

Undercutting Justice – Why legal representation should not be allocated by the market

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journals.sagepub.com/home/ppe**Shai Agmon***University of Oxford, UK***Abstract**

The adversarial legal system is traditionally praised for its normative appeal: it protects individual rights; ensures an equal, impartial, and consistent application of the law; and, most importantly, its competitive structure facilitates the discovery of truth – both in terms of the facts, and in terms of the correct interpretation of the law. At the same time, legal representation is allocated as a commodity, bought and sold in the market: the more one pays, the better legal representation one gets. In this article, I argue that the integration of a market in legal representation with the adversarial system undercuts the very normative justifications on which the system is based. Furthermore, I argue that there are two implicit conditions, which are currently unmet, but are required for the standard justifications to hold: that there is (equal opportunity for) equality of legal representation between parties, and that each party has (equal opportunity for) a sufficient level of legal representation. I, therefore, outline an ideal proposal for reform that would satisfy these conditions.

Keywords

adversarial legal system, legal justice, lawyers, legal representation, marketisation, commodification, levelling down objection, moral limits of markets, market in legal representation

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There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.

Justice Hugo Black, 1956 *Griffin v. Illinois*, 1956.

Introduction

Legal Justice should not be for sale. Although most people find this uncontroversial, almost no one challenges the fact that legal representation (namely, lawyers and legal resources required for representation) – one of the most significant components of contemporary adversarial legal systems – is traded on the free market. This article offers a normative analysis of this discrepancy.

The Anglo-American adversarial method of adjudication is often defended as normatively appealing. First and foremost, this is for the supposed fact that its competitive structure facilitates the discovery of truth, both in terms of the facts, and in terms of the correct interpretation of the law. This, in turn, supposedly secures a high probability of delivering just results (Wertheimer, 1988: 309–310).¹ Second, it is seen as a method that protects individual rights and ensures an equal, impartial and consistent application of the law. The method is characterised by legal competition that consists, roughly, of the following three components: (a) a passive impartial tribunal (normally a judge and/or jury); (b) formal rules of procedure; and (c) two or more competing parties that are responsible for presenting their own case as best as they can and for opposing their adversaries (Assy, 2015: 11–12; Gerber, 1987: 4–5; Luban, 1988: 57). As modern adversarial legal systems have become increasingly complex and professionalised, nowadays one cannot normally make one's case in court effectively without professional legal representation (Assy, 2015: 10; Fuller and Winston, 1978: 383; Luban, 1985: 46). Thus, ideally, component (c) of the adversarial method – the preparation and presentation of the legal argument – is performed by lawyers who advocate for their client with one-sided partisan zeal, with the sole aim of their client winning.²

The influence of legal representation on the adjudicative process intensifies in adversarial systems. This is due to the institutionalised passivity of the tribunal, which leaves control over significant parts of the process in the hands of the lawyer. In addition to being in charge of litigation during the trial, the lawyer is also responsible for the entire legal preparation process: from deciding on strategies for questioning witnesses, to constructing legal arguments (to which the client is bound), to summoning experts (thus, legal representation cannot be reduced only to the argumentative skills of the lawyers, but also includes the access she has to quality *legal resources*) (Luban, 1988: 57–58; Schwartz, 1983: 546).³ The impartial tribunal only receives pre-processed legal material; its role is limited to assessing both sides' arguments, and in so doing trying to extract the truth of the matter.

Thus, the quality of legal representation influences, in theory and practice, courts' decisions: the better the lawyer is, the greater the chance that the court favours her client's case. Therefore, allocating legal representation by the market – i.e. the more

one pays, the better-quality legal representation one gets – starts to look controversial, as the rich enjoy a structural advantage (see Hadfield, 2000: 956).⁴

To be sure, the potential influence of economic inequalities on the legal system has not been ignored. Legal scholars have long been concerned with the problem of ‘access to justice’ – people’s inability to afford access to the court system (for example see Rhode, 2004). Other worries have arisen in relation to the ethical dilemmas deriving from the commercialisation of the legal profession (see Luban, 1988: 177–237; Markovits, 2008; Wendel, 2010). However, this work has mainly focused on remedies designed to minimise the problematic results which are caused by the influence of economic inequalities within the *existing structure* of adversarial systems (e.g. drafting an ethical code for lawyers, supporting free legal clinics, etc.). Almost all critics have refrained from challenging the fundamental structure of the whole system; that the legal representation is allocated by a market mechanism.⁵ This attribute has been taken as a given, and has therefore rarely faced normative scrutiny.⁶

This absence is particularly striking in light of the wide agreement that other legal functions, like prosecution and the judiciary, should not be marketised. Even staunch defenders of the market (e.g. Friedman, 2002: 25; Hayek, 1960: 229; Nozick, 1974: 14–15; Rand, 1964: 131 and others) do not suggest extending it to the judicial system. In fact, libertarians usually regard adjudication, including legal representation (although not explicitly oftentimes), as the quintessential role of the state.

In this paper, I attempt this scrutiny, and argue that the integration of a market in legal representation into the adversarial system undercuts the very normative justifications on which the system is based.⁷ The adversarial system has been justified in a way that assumes the absence of a market in legal representation. But the undeniable existence of such a market undermines the only merits that made the system normatively appealing in the first place. Furthermore, I argue that this undercutting reveals two implicit necessary conditions for the standard justifications to hold (which are currently unmet): that there should be (equal opportunity for) equality of legal representation between parties, and that each party should have (equal opportunity for) a sufficient level of legal representation. I therefore outline an ideal reform to the system that would meet these conditions.⁸

The paper is structured as follows. First, I characterise the legal representation market. Second, I present the three main normative justifications for the adversarial system, which together make up the ‘normative appeal’ of the system. Third, I argue that the legal representation market undercuts this normative appeal, in both the adversarial civil and criminal systems. Fourth, I show how this undercutting reveals the unstated requirements of equality and sufficiency. In this part, I also present my proposal for reform and reply to some objections to it. Finally, I conclude.

Part I: The legal representation market in adversarial legal systems

Before presenting my argument, a few preliminary comments are required to clarify what I mean by the ‘legal representation market’ or ‘market mechanism’. In this paper, these terms denote only three of the market’s typical characteristics: allocation according

to agents' ability and willingness to buy and sell, and the innate tendency to produce economic inequalities. Most importantly, the market is indifferent to its distributional results: its sole concern is procedural, i.e. that all transactions are voluntary and non-fraudulent (Nozick, 1974: 163–164; Satz, 2010: 17–21).⁹

Since legal representation in the adversarial system is bought on the market, consumers (clients) can use their money to obtain the best legal representation they can afford. Producers (lawyers), on their part, can set their fees without being limited by anything other than market forces (though public defenders and prosecutors, whom I discuss later, are an exception to this rule). Unless some other normative criterion is taken into consideration, producers generally aim to receive as much money as possible from consumers. Consequently, the rich usually secure high-quality representation, while the middle class and the poor, if they are able to hire a lawyer at all, can only afford representation of lower quality. By 'quality of representation' I mean the professional level of lawyers, as well as to the quality of legal resources available to them, such as experts and private investigators. These cost a lot of money too, and are an integral part of the lawyer's work (see Galanter, 1974: 97–98, 114.).¹⁰

These characteristics are not only present in the legal representation market *qua* market; they are exacerbated by its unique attributes. First, the legal system is particularly complex: lawyers undergo expensive training, the laws themselves are complex, the results of adjudication processes are unpredictable, and clients have trouble in assessing the scope of the work that has to be done by the lawyer. Additionally, the adversarial method is competitive and the stakes are usually high for the parties at trial. Clients, therefore, are willing to pay as much as they can to tilt the scales of justice in their favour. The combination of professional complexity and exceptional willingness to pay results in high fees, and in considerable disparities in the quality of representation received by clients (Hadfield, 2000: 963–999; Moorhead, 2011: 349–350).

So the legal representation market produces an advantage for the wealthy in terms of the quality of representation available to them. In a legal competition, like the one which takes place in an adversarial system, such an advantage means that the privileged party has a *de facto* better chance for making its case. This common-sense claim underpins the main argument of this paper, and is supported by the empirical evidence on the results of the adversarial system.¹¹

As further evidence of the disparities which arise from the adversarial system, various institutions which have been developed in countries in which the system exist – attesting to the fact that the legal system itself recognises, or at least reacts to, the difficulties that arise. Examples of this phenomenon include class action, legal aid and contingent fees mechanisms (regarding Class Actions see Conte et al., 2011: 9–21; Jones, 2003: 75). But these institutions have a negligible corrective force. Even if they were perfectly effective (a controversial assumption), they are either confined to a very specific field within the law (e.g. class actions) or simply insufficient to compensate for the disparities in the system as a whole (e.g. legal aid) (Emons, 2000: 21–33; Rhode, 2004: 60–62, 122–144; Rosen-Zvi, 2010: 721–722). Consequently, such mechanisms are no more than testimony to the existence of the structural problems of the system.

The arguments so far should not be taken as showing that people can buy justice *per se*. If this were the case, there would be no difference (in effectiveness terms)

between hiring a lawyer and bribing a judge. In cases where there is sufficient evidence and the legal interpretation is conclusive, money is unlikely to influence the court's decision. Thus, the scope of my argument is limited to cases in which legal argument is required. Moreover, even when a lawyer can influence a court's decision, spending tremendous amounts of resources on legal representation is limited and does not necessarily lead to winning a case – all my argument highlights, and depends on, is the fact that money increases one's probability of winning. The influence of money, nonetheless, can manifest in ways other than winning, such as the reduction of the compensation one has to pay when found responsible, or the softening of a sentence. Hence, the phenomenon I identify in the adversarial system should not be considered as bribery, but rather a significant structural advantage enjoyed by the wealthy.

Part II: The normative appeal of the adversarial system

In this section I present the three most convincing normative justifications for the adversarial legal system.¹² Although I present the arguments as justifications for the system as a whole, some differ in application between civil cases and criminal cases. I elaborate on these differences in the following sections.¹³

Providing just results

Using Rawls's terminology (1999: 73–78), the adversarial method of adjudication is an instance of *imperfect procedural justice*, which is comprised of two (related) components: imperfect results and an independent criterion of justice. The former means that even in cases where the procedure (e.g. the law) has been carefully followed and the proceedings properly conducted, the decision-maker (e.g. the court) may still reach a wrong conclusion. The latter is best understood in contradistinction to a dependent criterion for a just result. With such a criterion, any outcome of the procedure, correctly followed, is just. The procedure itself is the normative watershed. For example, a fair coin toss is a system with a dependent criterion of justice, because whoever turns out to be the winner, the result will be just. With an independent criterion of justice, the way to evaluate whether a result is just or not being to employ a criterion of justice independent from the procedure: in the legal system, roughly, a just result of the adjudicative process should be judged against the criterion of the accurate interpretation of the law, in accordance with the facts of the matter (Rawls, 1999: 73–78). This implies, for instance, that those who are innocent should not be convicted.

The crucial question that arises is whether the adversarial method, as an imperfect procedural system, provides mostly just results (Wertheimer, 1988: 309).¹⁴ There are two arguments in favour of the conclusion that it does: the 'invisible hand' argument; and the 'division of labour' argument.

The 'invisible hand' argument. The basic narrative underlying 'invisible hand' arguments is of a process in which the result of numerous individuals, acting in their narrow self-interest, results in the emergence of an optimal overall design, unplanned as well as unforeseen by them (Ullmann-Margalit, 1978: 270–272).

Regarding the adversarial method, the invisible hand argument is as follows. The individuals are the parties; each is incentivised to zealously fight for their own case, according to their self-interest, without any intention of achieving justice (yet within ethical boundaries preventing intentional obstruction of justice), by providing the best plausible legal argument. The aggregation of the products of such self-interest-based actions provides the impartial tribunal with the best form of legal argument from each party. Then, so the explanation goes, although each legal argument is biased in favour of one party, the arguments and evidence in their best form ‘cancel out’ each other’s biases. As Mill (1989 [1859]: 38) puts it: ‘three-fourths of the arguments for every disputed opinion consist in dispelling the appearances which favour some opinion different from it’. The unintended optimal design is thus of a judge provided with the best conditions to extract the truth of the matter, as a result of biased, zealous representation for each party (Luban, 1988: 69; Rhode, 2000: 53).

The ‘division of labour’ argument. The ‘division of labour’ argument is a comparative argument that refers to the limits of the inquisitorial system. The main feature of such a system is its ‘judge-driven trial’. The judge conducts the trial, investigates, summons witnesses, and questions the parties. The lawyers are considered an independent part of the justice system, not the extension of the client’s will (Luban, 1988: 94). Fuller (Fuller and Winston, 1978: 383) claims that in such a system, justice can be achieved only if the judge undertakes the role of the representative of all parties. In order to fully understand the case, the judge must ‘permit himself to be moved by a sympathetic identification sufficiently intense to draw from his mind all that it is capable of giving – in analysis, patience and creative power’. The problem is that after identifying with each side, the judge needs to put back the impartial cap on – a requirement that Fuller describes as unrealistic. ‘When [the judge] resumes his neutral position’, he argues, ‘he must be able to view with distrust the fruits of this identification and to be ready to reject the products of his own best mental efforts. The difficulties of this undertaking are obvious. If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once’. Therefore, another instrumental justification of the adversarial method is that the labour is divided: the lawyers are in charge of identifying with the parties and making their best case, whereas the judge is focused solely on judging the parties. This is a far more achievable task for the judge, which increases the likelihood that she would provide a just result.

Protecting individual rights

The standard conception of the lawyer’s role in the adversarial system consists of the following two complementary requirements:

Full advocacy: A lawyer has an obligation to zealously defend her client according to her client’s interests within the boundaries of the law. (Fuller and Winston, 1978: 382–384; Luban, 1988: 11, 57, 62–63)

Non-accountability: A lawyer is not accountable for her client’s actions, should not be normatively condemned for representing her client, and is not accountable for the result

of the trial, regardless of whether it is just or not. (Luban, 1988: 52–57; Wertheimer, 1988: 310)

Owing to this standard conception, the adversarial system provides maximum protection of individual rights. Two main arguments support this statement.

The ‘unconstrained defence’ argument. Full zealous advocacy provides the best protection for an individual’s rights, simply because the more restrictions on the lawyer’s actions there are, the fewer tools the lawyer has to protect her client. Moreover, full advocacy prevents people or institutions (especially the state) from interfering with or influencing one’s defence in court, as it ensures that the lawyer is solely bound to the client’s interest.¹⁵ Zealous advocacy is one way to ensure this; non-accountability is another. It ensures that the lawyer can faithfully do her job, without worrying about being socially condemned for her performance in court, e.g. for being responsible for the release of a guilty man. Thus, this principle ensures that lawyers provide maximum protection to clients’ rights.

The ‘division of judgement’ argument. The two requirements result in a division of ethical judgement: the lawyer represents, and the judge judges (Luban, 1988: 78–80). The difference between this argument and the ‘division of labour’ argument is the following. The ‘division of labour’ argument focuses on the positive element of the adversarial system, dividing labour according to roles in order to better achieve just results. By contrast, the ‘division of judgement’ argument focuses on *defending individual rights* by preventing such a division from collapsing as a result of ‘controversial clients’. The fear of social condemnation provides an incentive for a lawyer to either ‘judge’ a client when asked to be hired and thus refuse to work for controversial clients, or ‘judge’ a client during representation, which results in inadequate representation.

The non-accountability requirement serves as a counterweight to such fear. It equips lawyers with an ‘ethical shield’ that justifies their actions. Thus, it is instrumentally desirable, because it increases everyone’s ability to receive maximum protection of their rights by overcoming social condemnation.

These arguments may not seem to be direct arguments for the adversarial system, but rather arguments for why, within an adversarial system, the lawyer’s role should have certain characteristics. However, the formation of the lawyer’s role in the adversarial system is unique and is celebrated as one of the system’s greatest advantages. If the lawyer’s role were constructed differently, the normative appeal of the system as a system which aspires to protect individual rights would be undermined. Thus, it serves as a powerful *independent* justification for the system as a whole – not just as an argument for what the lawyer’s role should be, having decided on an adversarial system with representation.

The ‘formal justice’ justification

Before elaborating on the ‘formal justice’ justification, I would like to make the following distinction. The justifications I have presented so far are *intra-case justifications*,

focused on the normatively appealing features of the adversarial system within the framework of a single case. However, they do not focus on the normative elements of the comparison *between* cases. The following justification does just that, and therefore I call it an *inter-case justification*.

As mentioned, the legal system is an instance of imperfect procedural justice. Its results are considered as just if and only if they are in accordance with an independent criterion. However, the procedure itself must be just as well. An adequate justice system is one that does not subject individuals to unfair procedures, not only because they are not likely to produce correct outcomes, but also due to their intrinsic inadequacy. In a system of procedural justice, fair procedure matters independently of correct outcome. One can have a valid grievance if subjected to unfair process, even if the outcome was correct. On the other hand, one can lay no blame at the foot of the court in the case of incorrect outcome produced by a fair procedure.¹⁶ Such defendants, it seems, have a valid grievance, not with respect to their conviction (which, per hypothesis was correct), but for having been subjected to an unfair procedure. From a doctrinal perspective, the norms associated with due process, embody the idea that fair trial is not merely an instrument for optimal decisions.

Just institutions or systems are evaluated using the concept of formal justice. Rawls (1999: 51) defines formal justice as the impartial, consistent, and equal application of the law. In the process of adversarial adjudication, like cases should be treated alike, and irrelevant factors should be excluded. Nonetheless, fair competition requires not just fair rules and impartial referees, but also equal opportunities. As Brian Barry (1990: 99) put it, procedural fairness must be supplemented by what he calls background fairness: 'procedural fairness rules out one boxer having a piece of lead inside his gloves, but background fairness would also rule out any undue disparity in the weight of the boxers [or] sailing boats or cars of different sizes being raced against one another unless suitably handicapped'. Following Barry, Rawls (1999: 63) argued for fair equality of opportunity, as opposed to merely formal equality of opportunity, because:

those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system . . . The expectations of those with the same abilities and aspirations should not be affected by their social class.

Fair equality of opportunity is necessary in order for the distribution produced by market competition constrained by the difference principle to be just (Rawls, 1999: 63).¹⁷ Analogously, the expectations of individuals in the same legal position (in terms of crimes committed, criminal responsibility, available evidence, etc.) should not be affected by their class, or financial resources.

I take it that the plausibility of such arguments and the common-sense intuition in favour of the normative desirability of formal justice allows me to assume that if a legal system does not comply with such requirements – impartiality, consistency, and equality – it is a *pro tanto* reason to deem it unjust (Rawls, 1999: 52). Accordingly, there is no need to elaborate on the specific ways in which the adversarial method adheres to such normative aspirations (appointing impartial judges; strict procedural rules, etc.). It

is sufficient to assume that just like any other legal system, one of the adversarial system's normative justifications is that it ensures formal justice.

Part III: Undercutting legal justice – Civil and criminal cases

In this section, I argue that the fact that legal representation is allocated by a market mechanism undercuts the normative appeal of the adversarial method. As there are relevant differences between civil and criminal cases, I discuss them separately. I start by discussing the clash between each justification of the adversarial system and the market in legal representation in civil cases. Then, to avoid repetition, I discuss the aspects of criminal cases that relevantly differ.

Different types of civil cases

In arguing that the legal representation market undercuts the adversarial civil law system's normative appeal, I refer to three types of possible civil cases:

Poor vs. Poor Case (PvP): neither party has sufficient resources to fund adequate legal representation, if any. I do not purport to define the exact amount of money for each case, but I do assume that a minimal amount for adequate representation can be set. I also do not assume that low-price lawyers are incapable of providing adequate representation. By poor I mean people who cannot acquire a minimal level of legal resources which is needed for their case. A good low-price lawyer cannot be of help, in some cases, without sufficient legal resources.

Rich vs. Poor Case (RvP): one party has sufficient resources to fund adequate representation, whereas the other does not. This also includes cases in which both parties have 'enough', but the gap between them is significant enough to tilt the scales of justice in favour of the richer party.

Rich vs. Rich Case (RvR): both parties have high and fairly equal resources for funding their legal representation.

Undercutting the 'providing just results' justification (civil)

The '*invisible hand*' argument. This argument relies on a qualitative assumption that each party acts according to its self-interest and provides the best legal argument possible, as well as on a comparative assumption – that the different arguments 'cancel out' each other's biases. The qualitative assumption conflicts with the legal representation market, because people who do not have the resources to buy adequate representation (i.e., a skilled lawyer with adequate legal resources) on the market would usually be unable to provide the best legal argument (Rosen-Zvi, 2010: 718–719). Even in PvP, although no party has a material advantage over the other, both sides would provide poor arguments. Thus, this problem applies both to RvPs and to PvP.

The comparative assumption also conflicts with the legal representation market in RvPs, because market-driven inequalities result in a situation in which due to unequal legal resources, the legal arguments provided by the parties tend not to mutually 'cancel

each other out', since they are not of the same quality. The perspective of the rich is more dominant.¹⁸

Both conflicts – the quantitative and the comparative – make it harder for the judge to extract the truth of the matter, and thus undermine the invisible hand argument in favour of the adversarial system.

The 'division of labour' argument. According to the division of labour argument, the adversarial method is normatively appealing because it offers the most appropriate framework for the delivery of just results. This argument does not directly conflict with the market in legal representation. Even if there are disparities between the parties, or if the quality of representation is poor, the division of labour might still be of value.

However, it does conflict indirectly with a potentially valuable response to the conflict between the market in legal representation and the invisible hand argument. Judges, according to this response, could 'reimburse' the poor party in RvPs for the 'influence' that the rich party's wealth has; or, alternatively, 'improve' both sides' arguments in PvPs, and thus avoid both the qualitative and comparative problems arising from the invisible hand argument. Such 'reimbursement', according to Posner and Yoon's survey (2011: 335), already takes place in reality. Nevertheless, this response fails to vindicate the method's appeal. To start with, it does not apply to adversarial systems with juries – citizens who do not possess the legal expertise required for the 'improvement' of legal arguments. Second, the normative appeal of the adversarial system stems from the superiority of its labour division in providing just results. Having a judge make arguments for one of the parties (or both), combines the two roles into one. Thereby, it undermines – and effectively, eliminates – the division of labour in an unappealing way. If the involvement of the judge is necessary, an institutionalised mechanism allowing her to lead the investigation seems more likely to provide just results than a vague 'reimbursement' by a passive judge in the adversarial system.

Undercutting the 'protecting individual rights' justification (civil)

Unconstrained defence argument. The standard conception of the lawyer's role, which consists of the 'full advocacy' and the 'non-accountability' requirements, is meant to protect individuals' rights. Although it is mostly regarded as a justification for criminal cases, it applies to civil cases too. Guaranteeing that irrelevant factors (like powerful corporations' influence, or public condemnation) will not influence legal representation, and thus jeopardise the protection of individuals' legal rights, is as relevant in civil cases as in criminal cases (Rhode, 2004: 8–10).

However, under the legal representation market, this standard conception leads to different results. With regard to the full advocacy requirement, two problems arise. The first is that, under the legal representation market, zealous advocacy is the *exception* (Rhode, 2000: 55–56). Most people do not have the resources to pay for zealous advocacy, and therefore do not enjoy the quality representation needed for protecting their rights. This problem is evident in RvPs, where the quality disparities endanger the disadvantaged party's rights.

It is hard to think about a similar problem in PvPps. In such a case, the parties do not endanger each other, for both suffer from poor representation. Nonetheless, in PvPps it is more difficult for the judge to provide just results. Think of a case in which the court's decision is reached by a coin toss. Ostensibly, there is no inherent unfairness in the act. At the same time, there is no reason to believe that the result will be the right one. The same applies to PvPps. Considering both sides are equal, no unfairness is evident, at least from an intra-case perspective. Nevertheless, there is no reason to believe that the just result will be reached by the court if both sides are poorly represented. Thus, both sides are endangered by an unjust result that might violate their rights. In any case, it is clear that one's ability to protect oneself is undermined by poor representation.

The second problem arising from the full advocacy requirement is that, while most people cannot afford quality representation, this requirement encourages the purchase of zealous advocacy by those who can afford it, based on the false assumption that any biases will cancel out. Thus, instead of protecting individual rights, zealous advocacy gives rise to a violation of rights by encouraging the wealthy to pursue their self-interest regardless of justice, at the expense of the disadvantaged.

The 'division of judgement' argument. The heart of this argument is that the non-accountability requirement ensures that the normative and legal judgement of the case is in the hands of the judge, not the lawyer. The legal representation market does not conflict with this justification directly. On the contrary, it might appear that it serves as an additional incentive for lawyers not to judge clients, but rather accept whoever can pay. As Friedman (2002: 109) argues, the market is blind; it does not discriminate between people – the only 'filter' in use is money. However, on closer inspection, the filter introduced by the market is no better than the lawyer's own normative judgement. Under the market, those who do not possess the necessary means are 'sentenced' by their financial status.¹⁹ This is a paradigmatic example of the 'access to justice' problem, on which I do not focus in this paper. Nevertheless, it is essential to bring it up in this context, to show that the legal representation market undermines yet another argument in favour of the adversarial method.

Undercutting the 'formal justice' justification (Civil)

Formal justice requires that the law and its enforcement are applied impartially, consistently, and equally. The market in legal representation does not conflict with judges' impartiality: I assume that judges rule according to what they believe is just, even if it is against the interests of the rich. With consistency and equality, things get more complicated. Assume the law says that X leads to consequence Y. Presumably, a judge will always rule Y when faced with X. Therefore, consistency – in this narrow sense – is maintained under the market. The same applies to equality: any person found responsible for X would have to bear consequence Y, just like any other person found responsible for X. The conflict between formal justice and the market in legal representation arises in a wider context, namely, in the process of arriving at the conclusion that the facts of the matter should be interpreted as X to begin with.

Disparities in the quality of representation may distort this process in two ways. One is that in some cases wealth may be needed in order to unveil the facts of the case, e.g. legal experts, labs, investigators, etc. Thus, two objectively identical cases could be treated differently in court due to epistemic disparity: the rich use extensive resources to reveal the truth, while the poor cannot afford to do the same.

Another way that representation disparities affect the interpretation of cases has to do with the comparison between identical cases (an inter-case conflict). In cases where the law is unclear and can be interpreted in different ways, parties that are better represented are more likely to convince the court to prefer their reading of the law. Thus, C_1 and C_2 – two identical cases – may receive different treatment from the court, not due to an asymmetry in their factual basis, but due to the different interpretation of the same set of facts in each case.

Different types of criminal cases

I now move to argue that, though there are some differences between the criminal and civil adversarial systems, they are insufficient to imply that the justifications for the adversarial system are not undercut in the criminal system. The same arguments that apply to the civil system apply – with some minor modifications – to the criminal system. The kind of criminal cases to which I will refer to are the following:

State vs. Rich case (SvR): a case in which the defendant has more resources than the prosecution. Theoretically, the state would almost always have more resources, or at least equal resources, compared to the defendant. However, a rich person may decide to invest a huge amount of money in one case that has no public significance. Matching her resources in every case would be unreasonable for the state, as the rich has only one case to deal with and the state needs to allocate its resources among many cases according to their public significance.

State vs. Poor case (SvP): a case where the defendant is being *inadequately* represented by a public defender due to a lack of resources, or where she privately funds her representation but still has significantly less resources than the prosecution.

Differences and similarities with civil cases

The main relevant difference between criminal and civil cases is that in the criminal system we prioritise avoiding false incarceration, and to achieve this we are willing to trade off some competence in delivering just results. As Blackstone's ratio indicates (1765–1769: 352): 'better that ten guilty persons escape than that one innocent suffer'. This difference in priority results in two of the criminal system's unique characteristics, both of which are supposed to create a structural imbalance in favour of the defendant (when compared to the parity between parties in civil cases). One is that the public prosecutor (at least theoretically) is neither obliged nor expected to zealously defend the victim (if there is one). To be sure, the state is a party to the trial, and the prosecutor argues its case passionately. But the prosecutor represents the public – and the public's

‘self-interest’ is justice. So the state pursues ‘justice’, while the defence pursues their own interests.²⁰ The other is the ‘beyond reasonable doubt’ standard of proof, compared to the ‘balance of probabilities’ standard in civil cases, which means that in criminal cases the burden of proof lies with the state.²¹

Despite these differences, the fact that the basic adversarial logic is supposed to function similarly in both kinds of cases means that, by and large, the legal representation market in the criminal system undercuts the system’s normative appeal in similar ways to those presented with regard to the civil adversarial system.

First, the market means that many defendants are inadequately represented (notwithstanding the fact that some states provide some funding to poorer defendants). For example, in the United States most court-appointed lawyers do not have the resources to defend their clients, and some do not even try – many defendants file ‘ineffective assistance’ claims about unprofessional or negligent lawyers. In addition, many poor defendants are provided with inexperienced lawyers (Rhode, 2004: 11–13, 122–137). Therefore, many SvPs are similar to PvPs and RvPs in that the *insufficient level of legal representation* provided to the poor undercuts some of the system’s justifications. So my argument about the market undercutting the ‘invisible hand’ (qualitative assumption: the poor cannot provide the best legal case for themselves), ‘division of labour’ (we do not want the judge to reimburse for low quality) and ‘unconstrained defence’ (the poor will not be zealously defended) justifications – as well as the resulting inter-case formal justice justification, concerning like cases being judged alike – apply. Only the division of judgement justification avoids being undercut, because some level of representation is usually provided to defendants in criminal cases.

However, intra-case *disparities*, on first glance, might seem less problematic in criminal cases for two reasons. One is that the structural imbalance in favour of the defendant in criminal cases might justify the claim, as Wertheimer (1988: 313) has argued, that people should be able to get ‘the best legal representation that money can buy’ in order to defend themselves. The second is that, in theory, the prosecutor has no incentive to use her material advantage to tilt the scales of justice in order to win, so disparities in SvPs are of less normative significance than in RvPs. After all, the prosecutor’s goal is nominally justice, not winning (theoretically, of course; I return to this ‘naive’ assumption below). I will take up each of these concerns in turn.

Concerning intra-case disparities in SvRs, as the system is *already* designed to favour the defendant, allowing the rich to tilt the scales even more is unjustified, since it could shift the balance in favour of the defendant to such an extent that it might prevent the system from providing just results at all. Thus, intra-case disparities in SvRs in criminal cases, caused by the free market in legal representation, also undercut the ‘providing just results’ and ‘protecting individual rights’ justifications, as presented with regard to RvPs in civil cases. A plausible response to this argument would be that in some cases the current institutional mechanisms, that are supposed to ensure the imbalance in favour of the defendant, are ineffective and that unlimited funding could be needed to achieve the right balance between the state and the protection of the individual. However, if unlimited funding is needed to achieve legal justice, the poor should also be entitled to it. But this, of course, would

render the system unfeasible: we cannot provide all with unlimited resources. Therefore, either the current institutional mechanisms to favour the defendant work (an assumption I make for the purposes of my argument), or better mechanisms should be put in place. Either way, market-based allocation that allows the rich to get the best legal representation money can buy does not lead to the reestablishment of the normative appeal of the system – on the contrary.

Moving to SvPs, the claim that disparities are less acute in criminal cases and thus do not undercut the normative appeal of the adversarial system is objectionable for several reasons. First and foremost, even though the prosecutor does not zealously defend a client, it does not change the fact that when she has more resources within a legal competition her argument and the poor defendant's argument will not to mutually 'cancel each other out', as has been assumed in the comparative assumption of the 'invisible hand argument', since they are not of the (roughly) same quality.

Furthermore, if, in response, one would argue that the prosecutor can somehow 'reimburse' the poor's insufficient level of representation, then one would face the same problem of 'undercutting the division of labour' argument, as presented regarding civil cases. Only this time, the division of labour problem seems to be much worse, since it leaves the fate of the defendant not in the hands of the well-intentioned impartial judge, but rather in the hands of the prosecution. Benevolent as the prosecutor may be, putting the fate of the poor defendant in her hands disaffirms the fundamental assumption of the criminal adversarial system – namely, that the facts of the matter will emerge out of the legal competition between the state and the defendant. Therefore, disparities in SvPs, as in RvPs, undercut the 'providing just result' justification.

As for the 'protecting individuals' rights' justification, allowing inequality of resources in favour of the state goes directly against it, because it gives the prosecutor an institutionalised advantage over the poor defendant. If the whole point of this justifications is to prevent the state from abusing its power against individuals, putting the fate of individuals in the hands of the state's lawyer seems unintelligible. So disparities in criminal cases undercut this justification as well. It is true, however, that since the prosecutor is not obliged to zealously defend the victim's interests, in some cases where the prosecutor is benevolent the results would not be as bad as in civil cases. But the fact that disparities in criminal cases would sometimes not lead to results that are as bad as the results in civil cases, is not good enough a conclusion to reestablish the appeal of this justification.

Finally, even if in theory the prosecutors are supposed to pursue justice and not their self-interest, in reality this is hardly the case. Either because they are being evaluated by incarceration rates, or because they believe that they pursue justice, public prosecutors are as zealous as any other lawyers.

To recap, due to the reasons specified above, although there are different normative rationales underlying civil and criminal cases, the legal representation market in both SvRs and SvPs, as in civil cases, undercuts the system's normative appeal. There are different existing institutional mechanisms (e.g. the 'beyond reasonable doubt' standard) that are supposed to address these differences: the legal representation market is not one of them.

Part IV: Reestablishing the system's normative appeal

The unstated requirements: (equal opportunity for) sufficiency and equality

The conflict between the legal representation market and the normative appeal of the adversarial system, both in civil and criminal cases, stems from two problematic consequences of that market:

The qualitative problem: Insufficient quality of representation of the badly off.

The comparative problem: Significant disparities between parties in the quality of representation.²²

These suggest that *sufficiency* and *equality* in legal representation are unstated underlying normative requirements of the adversarial system.²³ To be sure, perfect sufficiency and equality are unattainable: even with sufficient and equal legal resources, one's representation could still be insufficient, because, for example, the lawyer made an unintentional human error, or unequal if there are minor differences in talent between lawyers. This is where *opportunity* comes in. Addressing the ways in which the market undercuts the normative appeal of the adversarial system requires setting it up in such a way that each receives the *equal opportunity* for sufficient level of representation, and the *equal opportunity* for equality.

So what should be done? I do not purport to provide a detailed alternative institutional design for adversarial systems, which would require sophisticated empirical and economic analysis. Instead, I will discuss two – relatively abstract – general ways to change the current market-based system. One was presented by Wertheimer, and the other I offer as a preferable alternative.²⁴ Such a discussion, and the normative conclusions I draw from it, should provide a normative benchmark for future consideration of more detailed proposals for reform.

I start by discussing the proposals with regard to civil cases, and then move to discuss specific considerations for criminal cases (which are slightly different).

First option: Levelling down (civil cases)

Wertheimer (1988: 304–305) argues that in some RvPs we should level down the resources of the rich to match those of the poor. The merit of such a suggestion is twofold. First, it solves the intra-case comparative problem: the rich would not have the resources to tilt the scales to their side. Second, it acknowledges the fact that different cases require different legal resources, and does not impose a single cap on costs, but varies by case. However, it is deficient for two reasons. First, it does not solve the qualitative problem. Levelling down in RvPs, where the poor cannot afford to adequately represent themselves, would mean that both parties would have inadequate representation.²⁵ Second, since the qualitative problem remains unsolved, it is not clear whether levelling down solves the inter-case conflict at all. Under a Wertheimerian legal system, some cases would be RvR (rich vs. rich). Hence, there would be no need to level down. Other cases would be PvPs. In PvPs, where the legal representation of both sides is equally poor, it would be harder for the court to extract the truth of the matter, and consequently harder to apply the laws consistently and equally. Thus, there would still be inter-case disparities between PvPs and RvRs.

Furthermore, in such a system it would be hard to justify levelling down in RvP to the rich party, since levelling down renders them unable to receive adequate representation. Thus, Wertheimer's intra-case levelling down solution seems unsatisfactory.

Second option: Levelling down + type-based-floor (civil cases)

In contrast, the combination of levelling down and setting a resource 'floor' solves, at least theoretically, the conflicts presented so far. This solution satisfies both the sufficiency ideal (i.e. addresses the qualitative problem) and the equality ideal (i.e. addresses the comparative problem).²⁶ In each type of case, a minimum level of resources would be set, to which each party would be entitled, in order to ensure that all have an adequate level of representation (the state would be responsible for allocating resources to those who cannot afford the minimum). Such a floor cannot be universal: some kinds of cases require more resources than others. Thus, there would need to be different thresholds for different types of case.²⁷ Levelling down is supposed to ensure that parties would be unable to turn their market advantage into legal advantage.²⁸ In such a system, we are left with either AvAs (adequate representation vs. adequate representation) or RvRs, since when disparities emerge, levelling down takes place. In both cases, the intra-case qualitative and comparative problems are solved: there are no intra-case disparities and no qualitative deficiency.

A standard levelling down objection (hereafter: LDO) to my *Levelling Down + Type-Based-Floor* proposal is as follows. If one can improve the quality of one's representation without harming anyone else, there is no reason for requiring one to level down just for the sake of equality. Such an objection fails with respect to intra-case levelling down, because one's advantage in the adversarial system is necessarily the other's disadvantage. Therefore, levelling down is not done merely for the sake of equality, but also for the benefit of the disadvantaged.²⁹ Moreover, contrary to Wertheimer's suggestion, under the system I propose, the rich person whose resources are levelled down would not be able to complain that she is prevented from receiving adequate representation. She would be able to complain that she could get better representation if she faced a richer rival. However, under such a system, in which the rich person can fund her representation as she pleases in RvRs and get adequate representation, this complaint pales in comparison to the disadvantaged person's claim to receive an equal chance for justice.

Another objection to restricting the amount of money one could spend on legal representation is that the disparity in the willingness to pay may reflect justified preferences, and not just the litigants' ability to pay: a person may care greatly about a case, and this may affect how much they spend. In such a case – the objection might run – fairness could require that the one who cares more should be able to invest more in their legal representation without being levelled down.

Before responding to the argument, it should be noted that even if this objection is correct, it does not carry much weight. In reality, since defending oneself in court is a high stakes affair, the limiting factor on spending for almost everyone would be the ability to pay rather than willingness to pay. Therefore, the key question here is how many actual cases are there in which willingness to pay actually tracks the true intensity of people's preferences, and not their ability to pay. This is an empirical matter, but I think I can safely assume that the number is limited.

As for the objection itself, it is unclear why one's degree of 'caring' is relevant in the context of providing legal justice in an adversarial system. First, if the equality and sufficiency requirements are correct, then the system is set up in a way that already assumes allocation of legal representation should be done according to principles that are not responsive to preferences. Putting it differently, the system is designed to provide justice – not to satisfy preferences. So one is at risk of proving too much by claiming that preferences should matter for determining the amount of spending allowed, as this undermines not only my proposal but the appeal of the system as a whole. More generally, it is also unclear why preferences should matter in relation to legal justice. To illustrate, consider the following cases:

The Caring Rich: a rich person is charged with theft and faces trial. She has an extremely strong preference not to go to jail, and legitimately decides to invest everything she has in legal representation.

The Non-Caring Poor: a poor person from a minority group faces trial. As in the Caring Rich case, she is charged with *an identical case* of theft. She does not have the will power to properly defend herself, as she thinks the system is rigged against her, and decides not to invest anything in legal representation.

It is likely that the court will reach different decisions in each case – despite the charges being identical – owing to the rich woman's better legal representation. According to the objection, this disparity is justified, since the rich cared more than the poor. I find this result counterintuitive, to say the least. It is unclear to me why the fact that the result of the case is more important to one party than the other should matter in a trial. Quite the reverse, in cases where people do not wish to defend themselves, there might be a justification to compensate for that, and not to reward the more 'caring' party. To illustrate, imagine that the non-caring poor not only does not have the enthusiasm to defend herself, but also insists on not being legally represented at all. In such a case, it is clear that the adversarial method will not work as there are no two competing sides. To achieve justice, it might be justified to force the defendant to be legally represented, or conduct her trial according to a different, non-adversarial method.

Now, I am not trying to defend the rather strong claim that preferences should not matter at all in the context of adjudication. I am also not trying to argue, at least in this article, that we should force people to be legally represented if they do not wish to be. My point is that the examples above show that in addition to the fact that the adversarial system is already supposed to be set up in a way which is non-responsive to preferences, the more general claim that preference-satisfaction should matter in the context of providing legal justice also seems controversial. This is not a conclusive response, but I think it provides a *pro tanto* reason to consider this objection not especially forceful.

Having established the justification for intra-case levelling down (with a resources floor), the question remains: why allow RvRs at all? Why not force all to get equal adequate representation and remain with a system in which all cases are AvA and thereby solve the inter-case problem?

The LDO does apply to this proposal. In the system I suggest, a rich person's high-quality representation can never harm the non-rich, since in each instance of intra-case disparities the richer is required to level down. How can we justify levelling down the rich from RvR to AvA, when no one is being harmed?

One answer might be that due to the requirements of formal justice, the differences in results between RvR and AvA are unacceptable. However, assuming adequate representation, the differences should not be acute, since judges should be able to extract the truth out of fairly strong arguments and evidence even in an AvA. Thus, there is a trade-off between *absolute* formal justice and further restricting people's freedom to fund their legal representation as they please.

For those who are not strict egalitarians, the anti-levelling down stance is strengthened by this trade-off. Heavily funded legal representation can (and maybe does) lead to the development of the legal profession, as it incentivises talented people to become lawyers – funding that the state cannot provide. Second, it is unlikely that there would be similar AvA and RvR cases. The usual legal needs of the rich differ immensely from those of the poor (Hadfield, 2000: 998–999). Consequently, formal justice requirements are unlikely to be violated, since there are few similar cases available to be treated differently. Thus, there may be no need for inter-case levelling down in the first place.

Having said that, there is one reason to level down in RvRs. Investing many resources in cases where there is no need for such an investment might lead to wasting resources from the legal system – a fact which affects the public as a whole (Forer, 1984). For example, cases with overinvestment in representation could take longer (good lawyers can take advantage of the system and 'drag' the case for a long time). They could also require more work from the legal system's employees, who already face challenging workloads and suffer from insufficient resources. It is true that this is a different type of reason, which is not directly related to the qualitative or comparative problems. Nevertheless, it is still a valid and important reason that should be weighed against the reasons mentioned above for not levelling down in RvR cases. Thus, the question of whether the rich should be levelled down, even in RvR cases, remains open for the time being.

Levelling down + type-based-floor – Implications for criminal cases

In general, the *Levelling Down + Type-Based-Floor* suggestion applies to criminal cases as well. There are, however, two differences between the cases that should be considered. First, notice that in contrast with civil cases, there are no 'RvR' criminal cases. Hence, levelling down in SvR would mean de facto that inter-case inequalities will not exist: the state will have no reason to spend more than needed (and will be levelled down if needs be) and the rich will have to level down.

Second, unlimited funding of the rich in criminal cases might be more objectionable as it entails severe public costs. If justice is to be achieved, the state would need to increase its resources to the level of the rich. Thus, spending substantial resources when facing citizens of great means, so as to not constrain their right to use their money, seems unreasonable – especially when levelling down means that the rich are still protected by the structure of the system and by adequate representation. Thus, levelling down the rich in SvR is justified, provided that the other components of my suggestions are fulfilled.

In sum, although the criminal system operates with a different set of norms ('less justice, more protection'), my proposal stays largely the same: the poor should be provided with adequate representation (where what 'adequate' means varies by type of case), and the rich or the state should be levelled down in cases in which they possess an advantage as a result of their wealth.

A final comment on feasibility

The normative guidelines sketched above might seem unsatisfying, since they do not address feasibility concerns, like how an adversarial system can be economically maintained without a market. One objection could be that the rich, at least in civil cases, will response to these restrictions by opting-out from the public legal system and increasing their use of private arbitration. This would create problems in terms of inter-case equality, and could potentially lower the level of the services given to the rest of the public – assuming the rich's investment is crucial for sustaining the quality of the services.³⁰ Other objections might pose questions like how should the thresholds be set? How can a system be funded in a manner that secures adequate representation for all? And would this reform motivate people to overuse the legal system?

These considerations are beyond the scope of this paper. Also, following Jonathan Wolff (2020: 260), I am not sure that philosophers have a clear advantage over other experts in addressing them. I did make some feasibility-related assumptions throughout my argument, but only uncontroversial ones that do not require complex analysis (e.g. that it is impossible to provide unlimited legal resources to everyone all of the time). All other assumptions which might be deemed feasibility-related (e.g. that it is possible to provide justice by using an invisible-hand-based adversarial mechanism) are *internal* to the justifications of the adversarial system. If they are incorrect, then the system is founded on false assumptions and is unjustified to begin with.

One might argue that without answering these feasibility-related questions, my argument is meaningless. I dispute this claim. My purpose was to show that if we take the normative appeal of the adversarial system seriously, the requirements of equality and sufficiency must be somehow satisfied – and that in order for any kind of real life legal adversarial mechanism to work, market-based allocation is not the way to satisfy it. Thus, the *Levelling Down + Type-Based-Floor* proposal serves as a normative benchmark to evaluate whether an adversarial legal system is justified or not. My discussion of this proposal was intended to anticipate normative objections that could have potentially stopped it from getting off the ground (e.g. the LDO). Questions regarding viability do not undermine my proposal, but rather the possibility of establishing a (roughly) justified adversarial system in real life. To see this, consider these three scenarios concerning the relation between feasibility concerns and the normative stand of the adversarial system.

1. A free market in legal representation is *necessary* for the economic sustainability of the adversarial method, but meeting the normative ideals of such a system is impossible. Consequently, the method *cannot* be justified. That is unless one finds other justifications for maintaining the system. For example, if there are no other feasible legal systems that are more desirable. In this case, the trade-off would be

between a non-appealing adversarial legal system, other less-appealing systems, and no system at all.

2. A free market is *not necessary* for the system, but getting rid of it is too costly (e.g. in terms of efficiency or stability). In this case, an adversarial method *could* be justified (under very different circumstances), but *is not*.
3. There is a way to both implement the *Levelling Down + Type-Based-Floor* ideal and keep the system sustainable. In this case, once a reform is put in place, the adversarial method *could* be and *de facto* is justified.

In all three cases, feasibility-related concerns either affect the possibility of ever establishing justified adversarial legal systems (option 1), or the possibility of establishing a justified adversarial system in reality (options 2 and 3). They do not, however, impact the justification for the normative ideal I propose.

Conclusion

In contemporary adversarial systems, the services provided by lawyers are a commodity sold and bought in the market: the more one pays, the better quality of legal representation one gets. A lot has been said and written about the problems that this institutional structure gives rise to – the ‘symptoms of the disease’, as it were. But the disease itself – i.e. the fact that there is a market in legal representation incorporated into the adversarial system – have rarely been subject to normative examination. In this article, I have tried to address this discrepancy by taking a new approach to the philosophical evaluation of our adversarial legal systems: instead of making arguments about the role of distributive justice or professional ethics in the legal system, I have discussed the institutional normative limits of the market in legal representation.

After carrying out a scrutiny of this kind, my conclusion is that allocating legal representation by the market in adversarial systems undercuts the system’s normative appeal. In order for this normative appeal to survive, I showed that two, previously unstated normative requirements must be satisfied: (equal opportunity for) equality in legal representation and (equal opportunity for) sufficiency of legal representation. My *Levelling Down + Type-Based-Floor* proposal serves as a starting point for a reform that would satisfy these requirements.

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Notes

1. Hereafter I will use the term ‘truth of the matter’ to refer to both discovering the facts and, and to the accurate legal interpretation.
2. I will use, loosely, ‘lawyer’ and ‘legal representation’ interchangeably throughout this article.
3. In using the terms ‘lawyers’, ‘legal representation’ or ‘quality legal representation’, I refer both to the quality of the lawyer herself and the quality of legal resources available to her – depending on the financial resources of the client, as both influence the overall quality of the client’s legal representation.
4. Of course, money enters the ‘legal system’, in a broader sense, much earlier on. The emergence of disputes itself is influenced by the economic status of the opposing parties (as demonstrated in Felstiner et al., 1980: 633–637). However, these problems have been recognised and researched thoroughly, and are not unique to the legal system. Inequalities lead to a wide range of problems, with respect to many parts of society. The purpose of this paper is to show that the specific fact that contemporary adversarial legal systems are incorporated within a free market in lawyers leads to a different, more constitutive set of challenges.
5. A paradigmatic example for this phenomenon is Schwartz’s discussion (1983: 543–563) of the moral accountability of civil advocates. He acknowledges and identifies normative requirements for the adversarial system that could be undercut by a free market mechanism, but he does not question or challenge the market-based allocation of legal representation. Rather, he focuses on the implications of these requirements on the moral accountability of lawyers.
6. Wertheimer (1988) is the only scholar I am familiar with who provided a philosophical analysis of the market in legal representation within the adversarial legal system. However, he only discusses one justification of the adversarial legal system (providing just results), and focuses solely on civil cases (while I am discussing both criminal and civil cases). I elaborate on his argument in part IV of this paper. Additionally, during the publication process of this article, Frederick Wilmot-Smith (2019) has published a new book in which he argues for the primacy of justice over the market in legal resources. Nevertheless, he provides a somewhat general argument which is directed at all legal systems, thereby leaving the detailed discussion on the adversarial legal system unattended.
7. A similar philosophical approach was taken recently by Johana Stark with regard to regulatory competition law (see Stark, 2019: 125–126).
8. To clarify, my ideal for reform is therefore desirable solely in order to reestablish the adversarial system’s appeal. Further argument would be needed, if there is any, to apply it generally to all legal systems. Additionally, my intention is to make a *fairly general*

normative claim about the adversarial legal system as a whole. Admittedly, my argument might not apply to some specific fields of law, and would probably need refining in order to apply to different adversarial systems. This simply highlights that there is more work to be done.

9. Notice that my argument is not concerned with the question whether legal representation should be a private or public good. As shown by Anderson, goods can be privately owned without being allocated by the market, or publicly owned and marketised (Anderson, 1993: 190–191). There might be other reasons to think that legal justice should be a product of a completely public owned endeavour, but this discussion is beyond the scope of this paper (for more on this see Brennan, 2017; Dorfman and Harel, 2016).
10. Indeed, according to the American Bar Association's report (2014), most graduates from elite universities are employed by top private firms that seldom represent the poor. Moreover, a Legal Services Corporation (LSC) report (2009) shows that the proportion of self-representation in court among low-income citizens is extremely high.
11. For example, a survey conducted among American judges showed that courts' decisions are significantly influenced by disparities in legal representation quality (see Posner and Yoon, 2011: 335–336, 343–346; see also Anderson and Heaton, 2012: 188–197). It should be noted that James Geyner and Cassandra W Pattanyak (2012: 2175–2196) have challenged the existing literature on the subject for 'purporting to measure quantitatively the effect of legal representation in civil disputes', and argued that it is extremely difficult to reach generalised conclusions regarding the impact of quality legal representation. According to them, legal representation does not always make a difference (for an example of a case heavily influenced by the quality of representation see Greiner et al., 2012: 901–989). For the purpose of this paper I do not wish to evaluate the findings presented in the empirical literature. If Geiner and Pattanyak are correct, my argument is limited to cases where quality legal representation matters.
12. Another justification for the adversarial system on which I do not elaborate focuses on the intrinsic value of the adversarial method. This justification reflects the notion that the lawyer's role in the adversarial system is intrinsically valuable, for it is an instantiation of the client's dignity (Donagan, 1983: 123–133), autonomy (Fried, 1976: 1072–1073) or right to be heard (Harel, 2014: 225). Although I do not discuss this line of justification, I do believe that this justification is also undercut by the market in legal representation, as one's right to be heard is dependent on one's access to legal resources. Another useful summary of the justifications for the adversarial legal system can be found at Wendel (2010: 17–44).
13. I do not offer a defence for these justifications. If one rejects them, then one has no reason to believe in the adversarial system independent of the conflict between its normative justifications and the market in legal representation (unless, of course, there is some other justification for it).
14. Another relevant question is whether the adversarial system produces just results more often than alternative legal systems. I do not discuss such comparative arguments.
15. In criminal cases the prosecutors' role is different, as I explain in section IV.
16. Although one might have a legitimate grievance in the case of false conviction, for example, this is a separate issue from whether the court is blameworthy.
17. Notice that the concern is not merely optimising outcomes: 'the reasons for requiring open positions are not solely, or even primarily, those of efficiency. I have not maintained that offices must be open if in fact everyone is to benefit from an arrangement' (Rawls, 1999: 73). Restricting access to positions, Rawls argues, is a violation of equal treatment.

18. Recall that my argument does not encompass cases in which there is sufficient evidence and the legal interpretation is conclusive, since in such cases the impact of quality legal representation is marginal. However, in real life, even in cases where P is a stone-cold winner, R can, and sometimes does, use her economic advantage to settle the case out of court, so that the cases that do go for trial are more likely to be close cases in which disparities in legal resources are decisive (see Gross and Syverud, 1991: 319–393).
19. For instance, the LSC report (Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans (2009)) shows that almost one million Americans were denied legal aid by the LSC alone, and were left without legal representation.
20. However, oftentimes this structural imbalance does not have significant influence within a system in which the overwhelming majority of criminal cases are settled via plea-bargaining (Pfaff, 2017). Thus, some part of this section encompasses a fairly idealised normative discussion, and there might be a need to further strengthen the poor and adequate defendants' rights against the zealous prosecution.
21. Another difference is that in criminal cases the state usually provides its own legal representation, so there is only a legal representation market for defendants – but this does not change much for the purpose of my argument.
22. It might be plausible that in a different legal system equality between the parties would not be needed at all. However, this is the way adversarial systems are set. Thus, this is more of a structural problem than an intrinsic problem of inequality.
23. A similar idea was suggested in Murray L Schwartz's 'Postulate of Equal Competence' (1983: 546–548). However, he did not make the link between the postulate and the market in legal representation.
24. I only discuss proposal which involve levelling down, as I assume that balancing the scales of justice by levelling up people's legal resources, so as to make sure all cases become, in effect, RvR cases, is unfeasible, due to scarcity of public resources.
25. Recall that the definition of RvP includes cases in which the poor side can afford adequate legal representation, but the gap with the rich is so large that it is still problematic. Only in such cases Wertheimer's suggestion is desirable.
26. By 'equality' I do not mean equality per se, but rather a balance between the parties within the adversarial adjudication process.
27. Due to the diversity of cases, the classification of types would be general, and exceptions would be required. However, such a problem is common to all general legal principles that need to be applied to a diversity of cases, and therefore using it to object my claim would be to demand too much.
28. In some cases, one party's representation necessitates more resources than the representation of the rival party. Therefore, equalising resources by levelling down might lead to unjust results. To counter this, the threshold can be set according to the party which requires more resources. Moreover, the threshold could be a range between two limits and not a specific number.
29. This is an instance of a well-known, more general point, according to which nothing like the LDO applies in competitive settings or to positional goods (see Brighouse and Swift, 2006: 471–497).
30. For a similar objection regarding the education system see Hirschman (1970: 51–52).

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