the property was stolen, else why would they have been loading it into the Pontiac's back seat, instead of concealing it in the trunk?³

2. According to one Manhattan assistant district attorney, "[B]y and large defense lawyers here play a game. It's called delay. The more you delay your cases, the weaker they get for the prosecution." Steven Brill, *Fighting Crime in a Crumbling System*, AM. LAW, July-Aug. 1989, at 3, 122.

3. JAMES S. KUNEN, "HOW CAN YOU DEFEND THOSE PEOPLE?": THE MAKING OF A CRIMINAL LAWYER 117 (1983). Most defense lawyers seem to regard this type of argument as legitimate. By contrast, the propriety of presenting client perjury and impeaching truthful witnesses is controversial. Compare MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 43-58 (1975) (defending these practices) with Harry I. Subin, *The Criminal*

- Lawyers occasionally find it advantageous to disclose or threaten to disclose information that they know does not contribute to informed determination on the merits because such disclosure injures the prosecution or witnesses. Take the practice of “greymail” as pioneered in the perjury defenses of various government officials, such as CIA director Richard Helms, who lied to Congress about the agency’s involvement in the overthrow of Salvador Allende. The defense demands disclosure of information that would be damaging, or at least embarrassing, to the government solely to pressure it to drop the prosecution.⁴ Or consider the practice of bringing out embarrassing but irrelevant information about adverse witnesses. Assume, for example, that the defense lawyer threatens to cross-examine the complaining witness in a rape case on her prior sexual history, even though the defendant does not contend that she consented.⁵

I call the policy of engaging in such practices whenever they are advantageous to the client *aggressive defense*. The central question here is whether there is any feature distinctive to the criminal sphere that would lead one who disapproved of aggressive defense (and its plaintiff-side analog) in the civil sphere to approve of it in criminal defense.

Before discussing the distinctive features, we should consider two objections that, if conceded, would moot further discussion. The first objection points out that, in each of the situations mentioned above, the ethically questionable tactic is permissible only because the judge allows it. The judge grants the motions for continuance, overrules the objections to the misleading examination or argument, and grants the requests for the irrelevant information. The second objection challenges the premise that the defense lawyer ever knows anything with sufficient certainty to create the supposed tension between truth and advocacy. Even the client’s own inculpatory statements may be the product of confusion or psychopathology. It is the trier’s job, not the lawyer’s, to make difficult factual determinations, this objection asserts. Thus, both objections contend that, because there is another actor — the judge or jury — that is better positioned to take account of any interests threatened by

Lawyer’s “Different Mission”: Reflections on the “Right” to Present a False Case, 1 GEO. J. LEGAL ETHICS 125 (1987) (criticizing them).

4. See Joe Trento, *Inside the Helms File*, NATL. L.J., Dec. 22, 1980, at 1.

5. See Subin, *supra* note 3, at 129-36 (discussing the use of a rape victim’s past sexual history to illustrate the problem of truth subversion).

the lawyer's tactic, the defense lawyer should be excused from concern with them.

The problem with this contention is that the notion that the judge or jury adequately safeguards the competing interests is plausible only to the extent that the judge or jury has all the relevant information. The ethical tension in these situations arises because the lawyer typically has information, relevant to whether the tactic is justifiable that she withholds from the trier. She knows that the purpose of her motion for continuance is delay, or that the testimony of the prosecution witness is accurate, or that the requested discovery material will not be relevant to the defense.

To conclude that she "knows" these things, we do not have to attribute any cosmic, pre-Heisenbergian certainty to her; we just have to conclude that, given her knowledge and the fact that she does not fully share it with the trier, she is in a better position than the trier to make the relevant judgment. If the client has told her, credibly but confidentially, that he was at the scene of the crime, then the defense lawyer is better able than the trier to decide whether the information that the prosecution witness, who will place him there, has impaired vision or a prior perjury conviction will contribute to a determination on the merits.

Nevertheless, the objections do point toward two important considerations. First, the kind of ethical dilemmas at issue here presuppose some relative disability on the part of the surrounding roles, especially the trier, to take account of the interests threatened by the tactics. Lack of information is perhaps the most salient such disability (though there are others — for example, incompetence or corruption on the part of the trier). When the surrounding role players have all the information available to the defense lawyer and there are no other procedural deficiencies, it is plausible for the lawyer to defer concern with nonclient interests to the other role players.

Second, any factual judgments on which the defense lawyer bases decisions about aggressive defense tactics should take account of the presumption of innocence and the standard of proof beyond a reasonable doubt. The criminal process is committed to resolving factual ambiguity in favor of the defendant. This is one distinction between the civil and criminal processes that does have general significance for ethical decisionmaking. It means that the defense lawyer cannot "know" the facts adverse to her client until she is convinced of them to a higher degree of confidence (beyond a reasonable doubt) than would be required in a civil case.

I. DUBIOUS ARGUMENTS FOR AGGRESSIVE DEFENSE

A. *The Bogey of the State*

Libertarians claim that aggressive advocacy is distinctively appropriate to the criminal sphere because it serves to check oppression by the "state." Such arguments invoke the image of the "isolated," "lone," "friendless," or "naked" individual faced with the "enormous power and resources of the state." Aggressive defense is supposed to level the playing field and turn the trial into a "contest of equals," or at least express the system's commitment to treat all citizens with respect.⁶

Aggressive defense is also supposed to protect against the abuse of state power. The danger of abuse is most commonly attributed to the inherently corrupting nature of state power and the consequent aggression and rapacity of state officials. The aggressive defense lawyer inhibits such abuse by increasing the difficulty of conviction. In David Luban's rhetoric:

We want to handicap the state in its power even legitimately to punish us, for we believe as a matter of political theory and historical experience that if the state is not handicapped or restrained *ex ante*, our political and civil liberties are jeopardized. Power-holders are inevitably tempted to abuse the criminal justice system to persecute political opponents, and overzealous police will trample civil liberties in the name of crime prevention and order.⁷

This type of rhetoric has been exempt from critical reflection for so long that even a small amount should raise doubts. In the first place, the image of the lonely individual facing Leviathan is misleading. Let us grant the lonely part even though some defendants have lots of friends. But, what about the state? Libertarian rhetoric tends to suggest that the individual defendant takes on the entire state. But, of course, the state has other concerns besides this defendant. From the state's point of view, the defendant may be part of an enormous class of criminal defendants and suspects with which it can hardly begin to cope.

It is more plausible to portray the typical defendant as facing a small number of harassed, overworked bureaucrats. Of course, state agencies can focus their resources on particular defendants and, when they do so, their power can be formidable. But the state cannot possibly focus its power this way on all defendants or even most of them.

6. See, e.g., CHARLES FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE 128-32 (1970); LUBAN, *supra* note 1, at 58-66; Barbara A. Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983-1984).

7. LUBAN, *supra* note 1, at 60.

Yet, aggressive defense treats all defendants as if they faced the full concentrated power of the state.

Second, victims do not appear in the libertarian picture. Criminal actions are styled as claims by the state for punitive remedies. But in fact prosecutors often initiate such actions on behalf of particular individuals whose rights the defendant has violated and who have a strong personal stake in the outcome — not necessarily a claim for tangible compensation (although some criminal proceedings do involve restitutionary remedies), but a desire for vindication, retribution, or protection that the defendant's punishment might afford them.

The "victims' rights" movement has worked for the past two decades to replace in the popular consciousness the defense lawyer's image of the criminal trial as a state-versus-defendant contest with that of a victim-versus-defendant contest. The movement is often naive, even blind, about the efficacy of criminal punishment in deterring future wrongs or aiding victims, but its imagery seems as plausible as that of the defense lawyer.

Now consider the suggestion that it is desirable to equalize the abilities of prosecution and defense to level the playing field. If we really wanted to do this, we could "handicap"⁸ state officials, to use Luban's word, the way we handicap horses in thoroughbred races — by requiring the stronger ones to carry weights. It would certainly slow down prosecutors and police if they had to carry around belts with, say, forty pounds of lead weights. If we wanted to pursue equality, we would have to increase the weights in proportion to the probability of conviction. The prosecutor of a defendant caught red-handed before a crowd of witnesses might have to drag around a ball and chain of several hundred pounds.

The reason why this sounds silly is that the premise that there is any interest in *categorically* remedying imbalances of power between prosecution and defense is silly. We want the prosecution to be strong in its ability to convict the guilty but weak in its ability to convict the innocent. Where these goals are in conflict, we make tradeoffs, more often than not in favor of the latter. But an indiscriminate weakening of state power, unfocused on any of the goals of the process, serves no purpose at all. The problem with aggressive defense is that it impedes the state's ability to convict the guilty without affording any significant protection to the innocent.

The state-focused arguments for aggressive defense are driven by what might be called the libertarian dogma. The right-wing version of

8. *Id.*

the libertarian dogma is that the only important threat to liberty is the state. The left-wing version is that the only important threats are the state and powerful private organizations like business corporations. In the latter view, as Luban puts it, the central rule of the advocate is "the protection of individuals against institutions."⁹ The idea that informal, diffuse violence or oppression might threaten liberty is foreign to both versions of the dogma.

The libertarian dogma usually refers to totalitarian regimes like Nazi Germany and Soviet Russia and the absence of criminal defense rights in such regimes.¹⁰ These examples are supposed to illustrate the danger to liberty of the overpowerful state and the value of criminal defense in checking that danger. The point has merit, but it is incomplete. It ignores the dangers to liberty of the weak state. Both Nazi Germany and Soviet Russia emerged from weak states (the Weimar Republic and the Provisional Government), in part as a consequence of the illegal private terrorism and paramilitary aggression these states were unable to check. Since the end of colonialism, Latin America has seen many examples of weak states powerless to check the oppression of the paramilitary forces of landowners or narcotics traffickers.

Moreover, as an argument for defendants' rights in the criminal process, the libertarian dogma ignores that criminal law enforcement represents not only a danger that state power will be abused, but also an important *safeguard* against such abuse. The inability of certain weak Latin American states to prosecute effectively the crimes of their military officers tragically illustrates this. In the United States the sudden conversion of Oliver North's friends to criminal defense partisans struck many liberals as a satisfying irony, but now that the Fifth Amendment has thwarted his prosecution for one of the most egregious abuses of state power in recent years, liberals should qualify their claims about its role as a safeguard of liberty.

The left-wing version of the libertarian dogma at least recognizes the potential threat to liberty of private organizations like the Nazi party under the Weimar Republic or the Mafia in Italy. But it too makes arbitrary distinctions. Consider Luban's effort to update the dogma to fit the changing fashions of liberal discourse. In the 1960s some liberals had difficulty acknowledging any social interest in the enforcement of the criminal law. Since then feminists have helped them to see the social interest in enforcing at least one set of prohibitions — those against rape and sexual battery. This insight might

9. David Luban, *Partisanship, Betrayal, and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1028 (1990).

10. See, e.g., FREEDMAN, *supra* note 3, at 2.

seem hard to square with the libertarian dogma, since rapists and batterers are not typically agents of the state or organizations. But in his argument for restraint in cross-examining complainants in rape cases, Luban solves the problem by asserting that such cases do in fact pit the state against another menacing institution — “patriarchy.”¹¹

This tactic proves too much. Since all behavior is situated in and influenced by social structures and processes, you can reify almost any act into an institutional one. Imagine prosecutors urging moderation in the defense of a drug prosecution on the ground that the state is confronting the institution of the Drug Culture; or in the defense of a mugging prosecution on the ground that the state is pitted against the Underclass; or in the defense of a small-time con artist on the ground that the defendant represents Capitalism.

Carried far enough, the tactic would lead to the insight that formal institutions are not the only important threats to liberty, that a wide and unspecifiable variety of social processes that are experienced as diffuse violence can threaten liberty as well. But the whole point of the tactic is to deny this insight, to make rape look exceptional and distinctively statelike in order to acknowledge the liberty interests in its effective prohibition without conceding the point for a broad range of criminal prosecutions.

Luban’s argument that aggressive defense desirably “overprotects”¹² liberty against its abuse by the state raises the question of why overprotection against state abuse is worth the resulting underprotection against private abuse. To the extent one can discern an answer, it is the customary libertarian claim — typically unaccompanied by political or historical analysis — that the dangers of totalitarianism are greater than the dangers of anarchy.

If we put aside the problem, noted above, that these dangers are not entirely distinct, there is a further objection to this argument. The argument assumes that we must choose categorically between a criminal justice system that protects against one danger or a system that protects against another. But, in fact, the relevant choices are at the margin. We can all agree on a system that provides strong opportunities to establish innocence and to assert some intrinsic procedural rights. The question then becomes whether any net benefits are achieved by the addition of a categorically adversarial defense that includes, for example, active deception.

Although the image of the powerful, rapacious state is the most

11. Luban, *supra* note 9, at 1028.

12. LUBAN, *supra* note 1, at 60.

prominent one in the rhetoric of criminal defense, one occasionally finds aggressive defense rationalized with an image of a weak, bumbling state. In this image, the problem is not the bad faith of public officials, but their sloth and ineptitude. Aggressive defense works to keep them on their toes and enforce higher standards of practice.

In working this rhetorical vein, John Kaplan refers to a prosecution in Los Angeles of a celebrity for soliciting prostitution in a police decoy operation. As executed prior to this case, the operation involved a microphone in the decoy's purse that transmitted to officers hiding nearby but did not tape record the soliciting statements. Defense counsel won an acquittal by emphasizing how easily the police could have obtained more reliable evidence on tape and proceeding to cast doubt on the officers' "uncorroborated" evidence. As a consequence of this case, the police improved their practice by routinely taping the soliciting statements.¹³

The idea here is that the defense of the guilty helps the innocent by raising the standards of police and prosecutorial practice. Police and prosecutors who know that convictions are hard to get will gather more evidence and prepare more thoroughly; this will result in more consistent vindication of innocent suspects and defendants because the officials will discover more exculpatory evidence and better understand ambiguities and weaknesses in superficially strong cases.¹⁴

As an argument for aggressive defense, this theory invites several objections. First, we might ask why someone cynical about the dedication of public officials would expect them to respond to acquittals due to aggressive defense by raising their standards of practice. Might not they simply slack off, rationalizing their failures on the excuse that the courts are not cooperating? Or perhaps they might increase their efforts along less constructive lines than those contemplated by the argument, spending more time on misleading and coercive tactics of their own.¹⁵ Or perhaps they might try to get the legislature to compensate for the increased difficulty of conviction by increasing the severity of punishment, giving them more plea bargaining leverage.

Indeed, the recent history of demagoguery around crime control issues — pervasive efforts across the political spectrum to rally public support for vindictive, ineffectual punitive measures by exploiting fears

13. John Kaplan, *Defending Guilty People*, 7 U. BRIDGEPORT L. REV. 223, 231-32 (1986).

14. The point is elaborated in John B. Mitchell, *The Ethics of the Criminal Defense Attorney — New Answers to Old Questions*, 32 STAN. L. REV. 293 (1980).

15. One apparently widespread police and prosecutorial response to strict federal court decisions on search-and-seizure issues has been police perjury designed to circumvent the decisions. See, e.g., Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 83 (1992).

of criminal violence — suggests that the argument might be turned around to assert that reliable convictions of guilty defendants are a critical safeguard of innocent ones. In a world where aggressive defense is legitimate, acquittal is less a signal of probable innocence than it would be in a world without aggressive defense. In the aggressive defense world, acquittal is more likely to seem a consequence of defense delay, deception, or intimidation; this may be more demoralizing to officials and the public and might adversely affect the quality of official performance and exacerbate the vindictive irrationality of voter behavior.

Second, the argument seems to assume that *any* increased requirements of proof for the prosecution are desirable. But the kind of defense involved here increases the costs of prosecution. There will always be some point at which the social benefits of increased prosecutorial burdens do not warrant the increased costs. Someone has to make a judgment on behalf of society as to where the balance should be struck. A defense lawyer committed to aggressive defense refuses to make such a judgment, and he impairs the ability of the judge or jury to do so.

In order to appraise the conduct of counsel in Kaplan's story, we need to know something he does not tell us: Did defense counsel mislead the court? If counsel simply argued that the court should acquit because the police's practices were inadequate, he did nothing questionable, but neither did he engage in aggressive defense. On the other hand, if counsel suggested to the jury that the defendant had not made the solicitation, knowing that he had, then counsel made no contribution to an informed decision about police practices.

Third, the argument seems to assume that society invariably responds to the increased burdens aggressive defense puts on the prosecution by augmenting prosecutorial resources. This seems unlikely. Such resources are scarce, and prosecutorial tasks compete with many other social needs for them. At some point increased prosecutorial burdens are sure to press against resource constraints on expansion. At the margin, the critical effect of aggressive defense is to force a reallocation of resources *among cases*. This reallocation seems likely to *harm* innocent defendants.

Ideally, aside from protecting intrinsic procedural rights, one would want to focus prosecutorial resources on resolving doubts about the guilt of suspects or defendants. But aggressive defense forces prosecutors to reallocate resources to cases in which neither they nor the defense lawyers have any doubts about guilt. Similarly, aggressive defense requires prosecutors to clarify issues that make no

contribution to the reliable determination of guilt. To the extent that the total amount of resources is fixed, this means that fewer resources are available for cases and issues that involve doubts about guilt. This harms innocent defendants.

B. *Dignity*

A frequent concomitant of the idea that aggressive defense checks the rapacity of the state is the idea that it expresses respect for the "dignity of the individual."¹⁶ One might distinguish two ways of showing respect for individual dignity. One can show respect in a general way for an individual *regardless* of who he is or what he has done, and one can show respect in a particular way for an individual *because* of who he is or what he has done.

In the criminal process, we show respect in the general way by extending rights independent of an individual's guilt and innocence — for example, rights to notice of charges and to freedom from cruel and unusual punishment. Defense counsel respects the dignity of the client by helping enforce such rights as well as by observing the general civilities of polite intercourse with the client. It is not plausible, however, to suggest that this general sense of dignity embraces strategic delay, deception, and intimidation. Since this general notion of dignity applies regardless of the particular characteristics of the person, the client's general dignity rights have to be consistent with a comparable measure of dignity for others. It seems implausible, even incoherent, to think that everyone's dignitary interests require strategic delay, deception, and intimidation, and the dignitary argument alone provides no reason why the dignity of criminal defendants requires a different standard in these matters than that of others.

The more specific form of respect that differentiates among individuals because of who they are and what they have done seems incompatible with aggressive defense for two reasons. First, aggressive defense treats all defendants alike; it tries to help the accused thwart conviction regardless of whether or not they are guilty. Second, aggressive defense seeks to help many defendants present themselves as something other than they are. This means not only that it portrays defendants who have committed the acts with which they have been charged as not having committed them; it also means that lawyers typically dominate their clients' cases and orchestrate their clients' behavior in court not to express their own senses of themselves, but to conform to the judge's and jury's stereotypes about how a respectable,

16. See, e.g., FREEDMAN, *supra* note 3, at 2.

law-abiding citizen looks and behaves. Of course, if this is the best way to get an acquittal, most defendants would prefer such a defense; but few experience it as an affirmation of their individuality.

The idea that helping the accused escape substantively appropriate punishment through aggressive defense serves individual dignity is hard to square with the legitimacy of punishment after conviction. A viable ideal of dignity has to make room for respect for the rights of others and, at least in our system, for acceptance of punishment when the individual violates such rights.

C. *Equal Opportunity*

Defense lawyers often justify libertarian ethics as a way of equalizing the circumstances of rich and poor defendants. A poor defendant should have as good a defense as a rich one, they say, and since a rich defendant has the benefits of delay and deception, so should a poor one.¹⁷

The specious plausibility of this argument depends largely on its conflation in the phrase "as good a defense" or *as good an opportunity to prove one's innocence* (and to vindicate one's intrinsic procedural rights) and the quite different notion of *as good an opportunity to escape conviction*.

Not all inequalities are illegitimate and, more importantly, not all the illegitimate ones can be desirably mitigated by extending the advantages of the better-off to the rest. Rich people have much better opportunities to murder others than the poor because they can buy expensive weapons and hire skilled henchmen to help them. This, however, is not an inequality that could desirably be corrected by extending the advantage to the poor. Whatever gain would result from greater equality would be swamped by the loss represented by increased criminal violation of basic substantive rights of the victims.

The greater ability of the rich to escape conviction for their crimes is morally comparable to their greater ability to commit them in the first place. It is one of a large number of arbitrary determinants of conviction. Among criminals, the dumb, the clumsy, and the neurotic are more likely to be apprehended and convicted than the smart, the swift, and the single-minded. These inequalities are injustices, but they are trivial injustices compared to the injustices of many of the crimes themselves, and remedying them would not be worth the costs.

Needless to say, this point does not apply to advantages the rich enjoy over the poor in establishing their innocence. Moreover, we

17. I have often heard this argument in conversations with defense lawyers.

should also distinguish between advantages the rich enjoy because of social circumstances independent of the criminal justice process and advantages created or enhanced by the criminal justice process. An example of the latter would be the advantages created by official decisions to focus prosecutorial efforts disproportionately on poor defendants. I return to this point below.

D. *Self-incrimination*

The constitutional privilege against self-incrimination is an undeniably distinctive feature of the criminal process. It is not controversial that, where this privilege applies and the defendant wishes to take advantage of it, the defense lawyer should assist him in doing so. How the privilege should apply to a broad range of defense issues, however, is ambiguous. Moreover, for many lawyers the privilege embodies a general principle that should inform the defense lawyer's ethical decisionmaking, even where it is not specifically applicable as a constitutional, statutory, or common law mandate.

The importance of the privilege to the question of the distinctiveness of the defense lawyer's ethical obligations depends on how it relates to the right to counsel. On the one hand, we could interpret the relation to mean only that the defendant is entitled to the assistance of counsel in asserting his right to remain silent in the face of official interrogation. At the other extreme, we could decide that the privilege and the right to counsel require that the defendant not suffer any adverse consequences as a result of disclosures to counsel. This conclusion would require the lawyer to acquiesce in many forms of deception and manipulation, for often the lawyer will know that a particular tactic is deceptive or manipulative only because of something the client has told her.¹⁸

Choosing from the positions along this spectrum requires some interpretation of what the privilege is about and, given the entrenched position of the privilege in the legal culture, it is surprisingly difficult to find a plausible one.¹⁹ The privilege plays a prominent role in the history of Anglo-American liberty, most notably in the struggle against religious persecution in England in the sixteenth and seventeenth centuries and in the struggle against political persecution in America during the McCarthy era. In both periods, however, its pro-

18. FREEDMAN, *supra* note 3, at 30-31, presses this point.

19. The arguments for and against the privilege are surveyed in 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2250-84 (John T. McNaughton rev. ed. 1961); David Dolinko, *Is There A Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986). Dolinko's excellent article argues that the privilege lacks a plausible justification.

ponents associated the privilege with principles that now seem only indirectly related to its contemporary core meaning. Among their most basic concerns were the criminalization of belief and expression; the claim that the defendant should not be forced to incriminate himself was usually linked to an explicit contention that the activity in question could not be legitimately punished. Another set of concerns was procedural; the privilege was used to support objections to "roving questioning," official interrogation without specified charges and without supervision by independent judges.²⁰

The American legal system now deals with the former concerns under the rubric of freedom of belief and expression; it deals with the latter under the rubric of due process. These doctrines provide a variety of direct restraints on the criminalization of belief and a variety of explicit requirements with regard to charging and judicial supervision in the criminal process. To the extent these measures seem inadequate, the appropriate response is to strengthen them directly. The practices we associate with the privilege seem a roundabout route to these concerns.

To advance the inquiry, we have to ask what role the privilege has to play in connection with activity that has been legitimately criminalized and in a procedure where there is fair notice, specification of charges, and some preliminary judicial determination that the charges have a minimal basis. Three defenses of the privilege are relevant to this narrowed inquiry.

First, it is said that the privilege deters irresponsible prosecution. Without it prosecutors might proceed to trial without adequate investigation in the hope that they could prove their case by examining the defendant. This argument could be made just as well against the subpoena power. Limiting access to evidence at trial seems an inefficient way to encourage more investigation. One would think this concern would be adequately served by requiring the prosecutor to make a sufficient *prima facie* showing before examining the defendant.

Second, it is often asserted that forcing someone to "admit his guilt" is an unjustifiable infringement on autonomy or liberty. This suggestion is only plausible if "admit guilt" means *concede that punishment is justified*, rather than simply *acknowledge conduct that the law defines as criminal*. To preclude the defendant from disputing the legitimacy of the proceeding or the punishment she faces would violate important First Amendment values. But precisely for that reason we do not need the privilege to protect against this danger. The real issue

20. See generally LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968).

is whether asking the defendant to describe her conduct (to the same extent that a third party witness could indisputably be asked about it) violates the privilege.

Third, the privilege is sometimes associated with privacy values. According to this argument, it is a violation of subjectivity to enlist a person's knowledge against her for the purposes of punishment. But let's face it: the entire criminal process is one massive invasion of privacy. (Murder is the most private act a person can commit, William Faulkner suggested.²¹) Compelled testimony about self-incriminating conduct seems a far less serious inroad on privacy than substantive rules that make liability turn on subjective intent (even where intent is established by third party testimony). For example, intent is often the critical element of many fraud and embezzlement prosecutions; this requires an investigation into the defendant's subjective motives in which a broad range of his conduct and lifestyle is potentially relevant. Yet, the defendant's privacy has rarely been treated as a serious objection to substantive rules of this kind.²²

Thus, it is very hard to derive any general support from the privilege for aggressive advocacy beyond the specific confines in which it is historically rooted.

E. *Burden of Proof*

I conceded earlier that it is proper for a defense attorney to seek an acquittal for a substantively guilty client on the ground that the prosecution has failed to meet the burden of proof. Some defense lawyers view this concession as a slippery slope leading to active deception. In practice, there are difficulties in maintaining the line between arguing that the burden of proof has not been met and actively deceiving.

The case of Norman and the borrowed Pontiac is a good example. The defense lawyer argued that "*obviously* Steve and Norman had no idea that the property was stolen, else why would they have been loading it into the Pontiac's back seat, instead of concealing it in the trunk?"²³ In fact, the lawyer knew that the reason they had not

21. WILLIAM FAULKNER, *INTRUDER IN THE DUST* 57 (1948).

22. George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469 (1976).

Another argument occasionally advanced for the privilege is that to require someone to give evidence that would tend to bring about his own punishment is unconscionably cruel. As David Dolinko has pointed out, this claim is inconsistent with a variety of legal practices that impose punishment on people for failing to make psychologically difficult but morally appropriate choices. Dolinko, *supra* note 19, at 1090-1107. As Henry Friendly emphasized, it also seems wildly inconsistent with popular morality, which insists on the virtue of taking responsibility for one's wrongs. Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CINN. L. REV. 671, 680 (1968).

23. See KUNEN, *supra* note 3 and accompanying text.

loaded it in the trunk was that they did not have the trunk key. This sounds like deception. The lawyer at least strongly implied that they could have opened the trunk, knowing that in fact they could not have.

But many defense lawyers feel that this argument simply amounts to pointing out an omission in the prosecution's case. It failed to produce evidence adequately negating the possibility that Norman could have opened the trunk. Thus, any counterfactual argument can be seen as a suggestion that the prosecution has failed to sustain its burden in negating the inference in question.

I think this goes too far. All the defense lawyers I know who press this contention concede that the jury understands this sort of argument not just as a claim about the burden of proof, but as a suggestion that the exculpating inference is true. Although ethics rules forbid lawyers from asserting their "personal opinion[s]" about the matters they argue to the jury,²⁴ lawyers often violate the prohibitions in form, and many believe that lawyers *must* violate them, at least in spirit, to be effective. As Monroe Freedman writes, "[e]ffective trial advocacy requires that the attorney's every word, action, and attitude be consistent with the conclusion that his client is innocent."²⁵

Thus, where the defense lawyer knows the inference is false, this type of argument can only be regarded as deception. That does not necessarily mean that it is unjustified, however. Defense lawyers feel that jurors tend not to understand and to undervalue procedural norms; they are naturally substance-oriented. If deception is the only way to get the process to take account of burden-of-proof considerations, it is an ethical price worth paying.

The problem with this argument is that misleading juries is not the only way to implement burden-of-proof concerns. When we distrust the jury with an issue, we commonly give it to the judge. Indeed, the judge now has responsibility to dismiss charges on motion of the defense where the prosecution fails to produce evidence from which the jury could reasonably infer guilt.²⁶

Why isn't this practice adequate to address burden-of-proof concerns without deceptive argument? There are three relevant concerns. One is the privilege against self-incrimination, which is partly implemented by placing the burden of proof (the burden-of-going-forward

24. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(e) (1992).

25. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1471 (1966).

26. 2 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 461 (2d ed. 1982).

dimension) on the prosecution, but which I argued above does not require aggressive defense.²⁷ Another concern served by the burden of proof (the burden-of-persuasion dimension) is to institutionalize a social judgment about the relative harms of erroneous acquittal and erroneous conviction by encouraging the resolution of doubts in favor of acquittal. But aggressive advocacy makes only the most indirect and overbroad contribution here. It decreases the likelihood of erroneous conviction only by decreasing the likelihood of any conviction. Licensing fraudulent *evidence* would have the same effect, though nearly everyone concedes that this would be improper (excluding the controversial case of client perjury). As I argued above,²⁸ the idea that aggressive advocacy protects the innocent through its long run effects on standards of police and prosecutorial practice seems mistaken.

Finally, putting the burden of proof (going forward) on the prosecution serves to discourage officials from subjecting citizens to the expense and anxiety of prosecution without adequate investigation or consideration in the hope that the defendants' evidence will help them complete their cases. But this concern seems adequately served by a rule requiring the judge to dismiss if the prosecution fails to produce evidence warranting conviction. As we saw above,²⁹ it is not obvious that aggressive defense induces higher levels of preparation or, even if it does, that the benefits of the additional preparation warrant its costs.

F. *Disclosure to Counsel*

Consider now the claim that, to the extent that we reject aggressive defense, we endanger adequate representation by deterring full disclosure by clients to counsel.³⁰ Clients will withhold information if they fear that it would cause their lawyers to forego strategically advantageous tactics. Because they will make mistakes in estimating what information would be harmful, they will sometimes withhold information that would help establish legitimate defenses. Thus, the argument goes, we must assure clients that nothing they say will cause the lawyer to forego an advantageous tactic.

This argument covers a broad range of deceptive tactics in aggressive defense, since most commonly the lawyer is aware of the deception because of something the client has told him. The argument is not limited to the criminal sphere, but it may have special weight there

27. See *supra* notes 18-22 and accompanying text.

28. See *supra* notes 13-15 and accompanying text.

29. See *supra* notes 13-15 and accompanying text.

30. See, e.g., FREDMAN, *supra* note 3, at 30.

because of the relatively high stakes for the criminal defendant and because the argument resonates with the privilege against self-incrimination and the right to counsel.

It is tempting to respond that, if the defendant loses a legitimate defense because he mistakenly withholds exculpatory information, that is the penalty he pays for dishonesty. This is too glib, however. There is no reason to think that the penalty will be proportionate to the offense. For some defendants, dishonesty may be an understandable and forgivable response to a lawyer who appears to be an integral part of a system that has abused and betrayed them in the past.

The key issue, then, is the practical extent to which the inhibition of disclosure by the repudiation of aggressive defense would cause the loss of valid defenses. This is an empirical question about which we have only anecdotal information and which could probably never be settled in any definite or systematic manner. Nevertheless, my intuition is that the costs of repudiation are not great.

The client disclosure argument assumes that the client cannot understand the substantive rules that determine what information would be helpful to her at trial but that she *can* understand the confidentiality rules that determine what she can safely disclose to counsel. To the contrary, I would expect that in most cases the lawyer can educate the client about the substantive rules, but that in cases where she fails to do so, she will also fail to make the client understand the confidentiality rules.

If the client is sophisticated and trusting, the lawyer should be able to help her understand what information would be helpful. The elements of most crimes can be defined with some succinctness; the charging papers will narrow the relevant factual circumstances, and there are a limited number of affirmative defenses.³¹ In fact, many criminal defense lawyers try to formulate their defense strategies *before* they question their clients in detail about relevant facts because they do not want to know facts that would not be helpful and would constrain aggressive advocacy. They typically do not ask the client, "What happened?" but instead pose narrow questions tailored to surfacing information responsive to the prosecution's charges.³²

This practice is ethically unattractive, but the accounts do not sug-

31. People often worry that informing clients of their legal interests before they commit themselves to their stories gives too much temptation to perjury. The objection ignores that even honest clients often will not know what information is relevant until they know the legal standards and, more to the point here, the perjury risk seems a small price to pay to obviate the need for aggressive defense as an inducement to candor.

32. See KENNETH MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 104-11 (1985).

gest that lawyers miss a lot of exculpatory information because of it. Thus, lawyers appear to be able to infer the relevant defenses without the client's full story and, if they can do that, they should be able to educate clients about their interests sufficiently to induce them to disclose exculpatory information.

Of course, some clients will still withhold information the lawyer has indicated would be helpful because they do not trust or understand the lawyer. But strong confidentiality guarantees and assurances of aggressive defense would improve this situation only if the client understood the confidentiality and advocacy rules. Perhaps the clearest finding of empirical research on the confidentiality rules is that clients do not understand them. Many clients think that the rules protect information absolutely that in fact may sometimes be disclosed, and they believe other categories of information are subject to disclosure that are in fact protected.³³ Moreover, defense lawyers, especially for unsophisticated clients, often report that their clients hold back information because they distrust the lawyers.³⁴ Thus, for all we know, most of the problem of inadequate client-lawyer disclosure would remain *regardless of what the rules on confidentiality and advocacy are*.

G. Punishment

Some people find the criminal process categorically different from the civil one because the former is concerned with punishment rather than compensation. When a civil litigant prevails despite the merits of the case, the result is typically injustice to another particular citizen. When a criminal defendant prevails despite the merits, the cost is more abstract and diffuse. The victim of the injustice is society at large. Moreover, the nature of the cost is harder to define. Given widespread uncertainty about the legitimacy and efficacy of punishment, one might believe that we should have a high tolerance for the costs of wrongful acquittal.³⁵

As I will soon acknowledge in detail, I think there is some substance to this point, but it fails as a categorical rationale for aggressive defense. First, arguably this point has already been taken into account in defining the substantive terms of punishment and certain procedural

33. See Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 377-96 (1989).

34. MANN, *supra* note 32, at 40-42; see also JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 105 (1972) (stating that only 20.4% of defendants responding to a survey felt their public defender was on their side).

35. See, e.g., Wasserstrom, *supra* note 1, at 12.

protections of the accused, such as the right to counsel and the high burden of proof in criminal cases.

Second, this argument overlooks the fact that the criminal process is often a substitute for the civil process. In cases where defendant and victim are in continuing contact, the criminal process is often used to deter specifically wrongs that are in principle civilly actionable but for which either the civil process is too expensive or the civil remedies inadequate. In addition, some criminal processes involve victim restitution remedies that are indistinguishable from civil remedies except in their relative ease of enforcement.

H. *Interim Conclusion*

The arguments commonly made for the propriety of aggressive defense in the criminal sphere fail plausibly to distinguish criminal from civil practice or to provide a tenable rationale for aggressive defense. The conclusion suggested by the argument so far is that aggressive defense should be, at least *prima facie*, condemned.

II. SOCIAL WORK, JUSTICE, AND NULLIFICATION

We have yet to consider a rationale that is not prominent in the rhetorical arsenal of the proponents of aggressive defense but in fact seems to reflect an important ethical motivation of many defense lawyers. Barbara Babcock calls it the "social worker's reason," and she illustrates it with a story about how she used a strained insanity defense to save an indigent black client from a mandatory twenty-year prison sentence for *possession* of heroin.³⁶

The "social worker's reason" focuses on the harshness of contemporary punishment practices and on the disproportionate incidence of harsh punishment of racial minorities and the poor. The practices in question seem both pervasive and intensifying. A few years ago Texas sentenced a man convicted of three frauds involving a total of about \$200 to life imprisonment.³⁷ In California a young three-time loser who had never been charged with a violent crime recently received life without possibility of parole for possession of 5.5 grams of crack.³⁸ These are not idiosyncratic instances, but examples of an enormous class of insanely harsh sentences, many of them prompted by public and official hysteria over the drug problem fueled by demagogic poli-

36. Babcock, *supra* note 6, at 178-79.

37. See *Rummel v. Estelle*, 445 U.S. 263 (1980) (rejecting the claim that the punishment was unconstitutionally cruel and unusual).

38. MIKE DAVIS, *CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES* 288 (1990).

tics. The United States now has a larger fraction of its population locked up than any country in the world: in the 1970s and 1980s its incarceration rates exceeded those of nearly all totalitarian states.³⁹

The fact that such punishment is disproportionately visited on racial minorities and poor people is surely an important part of the reason why these practices are politically supported. Nearly a quarter of all black men in America aged twenty to twenty-nine are locked up or on probation or parole.⁴⁰ Moreover, in some jurisdictions the punishment practices are an integral part of a system of policing that targets minority communities and people of color, especially young men, for intensive and often abusive surveillance, designed in part to keep them out of areas used by privileged racial and economic groups and in part to reinforce their subservience to a local power structure that excludes them.⁴¹ Of course, this characterization of contemporary criminal law enforcement is controversial, and one who doubts it will not find much support for aggressive defense in it. However, because many people (including me) believe it is accurate, it is worth assessing what support this characterization would provide, if it were true, for aggressive defense.

Consider first that Babcock calls the argument in question "the social worker's reason." At first glance, this seems an odd way to characterize an argument about *legal* ethics. It refers to a different profession. Moreover, it eschews rhetoric that is associated with the legal profession and seems appropriate here, notably "injustice." Babcock's formulation reflects the fact that the argument is in tension with the positivist strains of the legal culture.

For the most part, the practices in question involve the imposition of statutorily prescribed penalties and the exercise of statutorily conferred official discretion. Moreover, doctrine has long closed off the principal routes to constitutional review of these practices. It all but precludes review of the fairness or proportionality of punishment under the Due Process or Cruel and Unusual Punishment Clauses,⁴² and it permits relief under the Equal Protection Clause for abuse of prosecutorial discretion only in rare and extreme circumstances.⁴³

39. ELLIOTT CURRIE, *CONFRONTING CRIME* 28 (1985); Fox Butterfield, *U.S. Expands the Lead in Rate of Imprisonment*, N.Y. TIMES, Feb. 11, 1992, at A16.

40. Butterfield, *supra* note 39.

41. See, for example, the chilling portrait of the Daryl Gates regime in Los Angeles in DAVIS, *supra* note 38, at 267-322.

42. See *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991) (discussing Cruel and Unusual Punishment Clause).

43. See STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 665-70 (4th ed. 1992).

This was true even throughout the period in which the federal courts opened wide avenues for review of police interrogation and search-and-seizure practices.

Especially in the absence of any ample constitutional footholds, it is hard for lawyers to find direct support within their own professional culture for efforts that are in essence designed to subvert the practices of excessive and discriminatory punishment. Since the legislature has mandated or authorized the punishments and conferred discretion on police, prosecutors, and judges, the punishments have sovereign authorization and hence legal legitimacy. Thus, lawyers motivated by opposition to harsh and discriminatory punishment find themselves reaching for justifications for their work in procedural concerns or nonlegal rhetoric.

In doing so, however, they ignore important nonpositivist strains of the legal culture; these strains might be called the *substantive justice* strains. From the substantive justice perspective, the fact that the legislature has authorized, and the courts have refused to condemn or provide remedies for, the practices in question does not conclude the issue of their legal legitimacy. There may still be room for a legal actor to conclude that the legislatures and courts are wrong — that they have misapplied the relevant legal norms in approving these practices — and then to proceed on the basis of what the actor believes would be the correct decisions to the extent she is able to do so.

There is a precarious but long-standing tradition in American law that legitimates some measure of this type of activity under the rubric of nullification. The idea of nullification is that in some circumstances legal actors should have the power to subvert the enforcement of presumptively authoritative legal — typically statutory — norms. Nullification is not a license for whim, but a partial decentralization of legal authority. The nullifying judgment is a legal judgment, not a subjective one; it considers the particular norm in question against the more general and basic norms of the legal culture. Nullification is often defended as an extraordinary function that safeguards against the breakdown or abuse of routine processes of government. The nullification power is uncontroversially extended to judges in matters of constitutional review and, more controversially, in nonconstitutional statutory cases. It is readily associated with juries, which are empowered to acquit even in the face of proof beyond a reasonable doubt of a criminal violation, and prosecutors, who are expected to forego prosecution of many offenses on which they could win conviction.⁴⁴

44. On jury nullification, see MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* 45-66 (1973); Mark D.

I have argued elsewhere that some lawyer conduct that subverts substantive legal norms might be understood and accepted as a desirable form of nullification.⁴⁵ I think that an argument based on the idea of nullification would provide better support for aggressive defense than the arguments commonly made for it. Aggressive defense is justified where it subverts punishment that, although formally prescribed, is unjustly harsh and discriminatory in terms of the more general norms of the legal culture. The practice is further supported to the extent that such unjust punishment seems to be a function of various political breakdowns, including the political disenfranchisement of the poor and demagogic obfuscation in the electoral process.

However, even if one concedes the view of contemporary criminal prosecution on which this argument is premised, it is inadequate as a justification for the current practice of aggressive defense. The problem is that the argument is underinclusive as long as one concedes that there is any substantial class of defendants for whom punishment would be just and otherwise appropriate. Aggressive defense is a practice of categorical or wholesale nullification; it does not focus on subverting only the prosecutorial and police practices that could plausibly be opposed as excessive and unjust.

Thus, for the "social worker's" or nullification argument to work, the practice of aggressive defense would have to be reformulated toward one of ad hoc or retail nullification. Aggressive defense should be limited to cases that present a threat of excessive or arbitrary punishment and only employed to the extent it is likely to counter that threat. The practice of aggressive defense ought to be part of a larger strategy designed to focus resources and effort on cases that present the greatest threats of injustice.

The practical ability of a lawyer to adopt this approach will vary with the degree of autonomy she has in her practice. Some lawyers will find it easier to continue to commit themselves categorically to aggressive defense but to apply selective criteria at the point they decide to take on clients, restricting their practice to clients threatened by excessive or discriminatory punishment. Other lawyers will have more discretion about how they handle cases than about which cases to take. Lawyers in offices that regulate ethical issues through institutional standards may be able to persuade their offices to adopt the ap-

Howe, *Juries as Judges of the Criminal Law*, 52 HARV. L. REV. 582 (1939). On prosecutorial nullification, see KADISH & KADISH, *supra*, at 80-85; SALTZBURG & CAPRA, *supra* note 43, at 1115-18. On nonconstitutional judicial nullification, see generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

45. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1113-19 (1988).

proach and specify criteria for it institutionally. Others may be unable to influence their office policies toward the approach but may retain a good deal of discretion over their own cases.

It is probably better for lawyers to formulate criteria for ad hoc nullification collectively and publicly — through public defender programs or specialized bar associations. Such criteria should take the form of general standards, not ad hoc institutional management of individual cases. But if public formulation of criteria is not practical, it is better to have criteria formulated and applied individually and in private than no criteria at all.

To varying degrees, defense lawyers are subject to pressures from bar associations and courts that regulate their practices, from referral and funding sources, and from clients. Some lawyers may have enough autonomy in these relations to adopt the ad hoc nullification approach publicly and to link it to public opposition to excessive and discriminatory punishment, perhaps allying themselves with alternative bar associations and nonlawyer groups seeking to reform the system. Other lawyers will lack the autonomy to adopt the approach publicly but will have enough discretion over their cases to apply the approach tacitly. The more practical discretion the lawyer has, the more ambitiously she can apply the approach, but very few lawyers could not meaningfully apply it at all.

Of course, some people will question whether there are any plausible criteria by which lawyers could distinguish excessive and discriminatory punishment, but the “social worker’s” argument presupposes such criteria, so anyone who subscribes to this argument should have some. Moreover, while legal doctrine on sentencing and discrimination does not specifically legitimate the lawyer decisionmaking proposed here, it provides ample illustration of how lawyers disposed to make judgments of proportionality and discrimination might do so in a structured way grounded in norms of substantial social acceptance.

Particular lawyer nullification judgments will be controversial, but that is not, in itself, an objection to the practice. Particular judgments of police about when to arrest, prosecutors about when to prosecute, and judges and juries about when to convict are controversial as well. In deciding whether to favor giving responsibility to role players, we do not ask whether each decision they make will meet with universal agreement, but whether on the whole their decisions will make a positive contribution in terms of the values we believe are relevant.

We cannot answer the question whether the widespread, open adoption of ad hoc nullification would improve the criminal justice system without committing ourselves to some criteria for evaluating

the system and making some predictions about what criteria defense lawyers would adopt and apply. But I think anyone who subscribes to the critique of the present system as systemically prone to excessive and discriminatory punishment should be optimistic about the potential of this approach. My guess is that most idealistic defense lawyers subscribe to this critique. The ad hoc nullification approach would allow them to express it more directly in their practice. It could improve practice both by leading to advocacy decisions that better fit the values most plausibly invoked to justify aggressive defense and by diminishing many defense lawyers' sense of alienation in their day-to-day practice from their basic normative commitments.

Because criteria will necessarily differ within the defense bar, some people will be concerned that clients will get different levels of defense depending on with which lawyer they end up. However, that situation already exists under the current regime, for we defined aggressive defense to encompass tactics that were not explicitly regulated. Moreover, this seems to be an instance in which concerns of horizontal equity are less weighty than concerns of substantive justice.

One standard liberal response to the legitimacy of this kind of decisionmaking by lawyers is the community-controlled legal services office. It is curious that the idea of community control has not been extended as often or as enthusiastically to public defender programs. There are serious problems with the community control ideal: for example, there is no self-evident way to define and represent communities, and fairness requires that lawyers have freedom from some forms of political interference while representing clients. But rational deployment of defense resources requires many fairness and humaneness judgments about police and prosecutorial practices, as well as about the relative social harm and iniquity of different offenses. Such judgments are best made by a body generally representative of a meaningfully defined local group. There are plenty of precedents and examples in the civil sphere and, while the record is mixed, the idea retains promise.⁴⁶

Some may object that the open adoption of ad hoc nullification would make defenders vulnerable by appearing to politicize their practice. Ad hoc nullification might simultaneously enrage the forces of crime control demagoguery and alienate libertarian liberals whose support for aggressive criminal defense rests on the fallacious but ideologically powerful views criticized in Part II. Yet, a substantive cri-

46. See, e.g., JEFFREY BERRY ET AL., *THE REBIRTH OF URBAN DEMOCRACY* 97 (1993); cf. 45 C.F.R. § 1607.3(e) (1992) (boards of federally supported civil legal aid programs to include members designated by neighborhood and community groups).

tique of excessive and discriminatory punishment might provide a more powerful ideological basis for opposing crime control demagoguery than libertarian liberalism. Especially outside the bar, the ideological appeal of libertarian liberalism has waned, and indeed crime control demagoguery seems to have profited from popular revulsion at its apparent antinomian contempt for responsibility and punishment, its paranoid antistatism, its indifference to victims, and its obsession with procedural at the expense of substantive justice. Many people concerned about crime control would be far more receptive to appeals for support for criminal defense based on ideals of substantive humaneness and fairness than they would to appeals based on the preoccupations of libertarian liberalism.

CONCLUSION

We began with the question of whether criminal defense should be treated differently for the purposes of the critique of the standard conception of adversary advocacy. The reasons most commonly offered for such a distinction turn out to be implausible. Nevertheless, there are reasons that might justify the selective use in criminal defense of the tactics of aggressive defense, as opposed to the categorical use entailed by the standard conception. The selective or ad hoc approach is one advanced for the civil sphere by some of the critics of the standard conception;⁴⁷ thus, if you buy their argument, the criminal sphere is not different at the level of general approach. Nevertheless, the selective approach I have suggested looks to the particular context of practice; the problem of excessive and discriminatory punishment is distinctive to the criminal sphere. In that sense, criminal defense is in fact different.

47. See Luban, *supra* note 9, at 1018-21; Rhode, *supra* note 1, at 638-47; Simon, *supra* note 45.