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JUDICIAL RHETORIC AND LAWYERS' ROLES

*Samuel J. Levine**

INTRODUCTION

Notwithstanding the rich scholarly literature debating the proper roles of lawyers and the precise contours of lawyers' ethical conduct, as a descriptive matter, the American legal system operates as an adversarial system, premised in part upon clear demarcations between the functions of different lawyers within the system. Broadly speaking, prosecutors have the distinct role of serving justice, which includes the duty to try to convict criminal defendants who are deserving of punishment, in a way that is consistent with both substantive and procedural justice.¹ In contrast, private attorneys have a duty to zealously represent the best interests of their clients,² within ethical bounds, but without taking into account broader notions of pursuing a just outcome. In some ways, criminal defense attorneys have a greater license or duty to engage in zealous representation of the interests of their clients, permitting or requiring them to use tactics that are questionable or prohibited for other private attorneys.³

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* Professor of Law and Director of the Jewish Law Institute, Touro Law Center. I was first introduced to Bob Rodes and his scholarship through my friendship with another towering figure at Notre Dame Law School, Tom Shaffer. I am honored to participate in this tribute to Bob's memory, and I would also like to take this opportunity to express my admiration for Tom and his work, as well as my appreciation for Rick Garnett, who continues to follow in their ethical and scholarly tradition. An earlier version of this Essay was presented at the Criminal Justice Ethics Shmooze at Fordham Law School.

1 See, e.g., Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 *FORDHAM URB. L.J.* 607 (1999); Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 *HOUS. L. REV.* 1337 (2004).

2 See MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2014) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); MODEL CODE OF PROF'L RESPONSIBILITY CANON 7 (1982) ("A lawyer should represent a client zealously within the bounds of the law.").

3 See, e.g., Levine, *supra* note 1, at 1344–45 nn.18–27; see also MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 3 (2014) (prohibiting lawyers from presenting a frivolous claim or contention, but noting that the rule is "subordinate to federal or state constitutional law

This Essay considers the rhetoric some judges have used to characterize the respective duties of prosecutors and criminal defense attorneys. The Essay suggests that, although this rhetoric often expresses admirable aspirations and ideals, it improperly blurs the lines between the roles different lawyers play within the adversarial system. Specifically, these judges have used language that would seem to place additional limitations on both the methods prosecutors employ in seeking to obtain just convictions and the tactics criminal defense attorneys employ in zealous advocacy of their clients' interests. This Essay concludes that judges should avoid such rhetoric, which has the potential to undermine basic principles of the American legal system.

I. PROSECUTORS

A. Maloney and Its Precursors

1. Maloney

In a highly publicized and widely praised 2014 decision, *United States v. Maloney*,⁴ the United States Court of Appeals for the Ninth Circuit reversed the defendant's conviction on the basis of the prosecutor's improper summation. The path toward reversal was unusual: after the appellate court initially affirmed the conviction, the court heard an appeal en banc, following which the United States Attorney for the Southern District of California filed a Motion to Summarily Reverse the Conviction, Vacate the Sentence and Remand to the District Court.⁵ In addition to concluding that the comments made during closing argument constituted reversible error, the U.S. Attorney informed the court of the office's plans to have attorneys view the video of the argument "as a training tool to reinforce the principle that all Assistant U.S. Attorneys must be aware of the rules pertaining to closing argument and must make every effort to stay well within these rules."⁶

In commending the U.S. Attorney, the court cited a segment of one of the most eloquent and well-known statements from the United States Supreme Court regarding the unique role of prosecutors in the American legal system:

A prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.⁷

The Ninth Circuit also quoted a more contemporary statement, from a 1993 opinion by Judge Alex Kozinski, who joined in the court's opinion in

that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule").

4 755 F.3d 1044 (9th Cir. 2014).

5 *Id.* at 1046.

6 *Id.* (internal quotation marks omitted).

7 *Id.* (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)) (internal quotation marks omitted).

Maloney: “The prosecutor’s job isn’t just to win, but to win fairly, staying well within the rules.”⁸ Judge Kozinski’s attractive assertion that the prosecutor should “stay[] well within the rules” has been cited in nearly two dozen cases, and not surprisingly—perhaps strategically—the U.S. Attorney in *Maloney* used this phrase as an indication of the good will the office now exhibits, in acknowledging the wrongfulness of both the summation and its own initial failure to concede error on appeal.⁹ In addition, the U.S. Attorney aimed to signal the office’s determination not to engage in such misconduct in the future, by instilling in its attorneys a recognition of the importance of remaining “well within the rules.”

Upon closer examination, however, while the Ninth Circuit was presumably correct in commending the U.S. Attorney’s willingness to admit error and deter future misconduct, the court’s broad rhetoric may raise questions of its own. Specifically, it may not be clear either that, as a doctrinal matter, prosecutors should be expected to remain “well” within the bounds of ethical conduct, or that the quotation from the Supreme Court supports such a contention.

2. *Berger*

It may first be useful to look at the quotation from the United States Supreme Court in its entirety. In *Berger v. United States*, Justice Sutherland wrote:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.¹⁰

Notably, from this entire statement, the court in *Maloney* cited—almost selectively—only the first part, emphasizing that the prosecutor’s interest is in serving justice, not in winning.¹¹ It is undoubtedly correct that when the prosecutor is faced with the choice between “winning” and serving justice, justice prevails; this choice, however, is not the norm for most prosecutors in most cases. Instead, as Justice Sutherland continued, the goal—therefore the

8 *Id.* (quoting *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993)) (internal quotation marks omitted).

9 *See id.*

10 *Berger*, 295 U.S. at 88.

11 *Maloney*, 755 F.3d at 1046.

role—of a prosecutor is typically to convict a defendant in a way that is consistent with the duty to serve justice.¹²

In fact, while Justice Sutherland's statement is often celebrated for its timeless and cogent reminder that prosecutors have a duty to avoid wrongful motives and tactics, his discussion operates from the premise that prosecutors clearly "should" prosecute with "earnestness and vigor" and "use every legitimate means to bring about a just [conviction]."¹³ In short, though Justice Sutherland rightfully insisted that the prosecutor aim to make sure that innocence should not suffer, he made clear that the prosecutor's "twofold" aim also includes the interest that guilt should not escape.¹⁴

Given this balance in the prosecutor's role, although it is likewise clear that the prosecutor should stay within ethical bounds, it may not be clear, as Judge Kozinski declared, that the prosecutor should stay "well" within ethical rules, in a way that might weaken the chances of obtaining a proper conviction.¹⁵ That is, if the duty to serve justice includes the duty to ensure that guilt not escape, it would seem unjust for the prosecutor to risk a proper conviction by refraining from using a tactic that is within the rules but not "well" within the rules.¹⁶

12 See *Berger*, 295 U.S. at 88.

13 *Id.*

14 *Id.*

15 See *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993).

16 See *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980) ("Prosecutors need not be entirely 'neutral and detached.' In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law." (citation omitted)); *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984) ("If honestly convinced of the defendant's guilt, the prosecutor is free, indeed obliged, to be deeply interested in urging that view by any fair means."); cf. Green, *supra* note 1, at 642–43 (describing the "traditional understanding" of the prosecutor's duty to seek justice). Green writes:

[A] prosecutor is a representative of, as well as a lawyer for, a government entity that has several different, sometimes seemingly inconsistent, objectives in the criminal context. Of these, convicting and punishing lawbreakers is only one, and it is no more important than others, such as avoiding the punishment of innocent people and ensuring that people are treated fairly. As the government's surrogate, the prosecutor's job is to carry out all these objectives and resolve the tension among them.

. . . This is also the understanding to which prosecutors should be more receptive, since it does not imply that they should "pull their punches" or otherwise act to level the playing field between themselves and the defense. On the contrary, it encourages their instinct to do battle. It implies, however, that prosecutors must not only battle lawbreakers, in furtherance of the government's objective of convicting the lawless. Additionally, prosecutors must resist various forces that would undermine the government's other aims.

Id. at 642; see also Bruce A. Green, *The Ethical Prosecutor and the Adversary System*, 24 CRIM. L. BULL. 126, 129–30 (1988) ("A prosecutor is not supposed to be neutral and detached. It is not the prosecutor's duty to present both sides of a criminal case. Nor is it the prosecutor's duty to urge the jury to draw inferences in favor of the defendant."); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 52 (1991) ("[A] noncompetitive approach to prosecutorial ethics is inconsistent with

3. *Kojayan*

Taking this examination one step further, it may be helpful to look at the source of the “well within the rules” formulation: Judge Kozinski’s opinion in *United States v. Kojayan*.

Judge Kozinski wrote:

Prosecutors are subject to constraints and responsibilities that don’t apply to other lawyers. See, e.g., *Berger v. United States*, 295 U.S. 78, 88 (1935). While lawyers representing private parties may—indeed, must—do everything ethically permissible to advance their clients’ interests, lawyers representing the government in criminal cases serve truth and justice first. The prosecutor’s job isn’t just to win, but to win fairly, staying well within the rules. See *United States v. Hill*, 953 F.2d 452, 458 (9th Cir. 1991); Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 Stan. L. Rev. 1133, 1141 (1982). As Justice Douglas once warned, “[t]he function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.” *Donnelly v. DeChristoforo*, [416 U.S. 637, 648–49 (1974) (Douglas, J., dissenting)].¹⁷

The first and third sentences of this paragraph seem beyond dispute, almost unremarkable in the context of prosecutorial ethics: of course the prosecutor is subject to unique constraints and responsibilities—it does not seem necessary to cite *Berger* for this proposition—and of course the prosecutor’s duty is to vindicate the rights of the people, not to “tack [the] skins of victims.”¹⁸

The middle sentence is less obvious. Judge Kozinski contrasts the license—and duty—of private attorneys to “do everything ethically permissible to advance their clients’ interests” with the prosecutor’s primary duty to “serve truth and justice first.”¹⁹ As in *Maloney*, the opinion paints a somewhat false dichotomy between the interests of the prosecutor and the interests of truth and justice. Apparently, the implication is that at times, the prosecutor will have an “interest” that differs from a true and just outcome. To the extent that such a conflict arises, it is again obvious that the prosecutor must choose justice. Furthermore, it is likewise obvious that the duty to serve justice includes safeguarding both substantive and procedural justice, obligating the prosecutor to abide by ethical rules. Again, though, it does not follow that the prosecutor must stay “well” within ethical rules, if such restraint lessens the likelihood of a proper conviction.

the professional codes’ underlying theory. . . . [The codes] do not exempt prosecutors from the requirements of zealous advocacy. . . . [T]he codes signal that prosecutors can achieve justice while operating within the adversary system’s rules. . . . [A]dvocates are meant to do their best. To the extent prosecutors temper advocacy . . . they call into question the essential assumptions of the very system the rules codify.”)

¹⁷ *Kojayan*, 8 F.3d at 1323.

¹⁸ *Id.*

¹⁹ *Id.*

It may therefore be instructive to look at the source Judge Kozinski cited in support of the “well within the rules” locution: the Ninth Circuit case *United States v. Hill*.²⁰

4. *Hill*

As it turns out, *Hill* does not appear to provide support for Judge Kozinski’s oft-cited articulation of the prosecutor’s duty to stay “well” within the rules. Instead, *Hill* involved a case in which the government offered into evidence statements that the Ninth Circuit held inadmissible. In concluding that “[t]he government should not have offered this evidence,” the Ninth Circuit found it important to “remind the government’s trial counsel and his superior of the basic duty of counsel for the government.”²¹ Thus, the court quoted, in its entirety, Justice Sutherland’s statement from *Berger*.²² Although it seems quite appropriate for the court to cite Justice Sutherland’s admonition as a reminder to the government that it should not seek to offer inadmissible evidence, once again it does not follow that prosecutors should avoid tactics within the rules—but not “well” within the rules—that would otherwise prove effective in helping to obtain a proper conviction.²³

B. Contrast Cases

To further illustrate the questionable value and accuracy of characterizing the prosecutor’s duty to serve justice as mandating that the prosecutor stay “well” within the rules, it may be helpful to look at two contrast cases: a somewhat contentious New York Court of Appeals case and a 2012 Ninth Circuit case.

1. *Jones*

In a widely discussed and sometimes criticized 1978 decision, *People v. Jones*,²⁴ the New York Court of Appeals considered the prosecutor’s disclosure obligations when, after plea negotiations had commenced, the prosecu-

20 953 F.2d 452 (9th Cir. 1991).

21 *Id.* at 458.

22 *See id.*

23 To the extent that the “well within the rules” standard might be intended as a prophylactic measure to prevent overzealous prosecution, the adoption of such a standard remains problematic.

As a normative matter, whatever its intended goal, the “well within the rules” standard incorporates an inaccurate, or imbalanced, depiction of the obligations of the prosecutor. As a practical matter, holding prosecutors to a “well within the rules” standard may have a chilling effect on otherwise appropriate and ethical efforts to achieve a conviction. Alternatively, placing arguably undue limitations on prosecutors beyond those mandated by ethics rules may have the unintended result of undermining the credibility of other ethical obligations. *See* Samuel J. Levine, *Taking Ethical Obligations Seriously: A Look at American Codes of Professional Responsibility Through a Perspective of Jewish Law and Ethics*, 57 CATH. U. L. REV. 165, 197–98 (2007).

24 375 N.E.2d 41 (N.Y. 1978).

tor learned of the death of the complaining witness. Without disclosing this information to the defendant, the prosecutor continued to engage in plea negotiations, culminating in the defendant's decision to accept a guilty plea rather than proceeding to trial.²⁵ Upon learning that the complaining witness had died prior to the plea agreement, the defendant moved to withdraw the guilty plea, arguing that the prosecution had been under an obligation to disclose the fact of the complaining witness's death.²⁶

As a threshold matter, the court concluded that the prosecutor did not violate the letter of the law that requires disclosure of exculpatory material. As the court observed, "proof of the fact of the death of this witness . . . would not have constituted exculpatory evidence," and therefore information regarding the death of the witness did not qualify as *Brady* material.²⁷ In fact, the court noted that defense counsel did not claim otherwise. Instead, the defendant argued that "in the spirit of *Brady versus Maryland*,"²⁸ the prosecution was under an obligation to disclose "information in its possession which . . . is highly material to the practical, tactical considerations which attend a determination to plead guilty, but not to the legal issue of guilt itself."²⁹

The court quoted, at length, Justice Sutherland's famous statement from *Berger*. Moreover, the court noted "that the responsibilities of a prosecutor for fairness and open-dealing are of a higher magnitude than those of a private litigant."³⁰ Nevertheless, rather than expecting the prosecutor to operate "well" within the rules, the court looked carefully at the "formal statements of the professional responsibilities of prosecutors to make disclosure[,] [which] appear to address only the obligation to disclose exculpatory evidence"—not "tactical data"—and "the formulation of standards [that] appear[] to consider only affirmative misrepresentation and possibly, by reasonable extension, misleading silence when there is an affirmative duty of disclosure."³¹ The court emphasized that "[t]he provision does not, however, assist in determining when there may be such an affirmative duty to disclose."³² Instead, the court concluded, "no prosecutor is obliged to share his appraisal of the weaknesses of his own case (as opposed to specific exculpatory evidence) with defense counsel."³³

Thus, the court fully acknowledged that the prosecutor's duty to serve justice entails the obligation to stay within unique ethical rules, which

25 *Id.* at 42.

26 *Id.*

27 *Id.* at 43.

28 *Id.* at 42 (citing *Brady v. Maryland*, 373 U.S. 83 (1963)) (internal quotation marks omitted). For a further discussion of *Jones* and, more generally, distinctions between the letter of the law and the spirit of the law in the context of legal ethics, see Samuel J. Levine, *The Law and "Spirit of the Law" in Legal Ethics*, 2015 J. PROF. LAW. (forthcoming).

29 *Jones*, 375 N.E.2d at 43.

30 *Id.* at 44.

31 *Id.*

32 *Id.*

33 *Id.*

include responsibilities toward the defendant beyond those of private attorneys toward their adversaries. At the same time, the court emphasized the prosecutor's concomitant license—or duty—to obtain a proper conviction by using tactics that are permissible within ethical rules, rather than weakening the chances of a conviction by staying “well” within the rules and forgoing tactical advantages.³⁴ In fact, paraphrasing *Berger* in a way that derives a lesson very different from Judge Kozinski's conclusion, the court declared that: “A fundamental concern of the criminal justice system, of course, is that an innocent defendant shall not be convicted; not that a possibly guilty actor shall escape conviction because the People are not able to establish his guilt.”³⁵

2. *Lopez-Avila*

In *United States v. Lopez-Avila*,³⁶ a 2012 Ninth Circuit case decided by a panel that did not include Judge Kozinski, in the course of describing the prosecutor's duty to serve justice, the court cited both *Berger* and *Kojayan*.³⁷ However, the manner in which the court cited and paraphrased these cases includes a subtle change from Judge Kozinski's articulation in *Kojayan*, which might also indicate a subtle difference in approach to the prosecutor's duty:

The Department of Justice has an obligation to its lawyers and to the public to prevent prosecutorial misconduct. Prosecutors, as servants of the law, are subject to constraints and responsibilities that do not apply to other lawyers; they must serve truth and justice first. *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993). Their job is not just to win, but to win fairly, staying within the rules. *Berger*, 295 U.S. at 88.³⁸

The first sentence that is followed by a citation to *Kojayan* is, in fact, comprised of phrases taken from both *Berger* (“servant of the law”)³⁹ and *Kojayan* (“subject to constraints and responsibilities that don't apply to other lawyers”; and “serve truth and justice first”).⁴⁰ Though it would be more accurate to provide a citation to *Berger* for the “servant of the law” phrase, it may not be surprising that, instead, the opinion offers a single citation—to *Kojayan*—which is the source of most of the sentence.

It is surprising, though, that the court cited *Berger* following the next sentence, which is quoted nearly verbatim from *Kojayan*, and which, though similar in theme, does not appear in Justice Sutherland's admonition in *Ber-*

34 The court's approach in *Jones* might also differ from the Supreme Court's in *United States v. Agurs*, 427 U.S. 97, 108 (1976), that “the prudent prosecutor will resolve doubtful questions in favor of disclosure.” The approach in *Agurs* seems to favor—and possibly require—staying “well” within disclosure obligations, even at the risk of providing the defendant more information than mandated under the rules.

35 *Jones*, 375 N.E.2d at 44.

36 678 F.3d 955 (9th Cir. 2012).

37 *Id.* at 964.

38 *Id.*

39 *Berger*, 295 U.S. at 88.

40 *Kojayan*, 8 F.3d at 1323.

ger. In addition, notably, the court omitted the word “well” in its description of the prosecutor’s job, declaring only that the prosecutor must “stay[] within the rules.”⁴¹ Perhaps the presence of both of these peculiarities in the *Lopez-Avila* opinion is an indication that this Ninth Circuit panel did not share Judge Kozinski’s view from *Kojayan* that the prosecutor should stay “well” within the rules. Instead, the panel may have found the obligation to stay merely “within” the rules to be more consistent with the balanced approach to the prosecutorial role set forth in *Berger*.⁴²

II. CRIMINAL DEFENSE ATTORNEYS

If prosecutors are unique in the degree to which their ethical obligations include duties toward their adversaries, criminal defense attorneys stand out in the degree to which their ethical obligations to their clients often trump other duties. For example, criminal defense attorneys are expected to make arguments, when effective, on the basis of false inferences and to cast doubt on the credibility of truthful witnesses.⁴³ Depending on the jurisdiction, criminal defense attorneys may be expected to raise contentions that would otherwise be considered frivolous, and they may be expected to allow their clients to testify falsely.⁴⁴

Although there is room for debate regarding the precise contours of ethical conduct for criminal defense attorneys, whatever the justification, the American criminal justice system accepts and often requires that criminal defense attorneys engage in forms of advocacy that may be off-limits to other private attorneys, let alone prosecutors.⁴⁵ Nevertheless, along with common public dissatisfaction with many of the tactics—or even the function—of lawyers who represent criminal defendants,⁴⁶ there are sometimes calls from within the legal academy and even the judiciary for more limited forms of advocacy among criminal defense attorneys.⁴⁷ At least one case illustrating this approach provides nearly a mirror image to Judge Kozinski’s application

41 *Id.*

42 Indeed, the court demonstrated a similar balance in its reference to “Justice Sutherland’s famous statement that the dual obligation of a federal prosecutor in our justice system is to strike hard blows but to refrain from striking foul ones; to use legitimate means to attempt to secure a conviction without employing improper methods to do so.” *Lopez-Avila*, 678 F.3d at 964.

43 See Levine, *supra* note 1, at 1344–45.

44 See *id.* at 1344 n.19 (“[I]n some jurisdictions a criminal defense attorney is obligated to accede to the wishes of a client who insists on testifying falsely.”); *supra* text accompanying note 3.

45 See Levine, *supra* note 1, at 1344 (noting that a prosecutor’s ethical obligations differ from those of most lawyers because of the prosecutor’s “duty of truth”).

46 See, e.g., HOW CAN YOU REPRESENT THOSE PEOPLE? (Abbe Smith & Monroe H. Freedman eds., 2013); Jed S. Rakoff, *How Can You Defend Those Crooks?*, N.Y. L.J., Sept. 25, 1990, at 3.

47 See, e.g., Symposium, *Limitations on the Effectiveness of Criminal Defense Counsel: Legitimate Means or “Chilling Wedges?”*, 136 U. PA. L. REV. 1779 (1988).

of *Berger* as grounds for placing more extensive limitations on prosecutors' tactics.

In *United States v. Cutler*,⁴⁸ Judge McLaughlin famously cast doubt on Lord Brougham's declaration that "the first great duty of an advocate [is] to reckon everything subordinate to the interests of his client."⁴⁹ Judge McLaughlin favored Chief Justice Alexander Cockburn's retort that

[t]he arms which an advocate wields he ought to use as a warrior, not as an assassin. He ought to uphold the interests of his clients *per fas*, not *per nefas*. He ought to know how to reconcile the interests of his clients with the eternal interests of truth and justice.⁵⁰

Notwithstanding the aspirational appeal—and at times, the doctrinal relevance—of Chief Justice Cockburn's response, in most cases, Lord Brougham's declaration more closely describes the ethical posture of the American criminal defense attorney. The duty of a criminal defense attorney is, indeed, to promote the interests of the client, even, when necessary, at the expense of broader interests of truth and justice.⁵¹

Of course, there are cases in which a criminal defense attorney is faced with an actual conflict between the duty to the client and other ethical obligations. Judge McLaughlin characterized Bruce Cutler as "a defense lawyer torn between his duties to act as an officer of the court and to zealously defend his client."⁵² Still, whatever the merits of Judge McLaughlin's conclusion that Cutler's conduct was unethical, the opinion seems more generally to blur the lines between the roles of criminal defense attorneys and other private lawyers—as well as the very different obligations of prosecutors and criminal defense attorneys. Anticipating that the court's decision "will elicit thunderbolts that we are chilling effective advocacy,"⁵³ Judge McLaughlin insisted that "[t]he advocate is still entitled—indeed encouraged—to strike hard blows, but not unfair blows."⁵⁴

48 58 F.3d 825 (2d Cir. 1995).

49 *Id.* at 841 (alteration in original).

50 *Id.* (alteration in original) (citation omitted) (internal quotation marks omitted).

51 *See, e.g., United States v. Wade*, 388 U.S. 218, 258 (1967) (White, J., dissenting in part and concurring in part). On the duty of criminal defense attorneys, Justice White wrote:

Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what [counsel] thinks or knows to be the truth. . . . [M]ore often than not, defense counsel will cross-examine. . . and impeach [a prosecution witness] . . . even if [counsel] thinks the witness is telling the truth In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

Id. at 257–58.

52 *Cutler*, 58 F.3d at 840.

53 *Id.*

54 *Id.*

For all of its eloquence, Judge McLaughlin's articulation of the bounds of ethical advocacy is problematic. Without attribution, Judge McLaughlin paraphrased Justice Sutherland's admonition that prosecutors not strike foul blows, not only applying this principle to private attorneys, but extending the prohibition on "unfair blows" to include criminal defense attorneys as well.⁵⁵ If Judge Kozinski's "well within the rules" standard was questionable for employing Justice Sutherland's admonition to place constraints on appropriate prosecutorial tactics that are within the bounds of ethical rules, Judge McLaughlin's standard is even more troubling for applying Justice Sutherland's admonition as a basis for placing constraints on the criminal defense attorney's zealous advocacy. Although all attorneys are prohibited from ethical misconduct, if Justice Sutherland's admonition—delineating the unique duty of prosecutors not to strike foul blows—means anything, it must be read as applicable only to prosecutors, not to private attorneys, and certainly not to criminal defense attorneys.

CONCLUSION

There are undoubtedly drawbacks to implementing an adversarial system. As Bob Rodes and others have suggested,⁵⁶ there may be considerable traction to the notion that private lawyers should adopt an ethical approach, beyond that prescribed under current law, premised on the broader goal of seeking justice. Likewise, some have argued that prosecutors should more extensively protect the rights and interests of criminal defendants, beyond the requirements and expectations of current ethical doctrine.⁵⁷ Notwithstanding the appeal of such aspirations, these proposals run contrary to the roles of lawyers within the American system of justice.

Perhaps, as some have suggested, paraphrasing Winston Churchill's famous quip about democracy, the adversarial system is the worst form of justice, except for all of the others.⁵⁸ In any event, for better or for worse, and for the foreseeable future, American lawyers will continue to function within an adversarial system, consisting of both prosecutors, who have a duty to seek justice—including the duty to convict deserving criminals, and private lawyers, with a duty to represent the interests of their clients. Accordingly,

55 *Id.* Indeed, Judge McLaughlin seems to acknowledge this blurring of the lines between the different roles of attorneys, stating further: "Trial practice, whether criminal or civil, is not a contact sport. And, its tactics do not include eye-gouging or shin-kicking." *Id.*

56 See, e.g., Robert E. Rodes, Jr., *Forming an Agenda—Ethics and Legal Ethics*, 77 NOTRE DAME L. REV. 977 (2002); Robert E. Rodes, Jr., *Government Lawyers*, 9 WIDENER J. PUB. L. 281 (2000); Robert E. Rodes, Jr., *On Lawyers and Moral Discernment*, 46 J. CATH. LEGAL STUD. 259 (2007).

57 See, e.g., James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1537–38 (1981).

58 Winston S. Churchill, Speech Before the House of Commons (Nov. 11, 1947), in 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897–1963, at 7563, 7566 (Robert R. James ed., 1974).

judges should take care to employ rhetoric that acknowledges and serves to promote, rather than undermine, the proper roles of lawyers within the American justice system.