

CONTEXTUALIST ANSWERS TO SKEPTICISM, AND WHAT A LAWYER CANNOT KNOW

WILLIAM A. EDMUNDSON*

I. INTRODUCTION.....	1
II. JUSTIFYING THE LAWYER'S KNOWING AID	4
III. THE EPISTEMIC STANDARD ATTACHED TO THE LAWYER'S ROLE	6
IV. THE LAWYER'S ROLE: THREE PUZZLES	7
V. THE GENERAL PLAUSIBILITY OF CONTEXTUALISM	9
VI. CULPABILITY AND EPISTEMIC RESPONSIBILITY	14
VII. JUSTIFYING THE ADVERSARIAL ROLE.....	16
VIII. ARE LAWYERS LIARS?	18
IX. THE LAWYER AS LAW REFORMER.....	20
X. CONCLUSION	23

I. INTRODUCTION

[W]e stood talking for some time together of Bishop Berkeley's ingenious sophistry to prove the non-existence of matter . . . I observed, that though we are satisfied his doctrine is not true, it is impossible to refute it. I never shall forget the alacrity with which Johnson answered, striking his foot with mighty force against a large stone, till he rebounded from it, 'I refute it *thus*.'¹

BOSWELL. 'But what do you think of supporting a cause which you know to be bad?' JOHNSON. 'Sir, you do not know it to be good or bad till the Judge determines it. . . .'²

These two passages seem to show Dr. Johnson at war with himself. He tells us on the one hand that *we* all know what we think we know about rocks and tables and chairs—the philosopher's sophistries to the contrary notwithstanding. On the other hand, he tells us that *lawyers* do not know what we all know they know—no matter how plainly the truth appears to them. I argue that Johnson was right on both counts.

My focal problem is that of explaining why it is not wrongful for a lawyer to help someone she “knows” to be guilty (i.e. the fairly typical client) escape punishment. Most laypeople (and many fellow lawyers!) look askance at criminal defense lawyers because they regard them as regularly engaged in helping those they know to be guilty

* Professor of Law and of Philosophy, Georgia State University. Thanks are due to Steve Rieber and David Luban for extensive help and encouragement. Thanks are also due to Paul Wiita, Bill Simon, Eric Segall, Kit Wellman, Ellen Podger, Robert Rosen, Stephen Schiffer, George Rainbolt, Kelly Timmons, Paul Milich, Bob Almedor, Jim Rossi, Rob Atkinson, and Steve Kaminshine; to participants at presentations of this paper at Georgia State, at Florida State University, and to the Georgia Philosophical Society; and to Rebecca Phelan and Tiffani Moody for research assistance.

1. 1 JAMES BOSWELL, *BOSWELL'S LIFE OF JOHNSON* 471 (G.B. Hill ed., 1934).
2. 2 BOSWELL, *supra* note 1, at 47.

evade punishment—something which would expose anyone else to censure, perhaps even to punishment, for being an accessory “after the fact.” A large portion of the sleaziness attributed to lawyers as a class is traceable to a common perception of the at least *prima facie* wrongfulness of rendering this kind of service.³ Dr. Johnson’s answer is that the lawyer lacks the culpable mental state—“knowledge.” The lawyer helps the client avoid punishment, but the lawyer does not know the client is guilty—even if he has confessed!

Johnson’s defense of the lawyer has been ridiculed on the ground that it applies a different epistemological standard, entirely ad hoc, to the lawyer *qua* advocate than to the lawyer *qua* anything-else-he-happens-also-to-be. In fact, in conducting a legal defense, the lawyer will treat the fact of his client’s guilt with the very same respect, or greater, as any other fact that he unquestionably (apart from skepticism) knows. Johnson’s defense of what lawyers do is usually regarded as, at best, a disingenuous cover story for a much better consequentialist defense—lawyers knowingly help the guilty, but this practice is better than any alternative—or dignity-based defense—lawyers knowingly help the guilty, but respect for the defendant’s dignity demands that such assistance be given her.

I want to rehabilitate Johnson’s defense of the lawyer’s role, which will involve, ironically enough, a defense of at least the spirit of his answer to Berkeley. Johnson’s answer to Berkeley is best understood as an adumbration of what is now known as the “contextualist” answer to skepticism. Skeptics point out that we cannot know anything, *p*, unless we have ruled out all relevant alternative possibilities that would make *p*, though false, appear to be true. For example, Johnson might see a *papier maché* stage-prop stone, and as he kicks at it might suffer a violent spasm that seems to correspond to meeting the solidity of a stone. For all he knows, he has kicked a stage prop; that possibility is consistent with the evidence of his senses. Possibilities of this kind can be multiplied endlessly. We are never in a position to rule them all out. Therefore, the skeptic concludes, Johnson did not know that he had kicked a stone, nor by the same line of argument, do any of us ever have any knowledge of a world around us.

The contextualist answer to skepticism is as follows. Admittedly, a person, *X*, knows that *p* only if *X* is justified in believing that *p*, and *X* is justified in believing that *p* only if *X* has ruled out all “relevant alternative possibilities.” But the range of relevant possibilities is

3. See, e.g., David Feige, *How to Defend Someone You Know is Guilty*, N.Y. TIMES MAG., Apr. 8, 2001, at 59, 60 (“Few public defenders have ever escaped a cocktail party without being confronted with ‘the question’” which Feige answers in a Zoolanderish mode: “[T]he thing that I have so much trouble explaining to people is that when I get to know them, I just really, really like my clients”).

context-dependent.⁴ Suppose that Erma and Ima are identical twins, and that Mary, who is looking for Erma, asks John if he knows where she is. If John says he knows that Erma is waiting in the lounge, the truth of his claim depends upon his having ruled out the possibility that Ima, rather than Erma, is the person waiting in the lounge. The possibility that it is Ima rather than Erma waiting in the lounge is a relevant alternative possibility. If John has reason to believe that Ima is touring the south of France, then he has ruled out the relevant alternative possibility; his belief that Erma is waiting in the lounge is justified, and he *knows* that Erma is waiting in the lounge.

At this point, the skeptic will want to know how John has ruled out the possibility that Erma is not one of identical *triplets*, or that he saw a wax mannequin in the lounge that looked just like Erma, or that he was experiencing an hallucination that caused him to have the visual impression of Erma. The contextualist answer is that these are not relevant alternative possibilities in ordinary contexts of discourse. But the contextualist does not deny that there are *extraordinary* contexts in which these unlikely possibilities are relevant. Where they are relevant, they *do* have to be ruled out if knowledge is to be achieved. Discussions about the abstract possibility of knowledge can create an extraordinary context, and in such a context it is true to say that John does not know that Erma is waiting in the lounge, or that Dr. Johnson did not know he has kicked a rock.

On the contextualist account, context determines what are the relevant alternative possibilities for purposes of assessing the knower's justification. Insofar as Dr. Johnson was trying, by kicking the rock, to return his discussion with Boswell to ordinary contexts, and to insist that in ordinary contexts we are entitled to rely on appearances, he was indeed advancing a contextualist refutation of skepticism (or rather "idealism," but I'll ignore this detail). The skeptic insists upon an *invariant* epistemic standard making *all* alternative possibilities relevant. But this makes almost all of our everyday knowledge claims false. The contextualist argues for a contextualized epistemic standard. In philosophical discussion, the context admits the relevance of any and all alternative possibilities; but in ordinary conversation, the context admits the relevance of a drastically reduced range of alternative possibilities. While it is possible that Dr. Johnson was insisting on an invariant epistemic standard allowing only the narrow range of relevant alternative possibilities, I think

4. As the late David Lewis put it: "Ascriptions of knowledge to yourself or others are a very sloppy way of conveying very incomplete information about the elimination of possibilities. . . . [T]hey are a handy but humble approximation." David Lewis, *Elusive Knowledge*, 74 AUSTRALASIAN J. OF PHIL. 549, 563 (1996).

mine is the more charitable interpretation. Kicking a rock *cannot* be a refutation except by altering the context of discussion.⁵

Contexts alter, and with them, epistemic standards alter. But what alters the context? Quite an array of things are capable of altering a context. Certain features of a situation may be especially salient, the topic of a conversation may shift, or aspects of the background not evident to the knower may affect the context. No catalogue is possible here, but among the things that can alter the context is the role of the knower and the relationships the knower has to others as determined by that role. Roles alter contexts and contexts alter the epistemic standard.

That is what Dr. Johnson was getting at. Because of the epistemic significance of role, the following is a commonplace type of occurrence:

Let *X* be a criminal defense attorney representing *Z*, *Y* be anybody else, and *E* be the evidence of *Z*'s guilt. Suppose also that *Z* is guilty and both *X* and *Y* believe it. When *X* and *Y* are jointly exposed to *E*, it is true both that:

1. *X* does not know that *Z* is guilty, and
2. *Y* does know that *Z* is guilty.

The reason *Y* knows and *X* does not is that *X*'s role subjects her to more stringent epistemic standards than *Y* need meet. There is no paradox here, just good, plain, English common sense.

II. JUSTIFYING THE LAWYER'S KNOWING AID

Why does it matter whether Dr. Johnson was right or wrong about this? For one thing, if the lawyer is engaged in *knowingly* helping his guilty client avoid punishment, then a justification is called for. Those justifications fall into several categories. One category is consequentialist: The idea is that the benefits of allowing the defendant a zealous advocate in his defense outweigh the harms that flow from the successful defense of a defendant known to his advocate to be guilty. "Better that a hundred guilty should go free, than one innocent should be wrongly convicted," is a familiar guise in which the consequentialist thought can appear. Following the consequentialist line, the lawyer's knowing assistance to the guilty is excused by the balance of good flowing from the adversary system. The *prima facie* wrongfulness of knowingly helping the guilty avoid conviction is outweighed. Normally, when consequences excuse a *prima facie* duty, the actor owes a residual duty of repair to any injured party, and at least ought morally to feel some degree of remorse. The consequen-

5. "Action can have no effect upon reasonable minds. It may augment noise, but it never can enforce argument." 2 BOSWELL, *supra* note 1, at 211.

tialist defense excuses the lawyer's conduct, but need not relieve her guilty conscience.

Many people may think that this is precisely where matters should be left. The lawyer does bad, but does so as part of a system that advances the greater good. My view, in contrast, is that, in Abraham Lincoln's words, a lawyer should "[c]hoose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave."⁶ This is Johnson's view too: honest lawyers have nothing to apologize for, nothing to feel remorse for. Consequentialist defenses of the legal system are inadequate to the extent that they accommodate the common view of the lawyer as one who routinely engages in wrongdoing, even if it is only *prima facie* wrongdoing. So, any consequentialist reconstruction of the legal system is unsatisfactory to the extent that it represents lawyers, in the normal course of business, as knowingly helping guilty defendants get away with their crimes.

Another category of justification is dignity-based: the idea is that respect for the dignity of the defendant demands that she be allowed a zealous advocate, whatever the consequences. An early and extreme statement of the dignity-based viewpoint was Lord Brougham's in Queen Caroline's case:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. [H]e must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.⁷

Dignity-based justifications of adversarial legal systems are especially appealing to those who think that consequentialist justifications concede too much ground to the state, and thus do not sufficiently guard the individual and her liberty. Persons drawn to dignity-based justifications get nervous at the idea of basing the right to a zealous advocate upon some counting or calculation of expected benefits; even to admit the argument that it is "better that a hundred guilty go free" is to make admissible the argument that one hundred and one would be too many.

The dignity-based justification, like the consequentialist justification, normally proceeds from the assumption that there is *prima*

6. ABRAHAM LINCOLN, *Notes for a Law Lecture*, in THE LIFE AND WRITINGS OF ABRAHAM LINCOLN 327, 329 (Philip Van Doren Stern ed., 1940).

7. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 580 (1986) (quoting 2 TRIAL OF QUEEN CAROLINE 8 (1821)).

facie wrongful conduct on the part of the lawyer which is redeemed by other considerations—good consequences in the former case, affirmation of the accused’s dignity in the other. But it is the assumption of *prima facie* wrongdoing that Dr. Johnson rightly calls into question.

Let me emphasize that my reconstruction of Johnson’s view does not pretend to be immune from the demand for justification—consequentialist, dignity-based, or other—at an appropriate level. A justification has to be given for the social practices that support the creation of special epistemic contexts, especially ones that attach to socially created and sanctioned roles, such as lawyer and juror. The demand need be answered only at the level of social practice; it need not be answered by, or *on behalf of* the practitioner of the role. It is sufficient for the lawyer or the juror to say, “I could not know she was guilty.” The lawyer and juror do not face the question, “How can you justify helping someone you know to be guilty?” for that question falsely presumes that they know. But all of us, lawyers, jurors and the rest, do face the question, “How can we justify a system that creates extraordinary epistemic contexts?” We will press for an answer to this last question, but it will not be composed under the pressure of excusing anyone for having engaged in *prima facie* wrongdoing.

III. THE EPISTEMIC STANDARD ATTACHED TO THE LAWYER’S ROLE

Contextualized epistemic standards figure prominently in Anglo-American law. Proof “beyond a reasonable doubt” is a contextualized epistemic standard. It is the standard that jurors are to apply to the evidence in determining guilt, and it explicitly refers to relevant alternative possibilities, viz., those whose non-elimination would leave reasonable doubt of guilt. One occasional complaint about the criminal justice system is that it invites juries to acquit defendants the jurors know to be guilty. A contextualist can readily explain the confusion. Applying everyday epistemic standards, the evidence at trial would often be sufficient to convey knowledge of the defendant’s guilt. But jurors who nonetheless vote to acquit would vehemently, and rightly, deny they had knowingly helped the defendant “get off” or “get away with murder.” The explanation is simple: the role of a juror in a criminal case imports a more exacting epistemic standard.

Notice that consequentialist and dignity-based justifications of the juror’s conduct are not as conspicuous as in the lawyer’s case. It is natural enough to say that the jury, finding the evidence to fall short of proof beyond a reasonable doubt, did not knowingly assist the guilty defendant escape punishment. There is no urgency to say that, though the jury knowingly assisted the defendant to escape punishment, that has better consequences overall, or that respecting the de-

fendant's dignity requires that he be acquitted though known to the jury to be guilty.

The standard attached to the criminal defense lawyer's role is more exacting still. The lawyer is frequently exposed to evidence which she, as a juror, would be bound to deem proves guilt beyond a reasonable doubt. What kind of standard, determining what range of relevant alternatives, does the lawyer's role impose? Not a Cartesian skepticism—e.g., entertaining the possibility that a powerful *génie malin* is trying to frame the client and has manufactured each and every bit of inculpatory evidence—but something close to it. A *film noir* sort of skepticism is what the lawyer's role imposes; the lawyer must rule out the possibility that by some unfathomable whim of fate, a kaleidoscope of otherwise disjointed appearances has frozen itself into a damning configuration. The *locus classicus* is the *noir* gem, *Detour*, in which (to cite but one example) the protagonist's innocent pulling on a telephone cord causes the strangulation of his unintended victim, who has shut herself, with the telephone, behind a bedroom door.⁸ The client as *noir* antihero *may* have done some very bad, stupid things—but from his lawyer's perspective never murder, or whatever the charge.

Naturally, the client's confession, whether standing alone or bolstered by what is for ordinary purposes ironclad corroborating evidence, cannot satisfy the criminal-defense lawyer's exacting epistemic standards. Confessions, eyewitnesses, DNA profiling; add it all up and it fails to rule out the alternative possibilities that are relevant from the criminal-defense lawyer's perspective. This is not to say that *everything* short of evil-demon, brain-in-a-vat, Cartesian-style possibilities is within the relevant range; the lawyer need *not* entertain, for example, the possibility that the client is *merely* a cleverly-crafted robot, incapable of voluntary action and culpable mental states.

IV. THE LAWYER'S ROLE: THREE PUZZLES

Here is a puzzle: If a lawyer cannot know that her client is guilty, how can she know when he is committing perjury? Rule 3.3 of the American Bar Association's Model Rules of Professional Conduct requires that the lawyer "not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client . . . [or] offer evidence that the lawyer knows to be false."⁹ Don't I have to deny that the lawyer can have the relevant knowledge, and doesn't that mean that I have mischaracterized the lawyer's role? It is idle for lawyers to impose

8. DETOUR (PRC Pictures 1945).

9. MODEL RULES OF PROF'L CONDUCT R. 3.3 (1999).

upon themselves a duty to not knowingly do something, if they could never possess the relevant knowledge.

This “duty of candor to the tribunal” is entirely consistent with Johnson’s account of the lawyer’s epistemic situation. Knowledge of the *underlying* offense simply does not enter into the lawyer’s duty to report client or witness perjury. What the lawyer “knows” is the existence of an irreconcilably inconsistent prior account; it is unnecessary to suppose in addition that the lawyer knows which (if either) is the true account. Think of the following variant of what David Luban calls the “Long Black Veil” case, in which the defendant takes a murder rap (“I spoke not a word, though it meant my life[.] For I had been in the arms of my best friend’s wife”).¹⁰ If, instead of saying nothing, the defendant took the stand and confessed in order to cover up his lover’s adultery, that would be a fraud upon the tribunal. If the client had earlier told the lawyer that he had been in the arms of his best friend’s wife, and then on the stand, told the court that he had committed murder, the lawyer would have a duty to the tribunal just as much as she would if the story were reversed (i.e., the client had admitted killing and then on the stand claimed to have been in the arms of his best friend’s wife at the time). The lawyer need not know which story is true to be under a duty to avoid fraud on the tribunal—all she must know is that the client has told two irreconcilable stories. Similarly, the duty not to knowingly offer false evidence can be disentangled from knowledge of guilt of the underlying offense.

Here is another puzzle: Sometimes the client doesn’t contest the facts, but the law. Even if there were a convincing contextualist case for denying the lawyer knowledge of factual guilt, it seems absurd to deny the lawyer legal knowledge. If a lawyer cannot know the law (while the rest of us are presumed to know it!) what *can* he know? I think the best answer is that the lawyer is under no contextual disability as to the law, but his factual disability persists even where the facts are not contested, thus blocking knowledge of the guilty conclusion. For the lawyer, it is always a relevant alternative possibility that the uncontested allegations of fact are misleading appearances disguising an innocent reality.

One more puzzle: We step in and out of role. Hume leaves his study and his doubts dissolve. The lawyer goes home, turns on the television, pops a cold one or mixes a martini, and ruminates over the day’s events. Surely the role is not so sticky that it is *never* shed. Why can’t it be shed at the end of the day, or at the courthouse steps?

10. David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 456 (quoting *The Long Black Veil*, a song written by M.J. Wilkin & D. Dill).

And, as soon as it is, does the lawyer not then recover her guilty knowledge?

Admittedly, the lawyer, once out of role, may very well know her client is guilty; but the lawyer is not *then* helping the client either. There is no “knowing aid” until the lawyer steps back into the role, with its special epistemic standards. Then the knowledge is gone. Just as Augustine said about the nature of time: “If no one asks me, I know; but if I want to explain it . . . I do not know.”¹¹ But this suggests that context is always as ephemeral as an occasion of utterance or episode of contemplation. Roles are stickier than that. A lawyer, in particular, is not free to shed her role as advocate at will. The advocate’s role survives even the judge’s or jury’s determination that the client is guilty—a detail that eluded even the astute Dr. Johnson.

Note also that the role is a directed one—the prosecutor may know that my client is guilty even though I, who have much better evidence, do not. This fact may explain some of the special vehemence of prosecutors toward the defense bar—at least until they join it. But prosecutors are notoriously thick-seeming when they deny having *known* that the stool-pigeon lied or that the arresting officer manufactured evidence; they too have a role and have role-differentiated epistemic standards. The problem with prosecutors is that the epistemic standard that attaches to the special role they inhabit is supposed to make them more skeptical of their own witnesses, and less of the defense’s, than they often are.

V. THE GENERAL PLAUSIBILITY OF CONTEXTUALISM

My defense of Dr. Johnson’s view of the morality of the lawyer’s role depends upon the general adequacy of contextualism as an answer to the philosophical skeptic. Contextualism, unsurprisingly, has its critics. The most familiar criticism is that contextualism is nothing more than an ad hoc move to avoid skepticism. Similarly, Johnson’s defense of the lawyer’s role has been called an ad hoc maneuver to cover up the lawyer’s essential immorality. Can two “ad hocs” make an “all right”? That would be doubtful if there were only these two, but in fact contextualized epistemic standards attach to many a role. There is a galaxy of contextualized standards that shows that the ad hoc objection to contextualism, and to Johnson’s view, both fail. Failure to appreciate the connection between epistemic contexts and epistemic roles may have retarded the general acceptance of contextualism.

11. AUGUSTINE, CONFESSIONS 343 (R.J. Deferrari et al. eds., Vernon J. Bourke trans., 1966).

Experts of many descriptions occupy roles that generate extraordinary epistemic contexts. Scientists, for example, are considered to be experts in large part because they *know more* than non-experts. But that doesn't mean that the scientist knows everything laypeople know about the object of the scientist's study. A layperson can know a great deal that an expert in a field is not yet able to know. This may seem paradoxical, particularly because the layperson is often wholly dependent upon scientists for her knowledge; but the expert's higher scruples, in the form of a more exacting epistemic standard, makes it so. Sometimes scientists, in other words, are able to *impart* knowledge which in many cases they do not yet *possess*.

We tend to assume that the transmission of knowledge from one person to another degrades as it propagates farther and farther from a figurative point of origination—from an original, first-hand observation, for example. Other things being equal, the less proximate person can only hope to know as much as the more proximate, and never more. Knowledge can pop into being at more remote points only if the more remote person has additional background information. For example, if John saw a tall redhead in the lounge, he might not know it was Sue, but when he tells me what he saw, *I* might know it was Sue because I know Sue and I know she had planned to be in the lounge. I know more than John only because I have information he does not.

There are other ways in which a remote person, having no more information than a proximate person, can know more than the proximate person. If the proximate person is not a believer, but the remote person is, then the remote person can know more. Suppose that a creationist biology teacher teaches evolutionary theory to her class. Those in her class whose minds are not clouded by creationism may learn something from the experience, in which case they know something that their teacher does not—despite the fact that they generally know much less about biology than she does, and in fact have more or less totally depended upon her for what they have learned!

To these two exceptions to the usual picture we have of knowledge transmission, contextualism adds a third. Sometimes the remote person knows more than the proximate person because the proximate person occupies a role that subjects him to a higher epistemic standard than the less proximate person. Being a lawyer is such a role, just as being a scientist is such a role. The resemblance between roles stops here: the scientist's ethical role requires that she strive to meet the higher epistemic standard, but the lawyer's job is not to do that. The lawyer's job is to insure that *others*—prosecutors, juries, judges—meet the epistemic standards applicable to them.

The third type of exception, the contextualist exception, explains the muddle that the eruption of scientific controversy often puts the public in. Laypeople tend to say “The experts disagree, so what can *we* know?” or, “The so-called experts admit it’s only a theory, so no one can *really* know.” This sort of fallacy is not so very different from the all-too-common inference from “Possibly not-*p*” to “No one knows whether *p* or not-*p*.” Creationists are one group who are particularly adept at exploiting this confusion. In candor, a scientist may say something like, “We don’t really know what the Hubble constant is.”¹² A creationist may seize upon this and insinuate that, “For all *anyone* knows, the age of the universe is just what a literal reading of the Bible says it is (six thousand years or something like that).” The truth of the matter is that perhaps a cosmologist working in this particular area *does not* know the age of the universe, not even approximately. She does not know, not because she has suspended belief, but because she has not ruled out the alternative possibilities that are relevant for her, as a cosmologist. Interview her, and she should admit this. But that does not mean that *we* don’t know that the universe is roughly 14 billion years old—far, far older than the Earth and the creatures that inhabit it. And it certainly does not mean that the cosmologist does not know, once she has taken off her cosmologist’s hat and put on her everyday hat, so to speak.

Some astrophysicists work with much more bizarre ideas than the magnitude of the Hubble constant. For these theoreticians, the Hubble constant may more or less be assumed to be within a certain range for their purposes, which are directed elsewhere. “Assuming that *p*” and “knowing that *p*” are not logically contrary, even if they are pragmatically. These other theoreticians may be working in subfields so distinct from that in which the magnitude of the Hubble constant is of focal concern that they may know things about the Hubble constant that Hubble-constant experts do not know. Again, this does not mean that the non-Hubble astrophysicists have pertinent background information the Hubble-specialists lack, or that they are more credulous than the Hubble-specialists—it means that, lurking within the intricate structure of evidence upon which estimates of the Hubble constant rest,¹³ there are radically fewer rele-

12. The Hubble constant measures the rate at which objects in the universe are receding from us. Current estimates converge on a value of 74 +/- 7 kilometers per second per Megaparsec. Joshua Roth, *One Less Hubble-Constant Hang Up?*, SKY & TELESCOPE, Feb. 2002, at 18. A Megaparsec is the distance light travels in 3,260,000 years. *Id.* There are holdouts for a lower constant, in the range of 58 +/- 6, but “battle-weary proponents of both values [are] expressing a desire to move on to other research topics.” *Id.* at 19.

13. For an overview of the intricacies involved in arriving at an estimate of the age of the universe, see Ned Wright, *Ned Wright’s Cosmology Tutorial*, at <http://www.astro.ucla.edu/~wright/age.html> (on file with author). For an overview of the continuing controversy about the size of the Hubble constant, see Gustav Tammann and

vant alternative possibilities for non-Hubble theoreticians than for the Hubble-specialists. More relevant alternative possibilities, to be sure, than for us laypeople, but fewer than for the Hubble-specialists.

Suppose we arrive at the happy day when the value of the Hubble constant is no longer a subject of serious debate within the relevant scientific community, and suppose that the consensus is a value that is consistent with the age of the universe being about 14 billion years, as had been suspected.¹⁴ A portion of the sophisticated lay public is apt to greet the announcement with a “Ho-hum, I thought they knew that *already*.” Well, they—the investigators, that is—*didn’t*, even if the sophisticated lay public *did*. Think of the disgust with which otherwise sensible people greet reports of studies that confirm what had formerly been only a deliverance of common sense—“Carrots Shown to Help Eyesight!” for example. We are tempted to snap, “Well, we knew that *already*.” As indeed we may have, but that does not mean that the scientists studying the matter knew it too and were only playing dumb in order to fatten themselves on grant money.

So, we have laypeople, lawyers, epidemiologists, Hubble-constant-specialist cosmologists, and non-Hubble-constant astrophysicists, which leads naturally to the question: How many roles *are* there exactly, and how many associated sets of epistemic standards and ranges of relevant alternative possibilities are there? There is no ascertainable number, nor any ascertainable upper bound to that number. Doesn’t this mean that contextualism, even in the role-bound version I have discussed, leads to an infinite regress—a vicious infinite regress—since “knowledge” becomes an unlearnable concept if it has infinitely many ambiguous senses? Contextualism does not render the verb “to know” as ambiguous—ambiguity and “hidden indexicality” are two different things. “Now” is not ambiguous, even though there are an infinite number of times to which it may refer. Nor is there any reason to fear that there is an infinite number of epistemic standards. Certainly there is no reason to suspect that there may really be an infinite number of relevant roles. Maybe there *is* an infinite number of potential *contexts*—in which case the better version of contextualism is one that emphasizes epistemic roles, where the number is more amenable to limits.

Another objection to contextualism is Stephen Schiffer’s: it simply is not plausible to represent people as systematically so mistaken about the semantics of knowledge.¹⁵ People are very quick to detect

Sidney van den Bergh, *The Scale of the Universe Debate in 1996*, at http://antwarp.gsfc.nasa.gov/diamond_jubilee/debate_1996.html (on file with author).

14. Paul Wiita improved my statement (and I hope my grasp) of the astrophysics.

15. Steven Schiffer, *Contextualist Solutions to Skepticism*, 1996 PROC. OF THE ARISTOTELIAN SOC’Y 317-33.

“hidden indexicals” in statements like “She’s tall” or, “It was raining.” The predicate “is tall” and the phrase “it was” obviously stand in need of specification for any listener who says, “What exactly are you telling me?” Such a listener would readily be told what the relevant comparison class for “is tall” is—NBA guards or eighth-graders. Not all indexicals are single-purpose linguistic items; in spelling out what is meant by, “It was raining” the speaker would also have to specify when, as well as where, it was raining. The tense of the verb indicates a temporal variable, and until that variable is specified it is not clear what proposition the speaker has uttered. But, Schiffer continues, people do not respond as contextualism would have them respond, when asked to clarify statements like, “Little Johnny knows the Earth orbits the Sun.”¹⁶

Contextualism¹⁷ maintains that the surface grammar of knowledge statements conceals a hidden indexical, but it cannot explain why ordinary speakers do not respond to invitations to fill in the reference of that hidden indexical. If we follow up and ask such things as “You say Little Johnny knows the Earth orbits the Sun, but *in what context* does he know this?” we are going to draw some puzzled looks. Hidden indexical theories are fine so long as normal speakers are ready to acknowledge the presence of the indexical when it is revealed to them, but contextualism fails this test.

I think the answer to Schiffer is the one Steve Rieber has suggested: “[S]ome indexicals are more hidden than others.”¹⁸ To that I would add that indications of role-bound contexts are relatively easy to get ordinary speakers to acknowledge. Compare, “Little Johnny knows the value of the Hubble constant” with, “Stephen Hawking knows the value of the Hubble constant.” Informed laypeople would, I think, readily acknowledge that the epistemic standard in the background is not invariant between Little Johnny and Stephen Hawking. Admittedly, one’s holding a justified belief that *p*, means that one satisfies a counterfactual condition which guarantees that one would not believe that *p*, were it not true that *p*. Accidentally true beliefs are not knowledge by any standard, but this does not mean that one cannot know things second-hand. If Little Johnny’s belief is grounded in popular journalism he can learn and come to know quite a bit; the accuracy of his belief is not to be dismissed as accidental any more than any adult’s second-hand belief is.

16. *Id.* at 326-28.

17. Contextualism, strictly speaking, is a theory not about semantics, but pragmatics. So a “hidden indexical” theory is not strictly speaking contextualist unless it is formulated in a metalanguage whose object language is everyday discourse. In what follows (and precedes) I ignore this refinement.

18. Steven Rieber, *Skepticism and Contrastive Explanation*, 32 *NOÛS* 189, 203 (1998).

If Stephen Hawking, on the other hand, is said to know what the Hubble constant is, the precise epistemic standard which he has been asserted (implicitly) to have met would be of interest. It would be big news if Stephen Hawking knew the value of the Hubble constant *qua* Hubble-constant inquirer, as opposed to *qua* astrophysicist making use of an estimate.¹⁹ In contrast, there is nothing of further interest about Little Johnny's achievement, because the epistemic standard to which a school child is held is so low.

VI. CULPABILITY AND EPISTEMIC RESPONSIBILITY

Some will object that I overrate the importance of knowledge attributions in the moral assessments we make. Who cares whether the lawyer *knows* her client is guilty so long as she *believes* he is? I do not for a moment deny that criminal-defense lawyers routinely form the belief that their clients are guilty. Knowledge of guilt is, admittedly, sometimes absent simply because the lawyer believes her client is innocent. Few would condemn a lawyer's efforts on behalf of a client she sincerely believes not to be guilty, but case-hardened criminal-defense lawyers are sometimes remarkably slow to spot the exceptional innocent. Such defendants are, as we all know, the exception. What about the rest, whom the lawyers defend anyway? Lawyers can't avoid belief, whether by dutiful efforts to suspend disbelief in the client's innocence, or by "Stockholm syndrome"-style²⁰ identification with the client's cause. They believe alright; but they just can't know, as I have tried to explain.

Why isn't helping those *believed* to be guilty bad enough, wholly apart from the question of knowledge? As a first approach to this seemingly very pertinent point, notice that the stereotypical cocktail party challenge is, "How can you help people you know are guilty?" rather than, "How can you help people you *think*, or *believe*, are guilty?" To the latter, the natural reply would be, "Well, I might be wrong" or "Well, they may not be guilty, after all" (better yet would be, "Well, *for all I know*, they aren't guilty"). Nothing further need be

19. The astute Nietzsche was (on this topic if on no other) attuned to Dr. Johnson's general way of thinking:

Morality of the Learned. Regular and rapid progress in the sciences is possible only when the individual is *not* obligated to be *too mistrustful* in the testing of every account and assertion made by others in domains in which he is a relative stranger: the condition for this, however, is that in his own field everyone must have rivals who are *extremely mistrustful* and are accustomed to observe him very closely. It is out of this juxtaposition . . . that the integrity of the republic of the learned originates.

FRIEDRICH NIETZSCHE, *HUMAN, ALL TOO HUMAN* 264 (R.J. Hollingdale trans., 1986).

20. The "Stockholm Syndrome" denotes an identification with the grievances of a wrongdoer and allegiance to a wrongdoer's cause, especially by the wrongdoer's victims. See *VICTIMS OF TERRORISM* (David A. Soskis & Frank M. Ochberg eds., 1982).

said; in particular, there is not yet an occasion to invoke what David Luban has called “the adversary system excuse”²¹ because there is no knowing wrongdoing to excuse.

But culpability may come in degrees, as in fact the criminal law has it. Mere belief may figure in less culpable states of mind than knowledge, without the actor thereby escaping all culpability. The criminal law, as formulated in the Model Penal Code, recognizes a hierarchy of culpable “mental states”—*purpose, knowledge, recklessness, and negligence*, in descending order of gravity.²² Acting upon a mere belief may amount to recklessness under the Model Penal Code, and recklessness typically suffices to establish criminal culpability.²³ The question explored here is not that of criminal liability, but of the moral attitudes that find expression in the “general part” of the criminal law. Nevertheless, to recast the point in Model-Penal-Codeese, mustn’t a lawyer have to justify her assisting an accused if she acts with “conscious awareness” of a risk that her assistance will free one who is guilty? And what is “conscious awareness” but belief?

The answer here (still analogizing to the Model Penal Code) begins with the observation that acting with awareness of risk is not generally blameworthy. So acting is blameworthy only if the risk is “substantial and unjustifiable” and the actor is aware of the aspects of the risk that make it so.²⁴ One who performs an emergency tracheotomy to save a person who will otherwise suffocate, acts with awareness of substantial risk, but does not act with awareness of *unjustifiable* risk. The unjustifiability of the risk is built into the concept of recklessness.²⁵ So also, a lawyer who defends a client aware that there exists a substantial probability (risk) of guilt, does not act recklessly unless so acting, given the risk, is unjustifiable. Her acting with awareness of substantial risk of guilt does not in itself establish either its unjustifiability or even a presumption of its unjustifiability. The challenge, “How can you defend people when you are aware of a substantial risk of their guilt?” thus carries no more sting than the question, to a surgeon, “How can you go around slicing open people’s

21. Cf. David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 83 (David Luban ed., 1983).

22. MODEL PENAL CODE § 2.02(2) (1985).

23. *Id.* §§ 2.02(2)(c), (3).

24. *Id.* § 2.02(2)(c).

25. Model Penal Code section 2.02(7) interestingly states that “knowledge” of a fact need involve no more than “aware[ness] of a high probability of its existence,” with no built-in reference to the unjustifiability of acting with such awareness. *Id.* § 2.02(7). The step from recklessness to knowledge, therefore, is not really treated as a step from “substantial” to “high” probability on a single scale. Extensive literature challenges the suggestion that a high probability of *p* can suffice to confer knowledge upon those who, on that basis alone, believe that *p*. See HENRY KYBURG, *PROBABILITY AND THE LOGIC OF RATIONAL BELIEF* (1961).

bodies like that?" Both are silly and impertinent if they are intended as challenges.

VII. JUSTIFYING THE ADVERSARIAL ROLE

I will now try to honor a promissory note I issued earlier. I said that a justification is demanded of the social institution—call it the adversary system—which assigns an especially rigorous epistemic standard to criminal-defense attorneys. This is not a justification that criminal-defense attorneys are called upon to provide in order to justify their having engaged in extensive *prima facie* wrongdoing. But the criminal-defense bar does bear a special onus of justification insofar as it is committed to preserving the adversary system. It is a regrettable fact that many criminal-defense attorneys bring the same zeal they exercise on behalf of their clients to the defense of the adversary system. Were this misplaced zeal relaxed, criminal-defense attorneys might be able to join the rest of us in coolly examining the justification of the adversary system. From a detached perspective, how does it fare?

Any type of criminal justice system has to be justified, and the candidate types of justification emphasize one or more of the following: the social consequences of adopting one or another type of system; the extent to which one or another system respects human dignity; and the extent to which one, rather than another, system would be eligible as an object of reasonable agreement among self-interested individuals. Whatever may be one's preferred pattern of justification, a defense of the adversary system will involve comparing it to alternatives, actual and hypothetical.

What is distinctive about the adversary criminal justice system is that it does two things. First, it requires the prosecution to establish guilt "beyond a reasonable doubt"—it imposes, in other words, an especially rigorous epistemic standard upon the finder of fact. Second, it requires that the accused be given the assistance of a skilled advocate whose business it is to assure that the finder of fact does not return a guilty verdict on proof that falls in any way short of that exacting epistemic standard. So, in précis, there are two moves essential to justifying the adversary criminal justice system. Move One, assign an extraordinarily exacting epistemic standard to the finder of fact. Move Two, provide the accused with the assistance of a zealous advocate. As I have explained, the advocate is subject to a super-exacting epistemic standard. Her job is not to try to meet that standard by investigating the facts, but to challenge the prosecution's case by holding the fact-finder to its epistemic duty.

Let us assume, as we safely may, that there is a satisfactory moral-political-theoretic justification for Move One. Social welfare,

respect for dignity, or reasonably compelling principles of justice justify Move One; the requirement that criminal punishment not be administered absent proof beyond a reasonable doubt of the facts constituting guilt. What compels the next move—Move Two? Even if we grant that the accused is entitled to some kind of assistance, why does that assistance have to be the assistance of a *zealous advocate* rather than, say, a *friendly inquisitor*? By “friendly inquisitor” I mean a skilled person whose job it is to make sure that the state’s proof burden is met, but whose own epistemic standards are no higher than the state’s ultimate burden, i.e., proof beyond a reasonable doubt. The role of the friendly inquisitor is to assure that the accused is not convicted on less than proof beyond a reasonable doubt, but she (unlike the zealous advocate) sifts the evidence herself with a view toward making an assessment, and the standard she employs in so doing is the self-same beyond a reasonable doubt standard. Once the friendly inquisitor is persuaded that the state’s competent evidence establishes proof beyond a reasonable doubt, her task is to help the accused overcome whatever resistance he has to accepting responsibility.²⁶

The crucial difference between the friendly inquisitor and the zealous advocate can be put this way. Both roles are designed to assure that no one is punished unless on evidence that excludes reasonable possibilities of factual innocence. But the friendly inquisitor’s job is to assemble facts, and if the facts exclude reasonable doubts about guilt, her remaining job is to bring the offender to accept responsibility, not to make efforts to help him avoid it. The zealous advocate, on the other hand, brings a far stricter epistemic standard to the facts, and she operates throughout upon the presumption (if not the belief) that responsibility cannot justly be assigned to the accused. It is this distinctive difference between the roles of the friendly inquisitor and the zealous advocate that is in need of justification.

Many may conclude that the friendly inquisitor role is as much as can be justified; and I would conjecture that a number of criminal-defense lawyers enact this role, rather than the zealous advocate’s role, at least some of the time—especially where prudence would counsel the accused to accept responsibility rather than to pursue his right to “put the state to its proof.” But there are familiar arguments in favor of zealous advocacy that merit consideration.

The general line is this: the friendly inquisitor is essentially in service of the state insofar as her advocacy ceases once she is per-

26. Can accepting punishment be in the client’s best interests *whether or not* he is likely to be convicted? See Plato, *Gorgias*, 472a-473c, in *THE COLLECTED DIALOGUES OF PLATO*, at 254-56 (W.D. Woodhead trans., 1963).

sualed beyond reasonable doubt that her client is guilty. Therefore, the accused is exposed to the risk of erroneous conviction by his attorney, an error from which there is no appeal. Generally, and more seriously, those who inhabit the role of friendly inquisitor will, in the absence of review of their conclusions, tend to become *mere* inquisitors—a tendency which will deprive the accused of the full and effective protection that is justified by whatever we can agree to have justified an elevated epistemic standard for criminal punishment in the first place. Call this family of considerations the “effective assistance” argument. The effective assistance argument is essential to get us from Move One to Move Two; and unless it is a good argument there is no justification for making Move Two, no matter how powerful the argument is for Move One.

In the following section, I consider one line of argument that counters the effective assistance argument. Then I argue that the effective assistance argument is, nonetheless, not compelling, and finally I conclude with a conjecture about why many criminal-defense lawyers have trouble appreciating the reluctance others have in making Move Two.

VIII. ARE LAWYERS LIARS?

One line of argument against making Move Two is this: when in the course of a representation the two roles diverge, what distinguishes the zealous advocate from the friendly inquisitor is that the zealous advocate, unlike the friendly inquisitor, essentially engages in *deception*. The two roles diverge at the point the attorney accumulates evidence that rules out every reasonable doubt of guilt. At that point, the friendly inquisitor suspends any effort to persuade others that reasonable doubt of guilt remains. The zealous advocate, on the other hand, persists in efforts to persuade the finder of fact that reasonable doubt exists. In other words, the zealous advocate tries to persuade others to believe what she herself does not believe, i.e., that the evidence fails to exclude reasonable doubt. This is deception. Deception is *prima facie* wrong, and thus Move Two is *prima facie* wrong, for it institutionalizes *prima facie* wrongdoing.

This line of argument does not necessarily carry the day against the effective assistance argument, but it has an undeniable cogency. Notice also that it does not appeal to knowledge on the zealous advocate’s part—so Dr. Johnson’s contextualism is no help here. Contextualism may remove the taint of *prima facie* wrongdoing from the juror, the judge sitting as fact-finder, and the friendly inquisitor, but a different and distinctive taint attaches to the zealous advocate. Knowledge is not a necessary element of deception, and what the

zealous advocate is regularly engaged in is nothing other than deception—the effort to cause others to believe what one does not.

Despite its initial cogency, I think the charge of deception fails. For one thing, deception—understood to be the speaker’s intentional causing another to have a degree of confidence in a proposition, *p*, that differs from the speaker’s degree of confidence—is not generally even *prima facie* wrongful. Think of your first job interview. Surely there was nothing even *prima facie* wrongful in your trying to inspire in the interviewer a confidence in your suitability that was greater than your own—unless, of course, you not only believed, but *knew* you were not suitable. Self-doubters do not wrong others, even *prima facie*, merely by projecting self-confidence.

What about persuading another to believe what one believes to be false? This seems categorically to be at least *prima facie* wrong once we have set aside commercial “puffery,” theatrics, acts of politeness, works of fiction, and practical jokes. But we must be clear about what is the relevant proposition, *p*, which is the subject of the zealous advocate’s alleged deception. It is not:

p1. I know my client is factually innocent.

Professional ethics forbid the advocate from representing that she has personal knowledge of the facts in issue; the lawyer is not (and does not wish to be) a witness. Nor need the relevant proposition be:

p2. My client is factually innocent.

Some experienced courtroom advocates opine that one cannot be for-ensically effective unless one’s aim is to persuade the fact-finder to believe *p2*, but I doubt that such an approach is essential to the zealous advocate’s role. Rather, the essential, relevant proposition, *p*, is:

p3. The evidence before you, the jury, does not exclude every reasonable doubt of guilt.

Notice that *p3* refers not to the whole body of evidence, or to the body of evidence available to the lawyer, but to a proper subset: the evidence properly before the jury, subject to whatever limiting instructions the judge has given or will give. The zealous advocate need not disbelieve *p3*, even if she believes that her client’s guilt would be established beyond a reasonable doubt if judged by the evidence to which she has been exposed.

Suppose that the zealous advocate does not believe *p3*, as perhaps she does not. She must so inform the client and advise him to authorize her to conclude a plea bargain. If no bargain is offered, or the client stubbornly refuses it, her duty as zealous advocate is to “put the state to its proof,” that is, to do the best she can to raise doubts in the fact-finder’s mind. Suppose she succeeds: the client is factually

guilty, but is acquitted because the fact-finder erroneously finds in the evidence a doubt that is not in fact reasonable, and makes this mistake because of the defense attorney's persuasiveness in fostering that doubt. Suppose that this has occurred, where is the wrongdoing?

The wrongfulness of what the zealous advocate does cannot be left to intuition if no harm attaches to it. What is the harm, and to whom? Certainly not to the jury. The jury has not been led into wrongdoing; its erroneous acquittal is not a wrong. Has the zealous advocate set back the state's or the victim's interest in punishing the guilty? That injury has occurred, but is it a culpable injury, that is, was it knowingly or otherwise culpably caused by the defense advocate? The zealous advocate, as Dr. Johnson has helped us see, does not know whether his client is guilty or not. The lawyer has caused the jury to act on a doubt that perhaps only a *film noir* skeptic would take seriously, but for all the lawyer knows, she has thereby brought about the acquittal of an *innocent* person. It would be absurdly harsh to say that those who have been properly convicted, having been found guilty beyond a reasonable doubt, deserve punishment *whether or not* they are factually guilty. So also it is absurdly harsh to say that a zealous advocate engages in culpable deception when her only remaining professional option is to put the state to its proof against a client who, *for all she knows*, is innocent despite appearing, even to her, to be guilty beyond a reasonable doubt.

IX. THE LAWYER AS LAW REFORMER

Beating the deception rap cannot, in itself, motivate Move Two. At the end of Move One, we have justified a social practice that requires an extraordinarily high epistemic standard before criminal punishment is imposed. We also have justified a social practice that assures the accused some degree of specialized assistance in preparing a defense. But Move One is indifferent between assistance in the form of a friendly inquisitor and assistance in the form of a zealous advocate.

The friendly inquisitor will embody the heightened epistemic standard and strive to see that it is met by some actor in the system, perhaps herself. She need not be troubled by the worry that she knowingly helps the guilty avoid responsibility. She does not. She regularly functions in a context in which ordinarily negligible possibilities of innocence cannot be discounted. When all relevant possibilities have been ruled out, according to the heightened epistemic standard operative in the contexts in which she works, then she may have knowledge, but from that point forward her assistance to the accused takes a different form. She does not further assist him to avoid responsibility, but rather to accept it.

The zealous advocate, in contrast, does not embody the heightened epistemic standard justified by Move One. She does not strive to meet it, but rather to insist that others meet it. Should her exposure to evidence be such that, in her judgment, the heightened standard is met, she must so advise the accused, but the exposure does not confer knowledge to her of her client's guilt, and her efforts to help the accused avoid responsibility need not, and may not, cease. Her role is subject to a super-high epistemic standard, typified by the *film noir* standard applicable to criminal-defense attorneys in the Anglo-American mold. Her further efforts may involve identifying possibilities not excluded under super-high epistemic standards and then persuading a fact-finder that these unexcluded possibilities are relevant ones judging by the high standard, even though she may happen to believe that they are not relevant by that standard.²⁷ In so proceeding, she does not engage in culpable or even *prima facie* wrongful deception or, if she does, it may be redeemed by the effective assistance argument.

So, how good is the effective assistance argument? I will not offer an evaluation beyond observing that it has a certain plausibility, but may be less than compelling. Further discussion is certainly warranted, for the justification of the adversary system appears to hang upon it. Without it, we may find broad agreement to making Move One, and then find no reason to make Move Two. If we do not make Move Two we are left at a point of indifference, at best, between instituting a zealous advocacy role and instituting instead a friendly inquisitor role.

Unfortunately, those best positioned to evaluate the effective assistance may be least inclined to do so. Those who are best positioned to evaluate it are members of the criminal-defense bar. It is they who are the learned professionals in most frequent sympathetic contact with people accused of crime. In the absence of systematic empirical study of the effective assistance argument, their anecdotal wisdom may be the best we can get. They are nonetheless not inclined toward dispassionate evaluation, largely, I would hazard to say, because they have been too willing to accept the popular view of themselves as persons regularly engaged in knowingly helping the guilty to avoid just punishment. That view mistakenly puts the lawyer—rather than the system we have all, together, inherited and sus-

27. Can't lawyer *X* know that juror (or witness) *Y* knows that defendant *Z* is guilty? But how can *X* know that *Y* knows that *Z* is guilty *without* knowing, *herself*, that *Z* is guilty? The answer is that what *X* knows is that *if Z* is guilty, *Y* knows it, but *X* does not know that *Y* knows that *Z* is guilty. The reason is that *X*'s heightened epistemic standard governs *X*'s relation to the question of *Z*'s guilt, as well as to the question of *Y*'s justification. Stephen Schiffer suggested this difficulty in private correspondence, but might not endorse my handling of it.

tained—before the bar of justice. The lawyer thus becomes an advocate in what she takes to be her own cause, and moreover, winds up having herself as a client—a situation lawyers above all have reason to avoid.

But doesn't this whole epistemological story carry with it a risk of inviting bad faith on the part of lawyers, by encouraging them to think they don't have to worry about what they know? What I am trying to find is a way of breaking an impasse that I think we are all in together. Criminal justice in America is notoriously harsh and is administered in a notoriously strange way. With one hand, our system offers elaborate (and socially costly) procedural protections to defendants (the well-represented ones anyway), but with the other hand it imposes a very harsh (and socially costly) schedule of penalties. We exacerbate the horror of an erroneous conviction by draconian sentencing, and try to palliate the horror by making punishment avoidable in all sorts of procedural ways. Could it be that Americans generally (and not only the prisoners) are in a prisoner's dilemma? We might all be better off with a system of lower penalties and lower procedural costs, but we are stuck with one in which we have higher penalties (because too many criminals get off) and higher procedural costs (to protect the innocent from those higher penalties).

This is something we all ought to be able to discuss. But we look down our noses at those whose profession it is to exploit those procedures; and, in turn, those professionals gird themselves in a self-justifying ideology that casts the state as an at least incipient police state, and police and prosecutors as an amateurish Gestapo. The criminal-defense lawyers who should lead the discussion are locked into an ideology that demands low penalties and high procedural costs. Their (to me, noxious) opposite numbers plump for high penalties and low procedural costs. Impasse.

Nothing could be farther from my intention than to promote complacency among criminal-defense lawyers. My sense is that they avoid the anguish of "cognitive dissonance" by indulging in an arid anti-state ideology. Were they to recognize that in at least one respect they are not doing anything even *prima facie* wrongful—doing nothing needing a simplistic anti-state ideology to redeem—they might be liberated from the bad ideology in which they have needlessly taken refuge. Once liberated, it might be possible for them to discuss in a detached way the justification of the elaborate procedural edifice; and it might be possible even to think about dismantling some of it as part of a more general reform (which will of course require some liberating of the other side). In short, good epistemology is not a prescription for bad faith, but an antidote to bad ideology.

X. CONCLUSION

“What does a lawyer know?” is a question that has woven its way into the issues of legal ethics, at least since Dr. Johnson’s famous deliverance on the subject to James Boswell.²⁸ The idea that a lawyer might not know what a layperson, identically situated, would know, has been attacked as unintuitive, if not a calculated evasion. Nevertheless, I think it is simply true that knowledge is role-relative in the sense I have explained. Not only is it true, it is clearly true, and can be demonstrated to anyone willing to accept a few harmless—in fact very helpful—truisms about knowledge.

The possibly surprising fact is that expertise can impair knowledge. A layperson may know a great deal about what an expert in a field may be forbidden to know. The expert is often forbidden to know because of higher scruples that are part-and-parcel of the expert’s role. That knowledge is relative to role is a discovery we may refer to the eighteenth century and one of its least appreciated but most acute philosophical minds, that of the lawyer’s champion, Dr. Samuel Johnson.

Once we acquit the legal profession of knowingly helping criminals avoid their just deserts, it becomes possible for lawyers disinterestedly to re-examine the justification of the adversary system. If it lacks its supposed merits, it should be exposed, but those who have labored within it will not thereby be revealed as unredeemed wrongdoers.

28. See 1 BOSWELL, *supra* note 1, at 471.