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## Advocacy revalued

Geoffrey C. Hazard, Jr.

*UC Hastings College of the Law*, [hazardg@uchastings.edu](mailto:hazardg@uchastings.edu)

Dana A. Remus

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# ARTICLE

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## ADVOCACY REVALUED

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GEOFFREY C. HAZARD, JR.<sup>†</sup> & DANA A. REMUS<sup>††</sup>

*A central and ongoing debate among legal ethics scholars addresses the moral positioning of adversarial advocacy. Most participants in this debate focus on the structure of our legal system and the constituent role of the lawyer-advocate. Many are highly critical, arguing that the core structure of adversarial advocacy is the root cause of many instances of lawyer misconduct. In this Article, we argue that these scholars' focuses are misguided. Through reflection on Aristotle's treatise, Rhetoric, we defend advocacy in our legal system's litigation process as ethically positive and as pivotal to fair and effective dispute resolution. We recognize that advocacy can, and sometimes does, involve improper and unethical use of adversarial techniques, but we demonstrate that these are problems of practice and not of structure and should be addressed as such.*

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<sup>†</sup> Thomas E. Miller Distinguished Professor of Law, University of California Hastings, College of the Law; Trustee Professor of Law, University of Pennsylvania Law School.

<sup>††</sup> Professor of Law, University of New Hampshire Law School.

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## INTRODUCTION

A central and ongoing debate in legal ethics scholarship addresses the moral positioning of adversarial advocacy. Professor Daniel Markovits brought renewed attention to this debate in his book, *A Modern Legal Ethics*.<sup>1</sup> With rhetorical flair, the book opens by asserting that professional obligations for lawyers to act in unethical ways—to “lie” and to “cheat”—“are deeply ingrained in the genetic structure of adversary advocacy.”<sup>2</sup>

Other scholars have made similar allegations. They, too, have located the problems and deficiencies of advocacy within the structure of our system. They, too, have argued that core principles of adversarial ethics, including the duties of loyalty and confidentiality, are the root cause of unethical lawyer conduct.<sup>3</sup>

Many scholars who have taken this position go on to argue that given the problem’s deep foundation in the structure of our system, it cannot be addressed through the extrinsic controls of the law governing lawyers; it can be remedied only through the intrinsic moral conditioning of lawyers. The solution, these critics conclude, is to redefine the role of the lawyer-advocate to include direct responsibilities for truth and justice.<sup>4</sup> Proposals along these lines are numerous.

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<sup>1</sup> DANIEL MARKOVITS, *A MODERN LEGAL ETHICS* (2008).

<sup>2</sup> *Id.* at 2-4.

<sup>3</sup> For examples of such arguments, see *infra* note 4; see also MARKOVITS, *supra* note 1, at 5 (“Fidelity, understood as a distinctively lawyerly virtue, offers lawyers their best hope for ethical vindication of their professional lives.”).

<sup>4</sup> See, e.g., MARVIN E. FRANKEL, *PARTISAN JUSTICE* 79-80, 83 (1980) (describing a report by “a commission of the American Bar Association” (for which one of us served as the reporter) that “considered, but did not adopt, a provision requiring the disclosure of facts known to the lawyer which ‘would probably have a substantial effect on the determination of a material issue’” (internal quotation marks omitted)); ANTHONY T. KRONMAN, *THE LOST LAWYER* 154 (1993) (“A legal education must do more than impart information and technical skills. It must also inculcate the character-virtues of prudence and public-spiritedness.”); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 138 (1998) (arguing that lawyers can defer to both “justice” and the existing legal frame-

Judge Marvin Frankel once suggested that “the paramount commitment of counsel concerning matters of fact should be to the discovery of truth rather than to the advancement of the client’s interest.”<sup>5</sup> Professor William Simon proposed a “basic maxim” that lawyers “take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice.”<sup>6</sup> Professor David Luban proposed that lawyers be held “morally accountable for what they do on behalf of clients and what outcomes they further.”<sup>7</sup> And Professor Anthony Kronman suggested redefining the lawyer-advocate’s role as that of a civic-minded “lawyer-statesman,” who would advise clients as to the course of action that was not only legal, but prudent and wise as well<sup>8</sup>—a position that might be consistent with some forms of adversarial advocacy but would not be with others. These and other proposals are unified by two common but problematic conclusions: the adversarial system is to blame for problems of lawyer misconduct, and the proper solution lies in improving the internal moral constraints of lawyers.

In the initial passages of *A Modern Legal Ethics*, Professor Markovits appears to locate the problems of advocacy in the requirements that advocacy imposes on lawyers as moral agents. In doing so, he suggests potential agreement with the views and premises of these proposals.<sup>9</sup>

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work); Robert Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1031-35 (1981) (discussing the costs and benefits of adopting attorney disclosure rules and suggesting the benefits of “third-party disclosure obligations governed by a negligence standard”); Marvin E. Frankel, *The Search for Truth: An Umpire’s View*, 123 U. PA. L. REV. 1031, 1056 (1975) (“We may want to ask . . . whether it would be an excessive price for the client to be stuck with the truth rather than having counsel allied with him for concealment and distortion. The full development of this thought is beyond my studies to date. Its implications may be unacceptable. I only urge that it is among the premises in need of examination.”).

<sup>5</sup> Frankel, *supra* note 4, at 1055; *see also id.* at 1057 (“The rules of professional responsibility should compel disclosures of material facts and forbid material omissions rather than merely proscribe positive frauds.”).

<sup>6</sup> SIMON, *supra* note 4, at 9.

<sup>7</sup> David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 CORNELL L. REV. 1437, 1437 (2008).

<sup>8</sup> KRONMAN, *supra* note 4, at 14, 147-55. Existing professional rules permit, and competent representation requires, such counseling. *See* MODEL RULES OF PROF’L CONDUCT R. 2.1 (2009) (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”).

<sup>9</sup> In outlining his argument, Markovits explains:

First, lawyers’ professional obligations to behave in ways that would ordinarily be immoral are not simply the results of excessive or perverse partisanship. Instead, they are deeply ingrained in the genetic structure of adversary advo-

As the book continues, however, he takes a different approach. He disclaims advocacy's truth-finding function and argues that advocacy must be understood and evaluated not against the first-person morality of the lawyer but instead against the goal of political legitimacy. In this light, he contends, conduct that would otherwise be called lying and cheating is rendered far less problematic.<sup>10</sup>

In this Article, we support and advance an approach to evaluate the role of the advocate by reference to a political need for authoritative dispute resolution. But we disagree that lawyers' actions, if undertaken in accordance with the standard rules governing advocacy, can or should be described as "lying" or "cheating." Both characterizations imply an access to ultimate truth, which all players in the legal system lack. Professor Markovits's comments in this regard may be intended as rhetorical flourish,<sup>11</sup> but they are nevertheless problematic

cacy. . . . Second, while it may be that lawyers' professional obligations to act in ordinarily immoral ways are necessary parts of a moral division of labor that best serves justice overall, this is not enough to redeem their professional ethics. . . . And third, an alternative approach to legal ethics, which develops an account of distinctively lawyerly virtue to complement division of labor arguments, can render lawyers' lives ethically appealing and so bring their professional ethics to a successful conclusion.

MARKOVITS, *supra* note 1, at 2. He also acknowledges that "although this vindication is possible in principle, recent developments in the structure of the legal profession threaten to deny contemporary lawyers practical access to the ideals on which it depends." *Id.* at 2-3.

<sup>10</sup> See *id.* at 171 ("doubt[ing] whether integrity-preserving role-based redescription is ultimately of much practical use to modern lawyers"). Professor Markovits's approach of evaluating the role of the advocate by reference to the exigencies of practical government has recently been embraced by others as well. See, e.g., TIM DARE, THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE 148 (2009) (responding to the argument that lawyers cannot "properly avoid moral censure by appeal to a distinct institutional morality" by arguing instead 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" (emphasis omitted)); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 72 (2005) ("Lawyers may not treat the law instrumentally, as an obstacle to be planned around, but must treat legal norms as legitimate reasons for action in their practical deliberation."); W. Bradley Wendel, *Moral Judgment and Professional Legitimation*, 51 ST. LOUIS U. L.J. 1071, 1073 (2007) ("Legal ethics differs in kind from ordinary ethics because the social function of the law is to settle normative disagreement procedurally and to adopt a provisional social settlement of moral conflict that precludes acting on the basis of ordinary first-order moral reasons.").

<sup>11</sup> We note that later in his book, Professor Markovits appears to accept that lawyers' actions should be understood not as lying and cheating but as means of facilitating a truth that is "good enough" to allow government to function. MARKOVITS, *supra* note 1, at 171-73, 188-93.

in two ways. First, they send the unfortunate message that law students' future line of work entails and requires dishonesty. Second, they obscure the pivotal and ethically positive role of advocacy in the authoritative resolution of disputes in our legal system.

In developing our argument, we draw on several insights from Aristotle's treatise, *Rhetoric*.<sup>12</sup> We find Aristotle's analysis relevant and useful for two reasons. First, Aristotle responds to Plato's criticism, leveled in the *Gorgias*, that rhetoric is per se unethical.<sup>13</sup> The arguments of many contemporary critics echo those of Plato,<sup>14</sup> such that Aristotle's defense is philosophically apposite. Second, *Rhetoric* offers a critical perspective that, until recently,<sup>15</sup> has been wanting in contemporary debate—namely that the role and function of advocacy must be understood by reference to its social context.<sup>16</sup> Aristotle identifies two defining features of this context in ancient Athens, which are equally relevant today: the inherent uncertainty in human knowledge

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<sup>12</sup> ARISTOTLE, *RHETORIC*, reprinted in *THE RHETORIC AND THE POETICS OF ARISTOTLE 2* (W. Rhys Roberts & Ingram Bywater trans., Random House, Modern Library College ed. 1984).

<sup>13</sup> As Aristotle wrote, "if it be objected that one who uses such power of speech unjustly might do great harm, that is a charge which may be made in common against all good things except virtue, and above all against things that are most useful." *Id.* bk. I, ch. 1, at 1355b. See also PLATO, *GORGIAS* 463 (Walter Hamilton trans., Penguin Books 1971) [hereinafter PLATO, *GORGIAS*] ("[W]hat I [Socrates] call oratory is a branch of something which certainly isn't a fine or honourable pursuit."). We note, however, that in the *Gorgias*, Socrates concedes the possibility of positive use of rhetoric, and in the *Phaedrus*, he presents the possibility of a positive moral standing for rhetoric. See *id.* at 504 ("[T]he good orator, being also a man of knowledge, will have [righteousness and moderation] in view in any speech or action by which he seeks to influence the souls of men . . ."); PLATO, *PHAEDRUS* 274B (R. Hackforth trans., Cambridge Univ. Press 1952) (stating that "the art of speech" includes "both the true art and the false").

<sup>14</sup> Plato's criticism was twofold. First, he argued that rhetoric lacked its own subject matter and allowed a speaker to persuade anyone about anything. As a result, it was not a socially valuable art worthy of study but a mere "knack" for persuasion through "gratification and pleasure." PLATO, *GORGIAS*, *supra* note 13, at 462. Second, Plato argued that rhetoric prioritized flattery of an audience over truth-finding. See *id.* at 466 (suggesting, through Socrates, that oratory is "a branch of pandering"). Many critics echo, or even explicitly cite, these arguments. See, e.g., Anthony T. Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 *YALE L.J.* 955, 959 (1981).

<sup>15</sup> See *supra* note 10.

<sup>16</sup> Aristotle accepted Plato's premise that rhetoric allows a speaker to persuade anyone about anything and that it can therefore have application in virtually any interpersonal setting. See ARISTOTLE, *supra* note 12, bk. I, ch. 1, at 1355b ("It is clear, then, that rhetoric is not bound up with a single definite class of subjects, but is as universal as dialectic . . ."). We question the need for this concession. As we explain below, Aristotle demonstrates that rhetoric is necessarily constrained by two defining aspects of its context, see *infra* Section I.A, which means that rhetoric's application is not truly limitless.

and affairs, and the social necessity for political action notwithstanding that uncertainty.<sup>17</sup> Aristotle's insights in this regard provide the basis for an effective response to the critics who contend that the problems and difficulties of advocacy are inevitable features of our legal system's core structure.

We begin our analysis in Part I by applying Aristotle's insights to our adversarial system. In doing so, we address a simplified model of advocacy. We speak of advocacy in our legal system's litigation process and not in negotiation or transactional work.<sup>18</sup> Within the domain of litigation, we address advocates who act within the bounds of the law and ethics governing lawyers. This simplified model has a limited resemblance to actual practice, but it allows for useful isolation of advocacy's legitimate and central function in our legal system. This function, which many critics fail to appreciate, is to facilitate construction of an accepted and authoritative version of truth upon which disputes can be resolved and justice administered.

In Part II, we turn from the core function of advocacy to its actual practice. We recognize that advocacy is sometimes employed in improper ways and to improper ends, but we argue that in our legal system, these problems reside outside the core structure of adjudication and the authorized role of the advocate. We therefore reject the suggestion of many critics that the problems of advocacy are properly addressed by reconstituting our legal system. We believe that solutions are better sought in the rules of procedure and evidence and in the law governing lawyers. We leave the task of formulating specific reform proposals for future work, but we argue that it is through ex-

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<sup>17</sup> See ARISTOTLE, *supra* note 12, bk. I, ch. 2, at 1357a ("Most of the things about which we make decisions . . . present us with alternative possibilities. . . [C]onclusions that state what is merely usual or possible must be drawn from premisses that do the same . . .").

<sup>18</sup> Some of the critiques that we address approach the role of advocates in common law systems as a single category, to be contrasted with the role of lawyers in civil law systems. We find this approach problematic for two reasons. First, the relationship between truth and the role of the advocate does not appear to correspond to differences between common law and civil law systems. The formal definition of "legal counselor" does not differ substantially between civil law and common law systems; in fact, actual fulfillment of the role is much more strongly influenced by a regime's ambient political culture, legal institutions, and social ethos than by its common law or civil law structure. Second, the advocate's role cannot and should not be abstracted from the institutions, practices, and norms of a specific regime. Accordingly, we address the practice of advocacy and the role of the lawyer-advocate in our contemporary legal system. This becomes particularly important in subsection I.B.2 as we address the details of our litigation process.

trinsic regulatory controls that the moral risk of the advocate's function can be set at an acceptable and desirable level.

## I. IN DEFENSE OF ADVOCACY'S VALUE

In *Rhetoric*, Aristotle addresses two principal settings in which rhetoric was employed in ancient Athens. One is the forensic setting of the law courts; a second is the legislative setting of the deliberative assembly.<sup>19</sup> Both are characterized by two defining features: the inherent uncertainty of available information and the social necessity for public decision and action.<sup>20</sup> In this Part, we describe these features and the challenges to which they give rise. We then argue that advocacy in our contemporary legal system should be understood and analyzed as a distinctive and necessary means of coping with these challenges.

### A. Understanding Advocacy in Context

#### 1. Ancient Athens

At the heart of Aristotle's explanation of the practice of rhetoric lies his distinction between two types of human knowledge—the theoretical and the practical.<sup>21</sup> Theoretical knowledge, which is pursued through a form of analysis and communication called “dialectic,” is knowledge of metaphysics, mathematics, and the natural sciences.<sup>22</sup> It gives rise to truths of the highest kind, absolute and universal truths about the world, called “demonstration[s].”<sup>23</sup> Practical knowledge, in contrast, is pursued through a form of analysis

<sup>19</sup> ARISTOTLE, *supra* note 12, bk. I, ch. 3, at 1358b. A third context discussed by Aristotle, but not relevant to our current analysis, is hortatory speech in praise of an honoree. *Id.* A fourth context, not addressed by Aristotle but relevant today, is appeals to the electorate.

<sup>20</sup> See *supra* note 17 and accompanying text.

<sup>21</sup> See ARISTOTLE, NICOMACHEAN ETHICS bk. VI, ch. 2, at 1139a, ch. 3, at 1139b, ch. 5, at 1140a, ch. 7, at 1141a–b (Martin Ostwald trans., Prentice Hall 1999) (discussing practical and theoretical wisdom); see also JOSEPH DUNNE, BACK TO THE ROUGH GROUND: ‘PHRONESIS’ AND ‘TECHNE’ IN MODERN PHILOSOPHY AND IN ARISTOTLE 237-74 (1993) (examining the distinctions that Aristotle makes between the two types of knowledge).

<sup>22</sup> ARISTOTLE, *supra* note 21, bk. VI, ch. 7, at 1141a–b; see also ARISTOTLE, *supra* note 12, bk. I, ch. 1, at 1354a (“Rhetoric is the counterpart of Dialectic.”).

<sup>23</sup> ARISTOTLE, POSTERIOR ANALYTICS, reprinted in PRIOR ANALYTICS AND POSTERIOR ANALYTICS 75, 76 (A.J. Jenkinson & G.R.G. Mure trans., Digireads.com 2006); see also Jonathan Barnes, *Aristotle's Theory of Demonstration*, 14 PHRONESIS 123, 123-24 (1969) (explaining Aristotle's meaning of a “demonstration”). The Pythagorean theorem is the classic example of a demonstration.

and communication called “rhetoric”—what we would today call advocacy. It is a much less secure form of knowledge, which consists of information that individuals acquire and use in living, producing, and interacting. It is the knowledge of ethics, politics, and human life generally.<sup>24</sup> As opposed to the certainty of theoretical knowledge, practical knowledge is contingent and contextual. In Aristotle’s words, it is at best “approximately” true.<sup>25</sup>

The challenges of practical knowledge identified by Aristotle give rise to the central difficulty of human action. An individual contemplating action can often make a reasonably accurate assessment of surrounding circumstances, but the dynamic and contingent nature of human life precludes anything approaching the certainty of a theoretical “demonstration.” Circumstances are always subject to change, information is always incomplete, and human action is always enveloped in some degree of uncertainty.

In the law courts and the deliberative assembly of ancient Athens, members of the polis confronted these challenges of practical knowledge. Sitting as judge and jury, they had to decide an accused’s guilt or innocence in the face of conflicting evidence, such as in the famous trial of Socrates.<sup>26</sup> Sitting as a legislative body, they had to make public policy decisions, such as whether to proceed to war or to rely on diplomacy, in the face of conflicting intelligence and recommendations.<sup>27</sup>

Aristotle explains that these and similar situations demand decision and action as a matter of community necessity. Decisions regarding guilt and innocence, and right and wrong, need to be made lest a dispute’s disruptive effects persist between parties and in the community at large.<sup>28</sup> Decisions regarding matters of war and peace and other matters of public policy need to be made lest the community fall into confusion and defeat. These decisions are unavoidable, for “the most essential of all . . . [is] a method of arriving at decisions about matters of expedience and justice as between one person and another.”

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<sup>24</sup> ARISTOTLE, *supra* note 21, bk. VI, ch. 8, at 1141b. Practical knowledge encompasses both practical wisdom, which is concerned with deliberation, choice, and action, and *techné* or art, which is concerned with creation and production. For a more thorough description, see DUNNE, *supra* note 21, at 237.

<sup>25</sup> ARISTOTLE, *supra* note 12, bk. I, ch. 1, at 1355a.

<sup>26</sup> *See id.* ch. 3, at 1358b (explaining how rhetoric is used in the judicial context).

<sup>27</sup> *See id.* (explaining how rhetoric is used in the political context).

<sup>28</sup> *See* AESCHYLUS, THE LIBATION BEARERS 60-69, *in* THE ORESTEIA OF AESCHYLUS 75 (Edward Wright Harle trans., Univ. Press of Am. 1994) (discussing Orestes’s submission to judgment for the murder of his mother at Apollo’s request).

er.”<sup>29</sup> At the same time, these decisions can be extremely difficult. Their consequences and implications always will depend on a multitude of unknown and unknowable factors, and they must be made on the basis of knowledge that is at best “approximately” true.<sup>30</sup>

Aristotle explains that rhetoric, which “exists to affect the giving of decisions,”<sup>31</sup> aids with this difficulty. Rhetoric mediates the epistemological and moral difficulties of human action and decision in the face of uncertainty. Significantly, it is only by understanding rhetoric’s social context that we can recognize this function. It is also only by understanding rhetoric’s social context that we can comprehend the distinctive means by which it fulfills this function. As we discuss below, these distinctive means necessarily diverge from the objective and disinterested analysis that would be appropriate in a dialectical pursuit of objective truth.

## 2. Our Litigation System

Many accounts of modern advocacy fail to recognize or account for the fact that the two defining features of rhetoric’s ancient context—uncertainty and social necessity for decision—are equally salient in our contemporary legal system. Instead, both positive and negative accounts of contemporary adversarial advocacy often assume the accessibility of objective truth in the litigation process. Sanguine proponents of our system argue that competition between partisan advocates is the most effective way of ensuring that the objective truth of a dispute will emerge.<sup>32</sup> Critics, meanwhile, contend that advocacy pays insufficient respect to, and may even obstruct realization of, objective truth.<sup>33</sup> For example, Professor Simon criticizes the “dominant view”

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<sup>29</sup> ARISTOTLE, THE POLITICS bk. VII, ch. 8, at 1328b (Trevor J. Saunders ed., T.A. Sinclair trans., Penguin Books rev. ed. 1992).

<sup>30</sup> See *supra* note 25 and accompanying text.

<sup>31</sup> ARISTOTLE, *supra* note 12, bk. I, ch. 15, at 1377b.

<sup>32</sup> These proponents contend that advocates’ responsibilities to investigate, discover, and present all relevant facts equip a tribunal to piece together the truth of a legal dispute. See, e.g., MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS § 2.10 (3d ed. 2004) (“Our constitutional adversary system is based in part on the premise that the adversary system is more effective in the search for truth.”); E. Allan Lind et al., *Discovery and Presentation of Evidence in Adversary and Non-adversary Proceedings*, 71 MICH. L. REV. 1129, 1141-43 (1973) (explaining why “adversary role structure seems most congruent with a public policy requiring overwhelming proof before a verdict can be rendered”).

<sup>33</sup> See Frankel, *supra* note 4, at 1032 (“[O]ur adversary system rates truth too low among the values that institutions of justice are meant to serve.”); Peter J. Riga, *The Nature of Truth and Dissent*, 40 AM. J. JURIS. 71, 76 (1995) (“How can we teach law stu-

of adversarial ethics for failing to account consciously and adequately for objective truth and justice.<sup>34</sup> And Professor Kronman criticizes the training lawyers receive in the technique of advocacy for encouraging “a kind of cynicism” regarding lawyers’ efforts to access the objective truth of a dispute.<sup>35</sup> Even Professor Markovits, who eschews advocacy’s truth-seeking function, describes advocacy as requiring lawyers to suppress their “correctly” and “properly” held views in favor of their clients’ views.<sup>36</sup> This characterization assumes that lawyers have access to “correct” and “proper” views in the first place.

The assumption that lawyers, judges, and jurors can access the objective truth of a litigated legal dispute is incorrect and unwarranted.<sup>37</sup> As an initial matter, and as Aristotle explains, uncertainty inheres in any context of “practical knowledge”—any context of human affairs.<sup>38</sup> This uncertainty is heightened in the subset of human relationships that deteriorate into litigation. Litigation signifies that the parties lack a shared understanding of the facts and differ over proper application of the law. The parties may agree on some facts—for example, who owned a particular car, who completed the accounting, or who was formally responsible for compliance measures—but, by definition, they will disagree on others. Similarly, they may agree on some aspects of applicable law but will necessarily disagree on others.

The engagement of lawyers will not dissipate the disagreement or clarify the objective truth of a dispute. At the outset, a lawyer receives

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dents to be morally sensitive to the truth as the highest value in the law and the legal system? . . . Too often truth is secondary to procedure, to winning, to partisanship.”); *see also infra* notes 34-37 (discussing the pursuit of objective truth in litigation).

<sup>34</sup> See SIMON, *supra* note 4, at 138 (arguing that “[l]awyers should take actions that, considering the relevant circumstances of the particular case, seem likely to promote justice”).

<sup>35</sup> Kronman, *supra* note 14, at 964.

<sup>36</sup> MARKOVITS, *supra* note 1, at 3-4.

<sup>37</sup> We do not dispute that there are such things as “true”—or at least undisputed—facts in human relationships, recognized by lawyers as well as everyone else. For example, George Washington was the first United States President and Barack Obama the most recent. Moreover, we recognize the notion of “true truth”—if understood as a sense of reality shared within a community—to be the foundation of noncontentious human relationships. But the role of the forensic advocate is inapposite to situations of social harmony. The forensic advocate engages in a very limited subset of human interactions that involve legal disputes, where the parties may agree upon some facts and norms but by definition do not agree on others.

<sup>38</sup> See ARISTOTLE, *supra* note 21, bk. I, ch. 3, at 1094b (arguing that just as precision is difficult to achieve in “manufactured articles,” so, too, is precision difficult to achieve in the search for knowledge); *see also* DUNNE, *supra* note 21, at 255 (“[E]lements of opportunity and luck . . . form a kind of penumbra around the clear light of rationality that the Socratic philosophers were trying to reveal.”).

only one side of the story, one version of the truth. It is a version that is filtered through a client's imperfect perceptions, biases, and recollections, but that will nevertheless condition the lawyer's understanding of the case going forward. This version will shape the mental framework through which the lawyer approaches the representation, the issues upon which she focuses, and the questions that she asks her clients and others.

As litigation progresses, a lawyer's initial impressions and understandings will frequently be complicated rather than clarified. Clients' memories will change under the force of additional information.<sup>39</sup> Verbalizations of the event will displace raw recollection and will become a part of the remembered experience itself.<sup>40</sup> Opposing counsel, meanwhile, will offer additional versions of the truth. Ultimately, there may be as many accounts of the underlying matter as there were participants. As we have noted elsewhere, individuals "have different understandings of what is happening in a transaction, different subsequent retrospections of what happened, and different interpretations of the significance of the event for their continuing lives."<sup>41</sup> Allegations, discovery, and disclosures may reduce discrepancies along some lines but will surely compound them along others.

Amid this uncertainty, lawyers will continually work to understand the facts that appear most likely true or at least "approximately" true. But the limits of human capacity still bind them, and they cannot be expected to discern an objective truth of the dispute.

Nor can members of the tribunal be expected to discern objective truth, notwithstanding their official responsibility to resolve the dispute. By design, judges and jurors have limited access to first-hand knowledge of the underlying matter. Those who have personal know-

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<sup>39</sup> See MARK PENDERGRAST, *VICTIMS OF MEMORY* 118 (1995) ("In remembering . . . people not only distort and interpret information from the past so as to make it fit what they know or believe in the present; they seem to add new information. The more distant the event, the more material the mind adds." (quoting JEREMY CAMPBELL, *THE IMPROBABLE MACHINE* 238 (1989))); James Lang, Note, *Hearsay and Relevancy Obstacles to the Admission of Composite Sketches in Criminal Trials*, 64 B.U. L. REV. 1101, 1136 n.189 (1984) (noting the assumption that observers of crimes will more accurately recall an event than will victims).

<sup>40</sup> See Lang, *supra* note 39, at 1116 n.89 ("Additionally, research has shown that during the course of the composite process the eyewitnesses' original recollection may be altered as replicated constructions are made.").

<sup>41</sup> Geoffrey C. Hazard, Jr., *The Client Fraud Problem as a Justinian Quartet: An Extended Analysis*, 25 HOFSTRA L. REV. 1041, 1047 (1997).

ledge are disqualified from participating.<sup>42</sup> Advocates who could be witnesses are generally disqualified as well.<sup>43</sup> The resulting distance between members of the tribunal and the events in question is designed to ensure objective, unbiased viewpoints. But the distance allows for significant distortion of the information that ultimately reaches the tribunal. This information necessarily comes through the accounts of participants who are available and willing to testify.<sup>44</sup> These accounts are filtered first through the witnesses' imperfect perceptions and recollections and then through the factfinder's evaluation of the witnesses' credibility and reliability.<sup>45</sup> Moreover, the admissibility of testimony and other forms of evidence is subject to constitutional doctrines and rules of evidence that sometimes prioritize the value of privacy over that of truthfulness. Examples include the exclusionary rule, which excludes otherwise relevant evidence that was obtained through an illegal search,<sup>46</sup> and evidentiary privileges, which allow individuals in certain confidential relationships to refuse to testify.<sup>47</sup>

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<sup>42</sup> See, e.g., *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 850, 867-68 (1988) (upholding a decision that the "appearance of impropriety" is sufficient to disqualify a judge who sat on the Board of Trustees of a party with interest in the litigation's outcome); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 815-19, 823-24 (1986) (holding that an Alabama Supreme Court justice who sued an insurance company should have been disqualified from participating in a case against another insurer, the outcome of which would possibly affect the justice's case); *Kirk v. Raymark Indus.*, 61 F.3d 147, 151-52 (3d Cir. 1995) (holding that the district court abused its discretion by failing to strike for cause jurors with preexisting biases against one party).

<sup>43</sup> See MODEL RULES OF PROF'L CONDUCT R. 3.7(a) (2009) (noting that, absent specific exceptions, a lawyer should not advocate in a trial where it is expected that she will be called as a witness); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 108(1)(a)-(b) (2000) (requiring lawyers who are "expected to testify" or whose "testimony would be material to establishing a claim or defense of the client" to refrain from participating in the proceedings, with some exceptions).

<sup>44</sup> See, e.g., Robert S. Summers, *Formal Legal Truth and Substantive Truth in Judicial Fact-Finding—Their Justified Divergence in Some Particular Cases*, 18 LAW & PHIL. 497, 504 (1999) (noting the limitations on available testimony and evidence imposed by the necessarily limited time frame of factfinding).

<sup>45</sup> See, e.g., Kenneth Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687, 699 (2004) ("[H]igh levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details."); Peter J. van Koppen & Shara K. Lochun, *Portraying Perpetrators: The Validity of Offender Descriptions by Witnesses*, 21 LAW & HUM. BEHAV. 661, 677 (1997) (finding that witnesses tend to identify "general" offender characteristics correctly but give "vague" descriptions overall).

<sup>46</sup> *Mapp v. Ohio*, 367 U.S. 643, 655-57 (1961).

<sup>47</sup> See *Trammel v. United States*, 445 U.S. 40, 51 (1980) (discussing various privileges); see also Summers, *supra* note 44, at 501 (discussing the spousal privilege). These evidentiary doctrines may impede the tribunal's efforts to discern truth, but they are thought to be justified by other, superseding values and policies.

On the basis of available and admissible evidence, jurors and judges piece together an understanding of the dispute that they believe is most likely true.<sup>48</sup> They determine whether a conclusion that something did or did not happen is supported by the relevant standard of proof, be it preponderance of the evidence, clear and convincing evidence, or evidence beyond a reasonable doubt.<sup>49</sup> Because of these different standards, the same evidence could lead to a finding of truthful fact in one case but not in another.<sup>50</sup>

In making these determinations, both jurors and judges strive to be objective in the sense of being disinterested. Jurors, as amateurs, may even view their job as finding objective truth. But the tribunal's determination of truth is never certain and absolute.<sup>51</sup> It is only "approximate," and this "approximate" truth is the basis on which the tribunal reaches judgment.

Just as in the law courts and deliberative assembly of ancient Athens, reaching judgment in our legal system is therefore constrained by unavoidable uncertainty. Also, as in its ancient context, our legal system requires reaching judgment as a matter of social necessity. Our judicial system exists, after all, to resolve disputes be-

As a result of the operation of this rule excluding evidence, the court may, in the end, fail to find the true facts. . . . But such resulting divergence between formal findings of fact and substantive truth can still be justified on policy or other grounds. It is simply not so that the exclusive business of a trial court in all disputed cases is to find the actual truth.

Summers, *supra* note 44, at 499-500.

<sup>48</sup> See ROBERT P. BURNS, A THEORY OF THE TRIAL 221 (1999) (defending the legitimacy of the trial by reference to its potential to "reveal, or at least converge on, the truth of a human action").

<sup>49</sup> Jurors are even instructed that

[u]nless and until outweighed by evidence to the contrary, [they] may find that official duty has been regularly performed, that private transactions have been fair and regular, that the ordinary course of business of employment has been followed, that things have happened according to the ordinary course of nature and the ordinary habits of life, and that the law has been obeyed.

3 KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL § 104.21 (5th ed. 2000).

<sup>50</sup> See Summers, *supra* note 44, at 506 ("[T]ruth varies with standards of proof, and standards of proof vary with what is at stake."). Facts against an accused in a criminal trial must be established beyond a reasonable doubt, while facts in a civil case must generally be established by a preponderance of the evidence. In certain civil cases where the stakes are higher, such as where punitive damages may be awarded, courts may require facts against the defendant to be established by clear and convincing evidence.

<sup>51</sup> See *id.* at 505 (noting "the risk of divergence between formal legal truth and substantive truth" emerging from a trial proceeding).

tween parties who cannot reach a mutually agreeable resolution themselves. As we will demonstrate in the next Section, the resulting challenges—the challenges of arriving at judgment on the basis of “approximate,” rather than objective, truth—justify the means and explain the ends of rhetoric in ancient Athens and of advocacy in our own litigation system.

## B. *Evaluating Advocacy in Context*

### 1. Ancient Athens

Aristotle elaborates on the techniques of rhetoric through a comparison with the techniques of dialectic. He explains that while both rely on logical argument, rhetoric alone relies on two additional means of persuasion: the audience’s perception of the speaker’s character and the audience’s emotional response to the speaker’s content and delivery.<sup>52</sup> Without an appreciation of rhetoric’s social context, one might view these additional elements of persuasion as manipulative and improper. With such an appreciation, however, one can see how these elements emerge as important aspects of rhetoric’s response to the task that the advocate and the tribunal confront. They are important ways in which a speaker helps an audience make a decision and take action in the absence of certain and objective truth.

Aristotle begins his comparison of the two forms of discourse by recognizing a similarity between the “demonstration” of dialectic and the practical conclusion of rhetoric. Both forms of analysis have a parallel logic,<sup>53</sup> proceeding by major premise, minor premise, and conclusion (deduction), or by reaching a conclusion through examples (induction).<sup>54</sup> The parallel structure follows. Dialectic involves syllogism, which relies on deductive reasoning, and induction, which relies on inductive reasoning.<sup>55</sup> Rhetoric involves enthymeme, which relies on deductive reasoning, and example, which relies on inductive reasoning.<sup>56</sup> This parallel structure is the basis of Aristotle’s assertion that

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<sup>52</sup> See *infra* note 62 and accompanying text.

<sup>53</sup> See ARISTOTLE, *supra* note 12, bk. I, ch. 2, at 1356b (“[J]ust as in dialectic there is induction on the one hand and syllogism or apparent syllogism on the other, so it is in rhetoric.”).

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

rhetoric is not a mere “knack” in emotional manipulation, as Plato had suggested.<sup>57</sup> It is a proper art—“the counterpart of [d]ialectic.”<sup>58</sup>

Beyond parallel logical structure, the two forms of analysis diverge. Aristotle explains that dialectic pursues the objective truth of a “demonstration” under no time pressure or compulsion to reach a conclusion. It does so in a purely intellectual and disinterested manner, proceeding through logical argument alone.<sup>59</sup>

Rhetoric, in contrast, pursues action and decision in response to a pressing practical problem. As a result, Aristotle explains, it cannot rely solely on the logically or deontologically “correct” arguments that are appropriate for dialectic.<sup>60</sup> The certainty of mind that carries a person beyond contemplation and into action results from engagement of the “whole” person, not just the intellect.<sup>61</sup> To inspire action, therefore, rhetoric must engage and appeal to all aspects of

<sup>57</sup> See *id.* ch. 1, at 1354a (arguing that “framers of the current treatises on rhetoric” have not fully considered the effort needed to acquire rhetorical skill); see also *supra* note 14 (discussing Plato’s criticism of rhetoric).

<sup>58</sup> ARISTOTLE, *supra* note 12, bk. I, ch. 1, at 1354a; see also William M.A. Grimaldi, *Studies in the Philosophy of Aristotle’s Rhetoric* (noting that Aristotle views rhetoric’s role as presenting dialectic to a listener “in such a way as to make accessible to the other the possibility of reasonable judgment”), in LANDMARK ESSAYS ON ARISTOTELIAN RHETORIC 15, 16-17 (Richard Leo Enos & Lois Peters Agnew eds., 1998).

<sup>59</sup> See ARISTOTLE, *supra* note 12, bk. I, ch. 1, at 1355a-b (discussing the differences between rhetoric and dialectic).

<sup>60</sup> See *id.* at 1355a (“For argument based on knowledge implies instruction, and there are people whom one cannot instruct.”); see also MARKOVITS, *supra* note 1, at 3-4 (discussing how lawyers employ tactics that may not adhere exactly to ethical rules but that are necessary to exploit advantages that their clients may hold in an adversarial proceeding).

<sup>61</sup> In *De Anima*, Aristotle refers to the emotional component of mental process as “appetite,” distinguishing it from reason and suggesting its energetic or impulsive character. ARISTOTLE, *DE ANIMA* bk. III, ch. 9, at 433a (R.D. Hicks trans., Cambridge ed. 1907). Various philosophers have subsequently and repeatedly affirmed this insight—that human action, as opposed to passive contemplation, requires more than purely intellectual mental processes. See, e.g., DAVID HUME, *A TREATISE OF HUMAN NATURE* bk. I, pt. IV, § V, at 238-39 (L.A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1978) (1739) (positing that while the utility of alternative actions can be evaluated through reason, decision among alternatives requires an act of the “passions”); FRIEDRICH NIETZSCHE, *THE WILL TO POWER* bk. II, § 142, at 91-92 (Walter Kaufmann ed., Walter Kaufmann & R.J. Hollingdale trans., Vintage Books 1968) (referring to the mental processes that carry a person into action as “the will to power”); BENEDICTUS DE SPINOZA, *THE ETHICS* pt. III, prop. 7 (G.H.R. Parkinson ed. & trans., Everyman Classics 1989) (1677) (referring to this element of mental processes as “conatus”). Modern brain research supports, and to some extent explains, the phenomena that these philosophers identified. See, e.g., ANTONIO R. DAMASIO, *DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN*, at xi-xiii, 36-51 (1994) (concluding that the brain functions differently and implicates distinct mental processes in bringing forth the psychological certitude necessary for action, as opposed to passive thought).

the audience's thought processes. Aristotle explains that it does so through three distinct forms of persuasion: logical argument (*logos*), the character of the speaker (*ethos*), and emotional appeal to the audience (*pathos*).<sup>62</sup>

Aristotle recognizes that rhetoric's emotional appeal risks dangerous distraction.<sup>63</sup> But he explains that the danger can be avoided if the emotional appeal—*pathos*—is properly employed with and constrained by the other elements of persuasion—*logos* and *ethos*.<sup>64</sup> When a speaker employs the three elements together, rhetoric engages, but does not dominate, the audience's emotions.<sup>65</sup>

As for the proper balance between these three elements of persuasion, Aristotle explains that it varies by context. It depends on the matter to be resolved and the audience to be persuaded. For example, a judge or jury determining the guilt or innocence of an accused will not be personally invested in the outcome of a decision and may therefore be less likely to detect and guard against inappropriate emotional appeal than will members of a legislative body, who will be personally affected by their decisions regarding public policy issues. Based on these observations, Aristotle concludes that rules prohibiting improper emotional tactics are highly desirable in court, but unnecessary in the assembly.<sup>66</sup>

Aristotle recognizes that there are ethical issues in the practice of rhetoric, but he locates them outside of the core act of persuasion. Emphasizing that it is a speaker's use of rhetoric in particular ways and to particular ends that determines its ethical character,<sup>67</sup> he explains that rhetoric can, but must not, be used "[to] make people believe what is wrong."<sup>68</sup> He further explains that rhetoric's possible

<sup>62</sup> ARISTOTLE, *supra* note 12, bk. I, ch. 2, at 1356a. Aristotle explains that "before some audiences not even the possession of the exactest knowledge will make it easy for what we say to produce conviction," *id.* ch. 1, at 1355a, because purely intellectual argument, no matter how "exact" and "correct," is insufficient to inspire decisionmaking and action.

<sup>63</sup> See *id.* at 1354a (analogizing the dangers of appealing to the emotions of judges to "warp[ing] a carpenter's rule before using it").

<sup>64</sup> See *id.* ch. 2, at 1356a (describing the "three means of effecting persuasion" and the critical role of each).

<sup>65</sup> *Id.*

<sup>66</sup> See *id.* ch. 1, at 1355a.

<sup>67</sup> This is surely correct. It would not be unethical to persuade a child to dress warmly after hearing a threatening weather report or to clear a building upon a credible threat of fire. But it could be unethical to persuade someone to clear a crowded building for false or exploitative reasons.

<sup>68</sup> ARISTOTLE, *supra* note 12, bk. I, ch.1, at 1355a.

abuse is no argument against its proper use.<sup>69</sup> After all, many “things that are most useful” offer great benefit when used properly, but great harm when not.<sup>70</sup>

## 2. Our Litigation System

Aristotle’s insights form the basis of a sound understanding of forensic advocacy in our contemporary legal system. They also provide an effective response to critics who condemn advocacy as paying insufficient respect to the goal and value of truth. To develop this point, we examine the role and function of the lawyer-advocate in its contemporary social context—more specifically, in addressing the challenges of “practical knowledge” and “approximate truth” inherent in the litigation process. We begin at a preliminary stage, prior to the involvement of lawyers, when individuals experience and understand an event as real and as wrong. In the useful formula of Professors Felstiner, Abel, and Sarat, individuals engage in “naming” (verbalizing the event), “blaming” (subjectively fixing responsibility on some person or institution), and then “claiming” (asserting that someone else is legally responsible).<sup>71</sup> In “claiming,” most individuals verbalize their grievances in lay terminology.<sup>72</sup> The affected individuals frequently incorporate hearsay, irrelevancies, and what lawyers would label mere conclusions. Would-be defendants respond in the first instance in similar fashion.

If the tribunal faced the daunting task of imposing order on these lay accounts alone, administering justice would be a drawn-out and paralyzing affair. As illustrated by the petitions of pro se litigants, lay accounts hold little meaning in the language and categories of legal thought and often remain legally incomprehensible.<sup>73</sup> Without translation to the common language and standards of governing law, the tribunal would have difficulty maintaining objectivity in comparing and reconciling divergent accounts of the same event or transaction.<sup>74</sup>

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<sup>69</sup> *Id.* at 1355b.

<sup>70</sup> *Id.*

<sup>71</sup> William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631, 635-36 (1980-81).

<sup>72</sup> *Id.* at 647.

<sup>73</sup> In *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), for example, the court discussed the difficulty that the pro se litigant would have winning his case without the assistance of an attorney in formulating a legal claim. *Id.* at 775-76. As a result, many federal courts have staff attorney positions devoted to pro se matters.

<sup>74</sup> As discussed above, the nature of human perception and memory ensures that the first-person accounts of various parties to a matter will diverge such that there will

As Lon Fuller and John Randall explained decades ago in defending the adversary system,

any arbiter who attempts to decide a dispute without the aid of partisan advocacy . . . must undertake, not only the role of judge, but that of representative for both of the litigants. Each of these roles must be played to the full without being muted by qualifications derived from the others. When he is developing for each side the most effective statement of its case, the arbiter must put aside his neutrality and permit himself to be moved by a sympathetic identification sufficiently intense to draw from his mind all that it is capable of giving,—in analysis, patience and creative power. When he resumes his neutral position, he must be able to view with distrust the fruits of this identification and be ready to reject the products of his own best mental efforts.<sup>75</sup>

Achieving objectivity in that context exceeds the limits of human capacity.

Generally, however, the tribunal does not confront its task alone. Most individuals who pursue litigation engage an advocate,<sup>76</sup> and the advocate facilitates the process through which the tribunal reconciles the conflicting accounts. The advocate does so by translating the client's first-hand account into a legal narrative that presents the tribunal with a view of how the "truth" of the matter appears from a particular perspective. The advocate acts as an arbitrageur—or learned intermediary—between versions of truth. She receives one version from the client and transmits another version, which holds greater value and meaning in legal currency, to other actors in the legal system.<sup>77</sup>

The advocate accomplishes this translation by bringing to bear empathy with both the client and the tribunal. Empathy with the client allows the lawyer to offer the client confidence and strength for

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likely be as many first-hand accounts of an event as there were participants. *See supra* notes 39–41 and accompanying text.

<sup>75</sup> Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1160 (1958).

<sup>76</sup> Of course, exercises in "naming," "blaming," and "claiming" do not usually result in litigation, as many individuals lack connections, resources, or motivation to pursue their grievances.

<sup>77</sup> Professor Markovits appears to agree with this position. *See* MARKOVITS, *supra* note 1, at 188–93 (describing the effectiveness of transitioning language from that provided by the client to the new formulation of the lawyer); *see also* Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 457 (2010) ("[P]articipation in the legal process . . . fundamentally reconstitutes [disputants' claims]. It does so by transforming brute demands into assertions of right . . .").

the ordeal of litigation.<sup>78</sup> It also allows the lawyer to comprehend and internalize the client's position and interests, so as to produce a narrative that is respectful of those interests. The narrative will not necessarily track the client's account, however. In some cases, the value of the narrative will lie in a departure from the client's account. For example, a lawyer in a criminal case may recommend that a client assert the privilege against self-incrimination, while the client would explain and defend her conduct defiantly. A lawyer in a civil case may recommend that a client admit liability and contest only the issue of damages, although the client considers herself free of any fault.

In addition to empathizing with the client, the advocate will also empathize with the task and the perspective of the tribunal. This allows her to comprehend the relative persuasiveness of various presentations of the evidence and to construct a narrative that is most likely to appear true to the judge and jury. In doing so, the advocate remains cognizant that a decision requires engagement of the "whole person," and not just the intellect.<sup>79</sup> She also remains cognizant that many cases, particularly those that reach a jury, are "rationally intractable."<sup>80</sup> She therefore makes an emotional appeal that equates to Aristotle's *pathos*.

The advocate is not free, however, to construct any narrative that might appeal to her audience's emotional processes. Instead, she is constrained by requirements that the narrative be based on a plausible version of the evidence and that it be informed by relevant substantive and procedural law. These are logical constraints that equate to Aristotle's *logos*. She is also constrained by the requirements of the law governing lawyers and the norms of the legal profession. These are ethical constraints that equate to Aristotle's *ethos*. In this way, and

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<sup>78</sup> For a discussion that may apply to the interpersonal and sympathetic nature of the attorney-client relationship, see Darien Shanske, *Revitalizing Aristotle's Doctrine of Equity*, 4 LAW, CULTURE & THE HUMAN. 352 (2008). Shanske offers an insightful discussion of German philosopher Heidegger's views on *Rhetoric*, applicable here. *Id.* at 364-73. Heidegger's concept of "being" can be achieved, at least in part, through direct interpersonal relationships in which rhetoric is employed as a means of communication and through which a sense of community is achieved. *Id.* The attorney-client relationship can be viewed as one such relationship.

<sup>79</sup> See *supra* notes 60-62 and accompanying text.

<sup>80</sup> Hazard, *supra* note 41, at 1053. Similarly, as Professor Jerome Michael suggested, "to say that I can decide an issue of fact reasonably either way is to say, I submit, that I cannot, by the exercise of reason, decide the question. That means that the issue which we typically submit to juries is an issue which the jury cannot decide by the exercise of its reason." Jerome Michael, *The Basic Rules of Pleading*, 5 REC. OF THE ASS'N OF THE B. OF THE CITY OF N.Y. 175, 199-200 (1950).

just as Aristotle suggested, the three forms of rhetorical persuasion—*logos*, *ethos*, and *pathos*—work together and constrain one another.<sup>81</sup>

Informed by all three forms of persuasion, the advocate's narrative will ease the tribunal's burden in arriving at an accepted and authoritative truth of the dispute. In most cases, the parties will settle before trial, relieving the tribunal of this burden. But even in cases that settle, the advocate constructs her legal narrative in anticipation of trial.

In cases that proceed to trial, the tribunal will consider the various perspectives of conflicting narratives and will synthesize them into a version that appears most likely and "approximately" true. In civil law terminology, this legally constructed but politically authoritative version of truth is called *verita processuale*—"procedural truth."<sup>82</sup> Procedural truth lacks the certainty of Aristotle's theoretical truth, but it is the authoritative basis for legal judgment. It is therefore pivotal to the administration of justice in our legal system.

Many critics contend that in facilitating the construction of procedural truth, advocates show insufficient respect for objective truth. These critics base their arguments on two realities of our legal system. First, the law governing lawyers does not permit advocates to impose their own views of truth and justice on their clients.<sup>83</sup> As a result, critics argue, lawyers are impeded in any attempt to constrain seeming perversions of the truth by their clients. Second, lawyers sometimes employ rules of procedure and professional responsibility that prioritize values other than truthfulness, such as confidentiality and privacy interests.<sup>84</sup> We accept these realities, but we do not think that they prove the critics' conclusion that lawyers disrespect the truth. We note that there are many ways in which an advocate can dissuade a client from pursuing an obviously untrue story without reference to the advocate's own beliefs. She can, for example, explain to the client

<sup>81</sup> Cf. ROBERT P. BURNS, A THEORY OF THE TRIAL 73 (1999) ("The rules of the trial are Plato's revenge on the rhetoricians."); James Boyd White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 850 (1983) ("[T]he modern lawyer and law teacher . . . in fact are rhetoricians very much as Plato defines them.").

<sup>82</sup> GEOFFREY C. HAZARD, JR. & ANGELO DONDI, LEGAL ETHICS 76 (2004).

<sup>83</sup> The principles of loyalty to the client and client control over the objectives of representation preclude the lawyer from doing so. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued."). For discussion of this argument, see, for example, MARKOVITS, *supra* note 1, at 34.

<sup>84</sup> The exclusionary rule and the evidentiary privileges, for example, prioritize privacy interests over truthfulness. See *supra* note 47 and accompanying text. For further discussion of evidentiary issues, see, for example, MARKOVITS, *supra* note 1, at 51-52.

that the story will conflict with those of other witnesses and will not likely hold up on cross examination. And the procedural devices that protect and advance interests other than the truth do not necessarily express or reflect active resistance to the truth. Rather, they express a recognition of the limitations imposed on a legal system that can administer only justice *processuale*.

Throughout the litigation process, advocates constantly and continually engage the truth of a matter, albeit an “approximate” version. Upon meeting a potential client, advocates evaluate the persuasiveness of the client’s account in order to determine whether to accept or refuse the engagement. Under cover of attorney-client privilege, advocates assess their clients’ credibility and confront their clients with difficulties or implausibilities in their stories. In discovery, advocates seek to unearth favorable evidence and take account of adverse evidence. And throughout litigation, advocates continually weigh the degree to which various pieces of evidence seem “approximately” true, both individually and in the aggregate. They remain cognizant that undisputed truth generally signifies an end to litigation through settlement.<sup>85</sup>

That advocates pursue and facilitate “approximate,” rather than objective, truth does not reflect disrespect for the goal and value of truthfulness. Rather, this process reflects acceptance of and engagement with the social contingency of a legal dispute. It also reflects acceptance of the limits of human knowledge and understanding—a humility that expresses great respect for the nature and challenges of truth in our litigation process.

If advocacy operated in a world of accessible and objective truth, adversarial technique might sometimes, if not always, be characterized as unethical. As Aristotle recognizes, it is unethical to persuade someone of that which is wrong, and in a world of easily accessible objective truth, it would always be possible to determine what was “wrong.” But our legal system does not have access to objective truth and must resolve disputes on the basis of truths that are socially contingent and ultimately uncertain. When analyzed and evaluated in

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<sup>85</sup> While there are many reasons behind the high rate of settlement in our legal system, recognition of and respect for undisputed truth is undoubtedly a significant factor leading many parties to settle. Cf. Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339-40 (1994) (discussing the difference between using the term “settle” to describe cases that “do not go to trial” and to describe cases that are “resolved solely by agreement between the parties without any decision by an authoritative decisionmaker”).

this light, advocacy emerges as an ethically positive and valuable means by which our legal system accesses truths that are persuasive enough to facilitate judgment.

## II. ETHICAL ADVOCACY IN THE REAL WORLD

We do not dispute that adversarial advocacy can be and sometimes is used in improper ways and to improper ends. In this Part, we address two of the deep and prominent flaws in our legal system—lawyer misconduct and unequal access to legal services. We argue, however, that these are problems of practice that do not detract from the ethically positive nature of advocacy’s core function. As a result, they are not properly addressed through many critics’ proposals of reconstituting the role of the advocate or the structure of our system.<sup>86</sup> Rather, they are properly addressed through extrinsic regulatory controls on practice, primarily in the form of the law governing lawyers and the rules of evidence and procedure. Specific reform proposals are outside of the scope of this Article and are a task for future work. Below, we lay the groundwork by noting a few proposals deserving of extended study.

### A. Lawyer Misconduct

Lawyer misconduct generally arises in two situations: where ethical rules are ambiguous and where enforcement is weak. The first situation is common, given that many rules of practice are stated in highly general terms. For example, the ABA’s Model Rules of Professional Conduct instruct that representation must be “competent,”<sup>87</sup> advice must be “candid,”<sup>88</sup> and fees must not be “unreasonable.”<sup>89</sup> Even rules addressing more specific practice situations are often stated in general terms. Examples include the rules prohibiting delay for the sole purpose of disadvantaging an opponent,<sup>90</sup> cross-examination for the sole purpose of embarrassing a witness,<sup>91</sup> and abuse of prosecutorial discretion.<sup>92</sup>

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<sup>86</sup> See *supra* notes 4-8 and accompanying text.

<sup>87</sup> MODEL RULES OF PROF’L CONDUCT R. 1.1 (2009).

<sup>88</sup> *Id.* R. 2.1.

<sup>89</sup> *Id.* R. 1.5.

<sup>90</sup> *Id.* R. 3.2 cmt. 1.

<sup>91</sup> See *id.* R. 4.4(a) (“In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass . . . a third person . . .”).

<sup>92</sup> *Id.* R. 3.8.

Formulating rules in general terms has advantages. It anticipates application of the rules to a diverse range of practice situations and offers desired flexibility.<sup>93</sup> At the same time, however, such an approach creates problematic gaps in guidance.<sup>94</sup> For example, the distinction between a reasonable and an unreasonable fee is clear only at the extremes,<sup>95</sup> leaving much room for questionable and undesirable billing practices. The ambiguity is particularly stark, and particularly problematic, in the case of rules requiring reporting of lawyer misconduct. Model Rule 8.3 requires lawyers to report incidents of misconduct of which they “know[]” and which “raise[] a substantial question as to [a] lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”<sup>96</sup> Because there is little consensus as to what level of knowledge triggers the Rule’s application and what constitutes a reportable offense, few lawyers report peers’ questionable conduct.<sup>97</sup> The problem is exacerbated by the embittering and often ineffective nature of the disciplinary process. The process leads many lawyers to believe that reporting misconduct by other lawyers will do little but harm their own reputations and relationships.<sup>98</sup>

A second and equally pervasive situation in which misconduct goes unaddressed is where enforcement is weak. As an initial matter, few reports of misconduct ever reach the relevant disciplinary authori-

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<sup>93</sup> For a discussion of the tension between the advantages and disadvantages of breadth and specificity in ethical rules, see Carol Rice Andrews, *Highway 101: Lessons in Legal Ethics that We Can Learn on the Road*, 15 GEO. J. LEGAL ETHICS 95, 110 (2001).

<sup>94</sup> See John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 974 (1984) (theorizing that uncertainty of legal outcomes may create an incentive structure that favors socially suboptimal behavior); Sean Keveney, Note, *The Dishonesty Rule: A Proposal for Reform*, 81 TEX. L. REV. 381, 382 (2002) (noting that inconsistently applied rules of law fail to contribute to social order and “invite[] the exercise of broad judicial discretion”).

<sup>95</sup> Cf. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE 159 (2000) (“What constitutes an ‘incompetent’ performance or ‘unreasonable’ fee is difficult to assess except at the extremes, and lawyers usually have no incentive to gather the relevant information.”).

<sup>96</sup> MODEL RULES OF PROF’L CONDUCT R. 8.3(a) (2009).

<sup>97</sup> See Arthur F. Greenbaum, *The Attorney’s Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 280-82 (2003) (discussing the ambiguity of Model Rule 8.3); Nikki A. Ott & Heather F. Newton, Note, *A Current Look at Model Rule 8.3: How Is It Used and What Are Courts Doing About It?*, 16 GEO. J. LEGAL ETHICS 747, 749-54 (2003) (discussing reasons that lawyers are hesitant whistleblowers).

<sup>98</sup> See Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175, 176 (1999) (“Attorneys are troubled by mandatory reporting requirements because of a general professional ambivalence toward those who report others’ wrongdoing to appropriate authorities.”).

ties.<sup>99</sup> Lawyers rarely report each others' misconduct. Judges are similarly reluctant to refer complaints to disciplinary authorities or to exercise inherent powers to sanction abuse.<sup>100</sup> Clients, meanwhile, are an unreliable source of information regarding misconduct.<sup>101</sup> They frequently associate an undesirable outcome with bad lawyering, failing to distinguish between the merits of a claim and the appropriateness of a lawyer's conduct.

Of the small number of lawyer misconduct reports that reach the relevant disciplinary bodies, an even smaller number results in disciplinary action. In 2002, approximately five percent of complaints were found to "warrant formal charges," and only four percent of complaints led to some form of disciplinary action.<sup>102</sup> Further, in a large proportion of complaints that resulted in disciplinary action, that action consisted only of private sanctions or reprimands; only twenty percent of attorneys against whom formal charges were filed were disbarred as a result.<sup>103</sup> Part of the problem is underfunding and understaffing of disciplinary agencies. Another part of the problem is excessively close ties between disciplinary agencies and the organized bar, raising suspicions that disciplinary boards prioritize the profession's interests over the public interest.

In the resulting gaps in guidance and enforcement, the possibility of misconduct survives. And because of financial and other pressures

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<sup>99</sup> See Michael J. Burwick, *You Dirty Rat!! Model Rule 8.3 and Mandatory Reporting of Attorney Misconduct*, 8 GEO J. LEGAL ETHICS 137, 143 (1994) ("[Model Rule 8.3] has been viewed by the profession as a Pandora's box which attorneys have been reluctant to open.").

<sup>100</sup> In *Golden Eagle Distributing Corporation v. Burroughs Corporation*, 103 F.R.D. 124 (N.D. Cal. 1984), the district court found that when local counsel did not "active[ly] participat[e] in the preparation or decision to file a paper" that led to Rule 11 sanctions for its authors, local counsel should not receive "sanctions other than criticism for their apparent neglect." *Id.* at 125 n.1. Moreover, while this court did impose Rule 11 sanctions on the primary firm, such sanctions were later reversed by the Ninth Circuit. *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986).

<sup>101</sup> See RHODE, *supra* note 95, at 159 ("Clients frequently lack sufficient information or incentives to file grievances."); DEBORAH L. RHODE & GEOFFREY C. HAZARD, JR., PROFESSIONAL RESPONSIBILITY AND REGULATION 264-65 (2d ed. 2007) (explaining that clients are rarely motivated to "initiate disciplinary proceedings" due to the nature of the system).

<sup>102</sup> GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 1142-43 (4th ed. 2005) (citing ABA CTR. FOR PROF'L RESPONSIBILITY, 2002 ABA SURVEY ON LAWYER DISCIPLINE SYSTEMS (S.O.L.D.), at Chart I, available at [http://www.abanet.org/cpr/discipline/sold/toc\\_2002.html](http://www.abanet.org/cpr/discipline/sold/toc_2002.html) (follow "Chart I" hyperlink)).

<sup>103</sup> *Id.* at 1143 (citing ABA CTR. FOR PROF'L RESPONSIBILITY, *supra* note 102, at Charts I and II).

for persuasion at all costs, the possibility often becomes a probability.<sup>104</sup> But lawyer misconduct is neither inevitable nor preordained by the structure of our legal system. If it were, we would expect misconduct to be universal. But this is not the case. Many lawyers conduct themselves appropriately and ethically, even in our underenforced system.

Nevertheless, many critics argue that the only way to address the problem of lawyer misconduct in our legal system is to reconstitute the system and the constituent role of the advocate.<sup>105</sup> They would do so by shifting the relevant regulatory regime from one that relies on extrinsic controls of lawyer conduct to one that relies on intrinsic conditioning of lawyers' morals.<sup>106</sup> We find this approach misguided for a number of reasons.

First, if the critics' causal assumption is incorrect—if the structure of our system is not the root cause of problems in the practice of advocacy—adoption of their proposals would not remedy the problems of lawyer misconduct and would arguably lead to more egregious abuses. To the extent the critics would abandon extrinsic regulatory controls in favor of intrinsic moral conditioning, adoption of their proposals would eliminate an important check on blatant misconduct and create an intolerable risk of abuse.

Second, the critics' approach would jeopardize fundamental individual rights and constitutional protections.<sup>107</sup> It would qualify the duties of confidentiality and loyalty. This qualification, in turn, could interfere with clients' fundamental interests in autonomy, dignity, and privacy. In the criminal context, it could compromise the right to effective assistance of counsel, the right against self-incrimination, and the presumption of innocence.<sup>108</sup>

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<sup>104</sup> Fee agreements often contribute to this problem.

That is one of the great disadvantages of our adversary system: fees are mostly dependent on whether lawyers win or lose for their clients. This heavy emphasis on winning produces its own subtle corruption as they appeal to every procedural trick to delay, discourage, hide, obfuscate, and finally destroy the truth of the matter.

Peter J. Riga, *The Nature of Truth and Dissent*, 40 AM. J. JURIS. 71, 75-76 (1995).

<sup>105</sup> See *supra* notes 4-8 and accompanying text.

<sup>106</sup> *Id.*

<sup>107</sup> See, e.g., MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 2-3 (1975) (explaining the significance of the criminal defendant's constitutionally protected liberties and the role of the defense attorney as protector of those liberties, even when they conflict with the truth-seeking function of the trial).

<sup>108</sup> As one of us has noted elsewhere:

The consequences of an alternative model are readily apparent in many totali-

Third, adoption of the critics' approach could decrease the perceived legitimacy of our legal system. Most litigants' perceptions of justice turn more on the opportunity to be heard in court pursuant to fair and predictable procedures than on the substantive outcome of a case.<sup>109</sup> And to most litigants, representation by a loyal advocate is an indispensable feature of a fair hearing.

Finally, in blaming the system for lawyer misconduct, critics who propose an intrinsic moral solution ironically imply a lack of moral agency among lawyers. Some lawyers undoubtedly hide behind professional obligations of zealous advocacy while engaging in questionable conduct. But scholarly accounts that accept this excuse give it unfortunate credence. Such accounts also fail to recognize the highly complex nature of the moral agency of the advocate, accounting as it does for the necessity of proceeding on the basis of available evidence and approximate truth.

The critics' approach diverts attention from what we believe to be the proper focus of reform efforts—the extrinsic regulatory controls of procedural rules, rules of evidence, and the law governing lawyers. These controls seek to set the moral risk of the lawyer-advocate's function at a socially accepted level by counterbalancing economic pressures on lawyer-advocates to engage in questionable or improper conduct. To the extent that lawyers are exhibiting the dishonesty and deceit that critics allege, the current risk level may be too high. The proper response, we would suggest, is sustained attention to specific and incremental reform efforts. For purposes of illustration, we briefly note a few proposals regarding the law governing lawyers.

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tarian countries that lack an adversarial process and an independent profession. Where defense lawyers' role is to "serve justice," rather than their clients, what passes for "justice" often is simply deference to prosecutorial authority. . . . In the long run, providing adversarial protections for individuals who are guilty also protects those who are not.

RHODE & HAZARD, *supra* note 101, at 57.

<sup>109</sup> See E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 64-67 (1988) (summarizing studies indicating that litigants evaluate legal outcomes based on whether they considered the proceedings to be fair). In large part, this may be why certain arbitration programs have been highly successful. See, e.g., NAT'L CTR. FOR STATE COURTS, CIVIL PROGRAMS IN THE PHILADELPHIA COURT OF COMMON PLEAS: FINAL REPORT, at iv-v (2004), available at <http://courts.phila.gov/pdf/report/NSCS-Civil-Final-Report.pdf> (outlining the success of Philadelphia's compulsory arbitration program); see also COMPULSORY ARBITRATION CTR., CIVIL ADMINISTRATION AT A GLANCE 2005-2006, at 1, <http://courts.phila.gov/pdf/manuals/civil-trial/compulsory-arbitration-center.pdf> (discussing Philadelphia's arbitration process).

With respect to the problem of ambiguous ethical rules that offer insufficient guidance, one approach would be to give greater and more detailed attention to specific fields of practice through standards of good practice. The American College of Trust and Estate Counsel has issued the ACTEC Commentaries, which offer ethical guidance specific to trusts and estates practice.<sup>110</sup> The American Academy of Matrimonial Lawyers has adopted similar standards for family law practice.<sup>111</sup> Alternatively, more context-specific guidance could be given in the Rules of Professional Conduct. We have elsewhere proposed a revised, context-specific no-contact rule to replace existing Model Rule 4.2.<sup>112</sup> Following this approach, we could address the critics' central concern—that some lawyers seem to show insufficient respect for the truth—by offering rules of candor that give more specific guidance in specific contexts.

With respect to the problem of ineffective enforcement—against, for example, lawyers engaged in intentional malfeasance—one proposal, frequently advanced, would be to increase public reporting by increasing public information regarding the disciplinary process and the profession's ethical standards. Some commentators have proposed establishing a clearinghouse of information regarding lawyers that would include performance records, malpractice coverage, and history of professional discipline.<sup>113</sup> This approach, however, does not

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<sup>110</sup> AM. COLL. OF TRUST AND ESTATE COUNSEL FOUND., COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT (4th ed. 2006).

<sup>111</sup> Am. Acad. of Matrimonial Lawyers, *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings (with Commentary)*, 13 J. AM. ACAD. MATRIMONIAL L. 1 (1995).

<sup>112</sup> See generally Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward a Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797 (2009). Model Rule 4.2 generally prohibits a lawyer from “communicat[ing] about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter.” MODEL RULES OF PROF'L CONDUCT R. 4.2 (2009). We observed that proper application of this rule appears quite different in a criminal matter (for example, where a prosecutor inappropriately approaches a defendant who has invoked his constitutional right to counsel), Hazard & Irwin, *supra*, at 816-18, than in a family matter (for example, where a lawyer seeks to communicate directly and quickly with a represented spouse concerning a potential threat to his or her safety), *id.* at 829-30. Accordingly, we proposed a revised rule that specified proper application in various contexts. *Id.* at 848-51. A similar analysis applies to many other rules, and a potentially fruitful approach would be to create context-specific standards.

<sup>113</sup> See, e.g., RHODE & HAZARD, *supra* note 101, at 267 (advocating for “data banks and toll-free hotlines that would provide information about judicial sanctions, disciplinary actions, and malpractice judgments”); Steven K. Berenson, *Is It Time for Lawyer Profiles?*, 70 FORDHAM L. REV. 645, 690 (2001) (“[E]ven if the time for lawyer profiles isn't this moment, that time should be coming relatively soon.”); cf. RHODE, *supra* note

address the central problem of client reporting, which is that relatively few clients distinguish between the desirability of an outcome and the appropriateness of a lawyer's conduct. A better approach may be to rely on independent government supervision and regulation of lawyer conduct. Particularly in states where disciplinary authorities have close ties to the organized bar, promising reforms would focus on increasing both independence and accountability.<sup>114</sup>

### B. *Unequal Access to Competent Legal Services*

A second prominent difficulty with the practice of advocacy in our legal system stems from unequal access to legal services. As Professor Deborah Rhode has summarized:

Th[e] [conventional] model presupposes adversaries with roughly equal incentives, resources, capabilities, and access to relevant information. But those conditions are more the exception than the rule in a society that tolerates vast disparities in wealth, high litigation costs, and grossly inadequate access to legal assistance. . . . In law, as in life, the haves generally come out ahead.<sup>115</sup>

When opposing parties are represented by advocates of significantly divergent skill, that divergence may dictate the case's outcome. As one of us has commented elsewhere, "[t]he blunt truth is that some decisions by the courts result from the fact that the advocate for one side was more clever, more steadfast, more patient, more diligent, or simply had a better day than the opponent."<sup>116</sup> Problems of divergent skill are compounded when opposing parties have unequal resources with which to fund representation.<sup>117</sup> At one end of the spectrum are indi-

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95, at 163 (concluding that the ABA's rejection of a proposal for increased public disclosure of disciplinary complaints was motivated by lawyers' self-interest).

<sup>114</sup> See RHODE, *supra* note 95, at 162 (arguing that a commission under control of a state's supreme court but "independent of the organized bar" would help produce a "regulatory structure more responsive to the public interest than the prevailing system"); Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1185-1204 (2003) (discussing the independence of state courts).

<sup>115</sup> RHODE, *supra* note 95, at 55-56.

<sup>116</sup> HAZARD & DONDI, *supra* note 82, at 69; see also Helen B. Kim, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to Be Heard*, 96 YALE L.J. 1641, 1644 (1987) (recognizing that the adversarial system is prone to unfairness for those who do not "assert effectively legal rights").

<sup>117</sup> See, e.g., Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 U. BALT. L. REV. 59, 70-72 (2007) (citing statistics showing that pro se litigants are far less likely to file motions, request discovery, receive continuances, and raise substantive claims and defenses than are litigants represented

vidual clients who cannot afford a lawyer at all. At the other end of the spectrum are sophisticated and wealthy clients who have the resources to “play for the rules.” It may be relatively rare that the opposing ends of the spectrum meet in a single case, but it is not rare to find a significant imbalance of power and resources between opposing litigants.<sup>118</sup>

Similar to the problem of lawyer misconduct, unequal access to legal services is not a challenge that originates within the structure of our legal system.<sup>119</sup> Rather, it is a product of power and wealth disparities that pervade society at large. Our legal system cannot resolve these disparities, but it can mitigate their impact by increasing the availability of low-or-no-cost legal services. One approach, supported by many commentators, is to establish a right to counsel in civil cases.<sup>120</sup> Implementing such a right faces significant obstacles, however, such as funding and determining to which cases the right would apply.<sup>121</sup> More incremental approaches may therefore be more realistic and effective. Legal services could be unbundled so that lawyers could offer targeted, limited representation,<sup>122</sup> or unauthorized practice of

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by lawyers); Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL’Y REV. 503, 506 (1998) (arguing in favor of a right to counsel “whenever access to the justice system is warranted” because of the high costs to society of unfair proceedings stemming from unequal representation).

<sup>118</sup> See generally Marc Galanter, *Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974) (analyzing the advantages enjoyed by “repeat players”).

<sup>119</sup> Cf. MARKOVITS, *supra* note 1, at 201 n.\*, 202-03 (arguing that eliminating partisanship advocacy would be an ineffective response to the problems of unequal distribution of legal services).

<sup>120</sup> See Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 LOY. U. CHI. L.J. 363, 379-80, 380 n.83 (2005) (citing commentators who have made this argument); Joan Grace Ritchey, *Limits on Justice: The United States’ Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U.L.Q. 317, 318 (2001) (arguing that the United States should “follow the lead” of other industrialized societies that are more protective of the right to counsel).

<sup>121</sup> Proponents respond that these problems of implementation should not be deemed fatal. They note that the same problems have been overcome in the criminal context, and they argue that there is often as much at stake in civil cases as in criminal cases. See, e.g., Gardner, *supra* note 117, at 73 (suggesting that civil matters, such as homelessness from eviction or loss of custody of a child, may present greater stakes for the indigent civil litigant than for the criminal defendant). Proponents also reference successful implementation of a right to counsel in civil cases in other countries, including England, Canada, and Australia. See Ritchey, *supra* note 120, at 331-36 (citing sixteen countries that provide attorneys for indigent civil litigants and discussing the implementations of such systems in England, Germany, and Switzerland).

<sup>122</sup> Given the number of young lawyers admitted to the bar each year notwithstanding the already saturated nature of the legal services marketplace, many lawyers would likely be willing to offer unbundled and comparatively inexpensive legal servic-

law rules could be relaxed so that paralegals and other nonlawyer professionals could offer specific, limited services. Low-cost legal services could be delivered at walk-in legal clinics, much as low-cost health services are delivered at walk-in medical clinics.<sup>123</sup> Other promising proposals include increasing the availability of free legal information resources<sup>124</sup> and encouraging reliance on arbitration proceedings as a lower-cost alternative to traditional litigation.<sup>125</sup> Proposals such as these, which target specific problems of practice, deserve and demand sustained attention and consideration.

### CONCLUSION

We have defended our system of adversarial advocacy not as capable of discovering objective truth, but as capable of constructing legitimate and authoritatively accepted truth.<sup>126</sup> We have defended good lawyers—those who are effective and ethical—as playing a critical role

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es. *See, e.g.*, Mark Greenbaum, Op-Ed., *No More Room at the Bench*, L.A. TIMES, Jan. 8, 2010, at A27, available at 2010 WLNR 388882 (admonishing the ABA for failing to “properly regulate” law schools and advocating government intervention to ease the oversaturation within the legal profession); Gerry Shih, *Downturn Dims Prospects Even at Top Law Schools*, N.Y. TIMES, Aug. 26, 2009, at B1 (discussing the difficult job market for law school graduates).

<sup>123</sup> In fact, low-cost legal clinics are already being organized in this fashion. For spirited commentary on this development, see, for example, Elie Mystal, *The Wal-Mart of Law Firms Might Be Wal-Mart*, ABOVE THE LAW (Nov. 16, 2009, 4:12 PM), <http://abovethelaw.com/2009/11/the-wal-mart-of-law-firms-might-be-wal-mart>. Other similar solutions that have been implemented include a coffee shop where drop-ins can seek legal advice. *See* LEGAL GRIND, <http://www.legalgrind.com> (last visited Nov. 15, 2010).

<sup>124</sup> Many efforts have been made to make legal information resources more freely available, which could lead to a substantial reduction in the cost of legal services. Traditionally, Westlaw and Lexis were the only available online databases, both very expensive. Now, there are several free alternatives, including Google Scholar, [http://scholar.google.com/advanced\\_scholar\\_search](http://scholar.google.com/advanced_scholar_search) (last visited Nov. 15, 2010); Cornell University Law School’s Legal Information Institute, <http://www.law.cornell.edu> (last visited Nov. 15, 2010); various court and agency websites, such as the website of the Third Judicial Circuit, which includes an opinion archive, <http://www.ca3.uscourts.gov/indexsearch/archives.asp> (last visited Nov. 15, 2010); and various other free legal information websites, including BitLaw, <http://www.bitlaw.com> (last visited Nov. 15, 2010); FindLaw, <http://www.findlaw.com> (last visited Nov. 15, 2010); and Justia, <http://www.justia.com> (last visited Nov. 15, 2010).

<sup>125</sup> *See, e.g.*, Am. Acad. of Matrimonial Lawyers, *supra* note 111, at 18 (encouraging settlement through mediation or other alternatives to avoid “acrimonious” family law disputes).

<sup>126</sup> Professor Markovits appropriately points out that production of an authoritative version of the truth, in turn, can give rise to political legitimacy. MARKOVITS, *supra* note 1, at 171-211.

in this process. We acknowledge that, as implemented, our adversarial system has numerous flaws, and, as practiced, advocacy can be abused. But we argue that these evils lie in the practice, and not the core function, of adversarial advocacy.

Addressing the practice of rhetoric in ancient Athens, Aristotle commented that it could be used for good or evil, but that its potential for abuse was no reason to condemn its proper use.<sup>127</sup> In evaluating the role of advocacy in our contemporary legal system, we might heed the wisdom of the ancients.

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<sup>127</sup> ARISTOTLE, *supra* note 12, bk. I, ch. 1, at 1355b.