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# Integrity and the Incongruities of Justice: A Review of Daniel Markovits, *A Modern Legal Ethics*

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# THE YALE LAW JOURNAL

BENJAMIN C. ZIPURSKY

## Integrity and the Incongruities of Justice: A Review of Daniel Markovits's *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age*

*A Modern Legal Ethics: Adversary Advocacy in a Democratic Age*

BY DANIEL MARKOVITS

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**INTRODUCTION**

The problem at the heart of Daniel Markovits's challenging new book *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age*<sup>1</sup> is a familiar one: may a lawyer present her client's case in a manner calculated to lead others to adopt her client's story, even though the lawyer is aware of facts that make the adversary's story likelier to be true? The legal profession answers "Yes." In fact, says Markovits, the legal profession takes the view that a lawyer who has agreed to represent a client is *obligated* to present the client's case in a way calculated to lead others to believe the client, even when the client's contentions are actually false. This suggests that lawyers may—indeed *must*—lie, or at least that lawyers must deliberately present distorted versions of reality in order to manipulate jurors and judges to come to form beliefs that are false, so their client will win. How can it be that lawyers are not only permitted, but obligated, to lie? At a very general level, the answer is that society benefits by having a system in which disputants are entitled to be represented by loyal and zealous advocates. Although these problems and solutions are, at a general level, well trod territory in legal ethics, *A Modern Legal Ethics* is anything but banal. Like a Cartesian philosopher engaged in an experiment of self-imposed skepticism, Markovits has set for himself—and the legal profession—an agonizingly difficult problem. The hope is that when Markovits shows lawyers and legal ethicists the way out of his exquisitely designed trap, we will finally be on secure moral ground; we will have a truly justifiable framework for understanding the core of legal ethics.

Markovits frames the problematic of his book in several distinctive and unusually provocative ways. In striving to find an *ethical* account for lawyers, Markovits is not simply trying to articulate the circumstances under which certain seemingly immoral conduct is actually morally permissible or to give an account of the reasons that such conduct ought to be deemed permissible. He is seeking such an account, but he is seeking more. For Markovits, the central goal of legal ethics is to explain "how the actions, commitments, and traits of character typical" of a lawyer "may be integrated into a life well-lived."<sup>2</sup>

Strikingly, Markovits depicts the ethical burden of a good lawyer in alarming terms. He writes that:

Although the law governing lawyers includes a host of secondary rules that constrain the lies that lawyers may tell and the ways in which they

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1. DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* (2008).

2. *Id.* at 1.

may cheat, the deeper principles of lawyer loyalty and client control bleed through these rules, so that lawyers remain professionally obligated to lie and to cheat on behalf of their clients in spite of the constraints.<sup>3</sup>

This is not simply a gratuitous moment of saber rattling, but actually a rather clear summary of Markovits's position, presented as a concluding paragraph of a chapter supposedly devoted to a close examination of whether it is in fact a fair characterization of lawyers' conduct to say that lawyers lie and cheat. The statement that lawyers lie and cheat is a frequent refrain throughout the book, worn almost as a badge of pride. It is not put forward as a descriptive claim that there are many bad apples out there; rather it is advanced as an analytical claim about what the professional role of "lawyer" obligates real lawyers to do.

The lawyerly vices of lying and cheating are not attributed simply to a small fragment of the American bar (for example, one could imagine a story in which the American criminal defense bar deploys these vices in a full-blooded commitment to defending the individual against the awesome power of the state). Rather, these forms of conduct are obligatory wherever and whenever lawyers act as advocates for their clients. On Markovits's view, this kind of "lying and cheating" is obligatory not only for criminal litigators, but litigators generally; not only for litigators, but those who represent clients before any sort of tribunal or commission; not only for tribunal-based representation but, to some extent, those who represent clients in counseling and negotiation. This obligation is not meant to apply simply in the United States, but in any legal system with a similar structure.<sup>4</sup>

Further intensifying his problematic, Markovits thoroughly rejects the best established and most frequent defense to the foregoing criticisms, which he calls "the adversary system excuse" and I shall call the "justice-consequentialist defense." This defense states that lawyers must remain partisan advocates, even when that involves advocating positions the lawyer does not privately believe, because in the long run the adversary system is the best way for our system to arrive at truth and to do justice. The idea is that vigorous partisan advocacy generates more justice on the aggregate level than any other system. Drawing upon decades of criticism by others,<sup>5</sup> Markovits rejects the justice-consequentialist defense for three reasons. First, he thinks that an adversary

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3. *Id.* at 17.

4. *Id.* at 13-16.

5. See, e.g., ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES* (1999); DAVID LUBAN, *LAWYERS AND JUSTICE* (1988); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998).

system with room for lawyers to abandon their advocacy position when on the verge of subverting justice would be a more justice-producing system; second, he believes that the justice-consequentialist defense lacks all plausibility where there are problems with the substantive laws and where legal services are not justly distributed; third, he contends that the rights violations that vigorous advocates knowingly support (in cases where they are aware of the lesser justifiability of their clients' point of view, but assert it loyally nonetheless) cannot be justified in an aggregative, consequentialist manner.<sup>6</sup>

Finally, Markovits maintains that even if the aforementioned shortcomings of the justice-consequentialist defense are put to one side, there is an even greater problem with that defense, which he calls the problem of *integrity*. The problem is that the standard model of how lawyers proceed within the adversary system treats everything a lawyer does as being only indirectly morally worthwhile, only indirectly part of finding truth, and only indirectly part of doing justice. The lawyer's own individual involvement is as a partisan advocate who deliberately lies and cheats for her client. The idea that the adversary system is conducive to the discovery of truth and the doing of justice in the long run is unsatisfactory for legal ethics and would be even if its long-run claims were true, and even if all of the participants in the legal system accepted those claims. This is not for the simple Kantian reason that long-term consequences cannot justify short-term breaches of duty. It is because it is unacceptable to ask people—namely, lawyers—to live a professional life whose day-to-day activities feel like, and are, a violation of others, and of basic moral norms, even if this is beneficial in the long run. A life of daily betrayal of moral commitments to be truthful, trustworthy, and fair in one's dealings is a life of alienation from oneself—at least for a person deeply committed to truthfulness, trustworthiness, and fair play. One would have to give up one's integrity to lead such a life, and it cannot be the case that leading the life of a lawyer requires giving up one's integrity.<sup>7</sup>

This final aspect of Markovits's distinctive and unusual framing of the problem of partisan advocacy is the central challenge of the book: Is there a way to understand what lawyers do as partisan advocates that does not succumb to the integrity critique? Can a hired gun have integrity? Markovits's answer is affirmative. His view is that the legal profession *can be defended* and the partisan lawyer's life is one that *can be well-lived*. By embracing the virtue of fidelity and exercising the capacity for negative capability explained by the

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6. MARKOVITS, *supra* note 1, at 104-05.

7. *Id.* at 107-08, 115-17.

nineteenth-century poet John Keats,<sup>8</sup> a lawyer can engage in a profession that is “worthy of commitment.”<sup>9</sup> Roughly, his claim is that a healthily functioning legitimate political state needs to have a system of resolving disputes that has authority, as a constitutional matter, and whose deliverances in dispute resolution have the capacity to be received by members of the community as legitimate. Indeed, the need for such a system of authoritatively resolving disputes in a manner that can be properly received by society and the disputants is in some ways analogous to the need to have a functioning polis that can decide controversial political issues, even as members of society disagree about what the law should be and what should be done. The latter system is *democracy*. The dispute resolution system is *adjudication*. Adversary advocacy is part of the legal process we utilize to make our adjudicative system work. Markovits’s claim is that adjudication and the legal process are essential to solving a community’s problem of political legitimacy as to the resolution of individual disputes, and that they are able to do this only because disputants are able to connect their concerns affectively and rationally with the legal process.<sup>10</sup>

More particularly, the daily performance of adversarial lawyers is a direct instantiation of the virtues of fidelity and negative capability. Lawyers acting as adversary advocates, exercising the virtue of fidelity and the capacity for negative capability, are essential to such engagement and therefore to the legitimizing capacity of adjudication. Once lawyers engage in what Markovits calls “role-based redescription” and take fidelity and negative capability to be fundamental commitments and values for their role, they can replace their commitments to honesty and fair play with these lawyerly ideals and ambitions, and therefore avoid sacrificing their integrity.<sup>11</sup>

A professional life that from an impartial point of view might be called “lying and cheating” is noble not because the lies and cheating make everything work out in the long run, but because: (a) a life of enabling clients to engage with the legal process is a life of making political legitimacy possible; and (b) if the bar is functioning properly and lawyers are able to understand themselves through role-based redescription, lawyers justifiably understand themselves as loyally representing their clients, not as lying and cheating. However, in a final chapter theatrically named “Tragic Villains,” Markovits’s skeptical side re-emerges, suggesting that perhaps the structural changes of the American bar in

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8. *Id.* at 93-96.

9. *Id.* at 211.

10. *Id.* at 171-211.

11. *Id.* at 163.

the twenty-first century, which have made the bar less insular, will make it practically impossible to develop and exercise the lawyerly virtues of fidelity and negative capability.<sup>12</sup>

How does one begin responding to this vibrant philosophical meditation, so bursting with intellectual sophistication that it is sometimes hard to tell just what is being asserted? In this Essay, I focus upon five provocative theses of Markovits's book, explaining each. These are:

1. The goal of legal ethics is to ascertain whether lawyers can lead a life worthy of commitment;
2. Lawyers are obligated to be liars and cheaters;
3. The life of a lawyer is encumbered by a serious integrity problem, such that it is not clear whether a lawyer can lead a life worthy of commitment;
4. Adversary advocates can, in principle, preserve their integrity by redescribing to themselves the role of lawyers as enablers of transformations of disputes so that the political legitimacy of adjudication is possible; and
5. The possibility of lawyers having integrity is threatened by the decreased insularity of the modern American bar, and therefore lawyers today may well be condemned to living the life of tragic villains.

Although I end up rejecting each of the propositions above, Markovits and I agree on five broader points:

- 1a. An important question for legal ethics is whether the aspects of being a lawyer displayed in the partisan conduct of lawyers can be squared with an individual lawyer's commitments to justice and society's commitments to justice;
- 2a. Lawyers are often obligated to act in ways that are far from displays of the virtue of honesty;
- 3a. Lawyers' self-reproach is an indication of a deeper problem, understandably called "integrity";
- 4a. Partisanship is best justified by a fidelity-based account of the legitimacy of the adjudicative system;
- 5a. Although there are important benefits to the decreased insularity of the bar, there are substantial risks as well, and these risks run to the core of some of the most serious problems of justice and integrity.

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12. *Id.* at 212-46.

Indeed, while I have my reservations about the darkly romantic metaphors strewn throughout this book, Markovits's strategy of scrutinizing problems of lawyers' integrity in order to understand the role of law in society is capable of shedding a great deal of light on both legal ethics and jurisprudence. Parts I through V take up each of these issues in turn, contesting Markovits's aggressive position, while supporting a more moderate contention.

Part VI—titled “The Problem of the Incongruities of Justice”—presents an alternative account of the normative problems underlying the self-reproach advocates sometimes experience. Many of those who choose to become lawyers—even as they sink into the pressures and pleasures of being a professional—like to think that part of what is good about being a lawyer is that one is part of a system that aims to do justice. But a reflective lawyer may worry that his work is an obstacle to justice being done. This unsettling perception is often quite true, I argue, because “justice” is not one ideal, but many, and the many forms of justice are incongruent with one another. Whether retributive justice, corrective justice, or distributive justice is done when the adversary system is working “justly” is a contingent question. I conclude by suggesting that the way to deal with one's awareness of the incongruities of justice is not single-minded commitment to the virtue of client fidelity, but practical engagement with the mid-sized problems of improving our systems for realizing justice.

## I. LEGAL ETHICS AND THE LIFE OF THE LAWYER

### A. *An Unconventional Description of the Field*

The inference that begins *A Modern Legal Ethics* provides an instant warning that readers must take care not to permit the author's beautiful writing to lure them to a peculiar place:

If the basic task of ethics is to say how one should live, then the basic task for a professional ethics is to explain how the actions, commitments, and traits of character typical of the profession in question may be integrated into a life well-lived.<sup>13</sup>

Here, Markovits is asserting an important, broad conclusion about the appropriate methodological orientation of the subject of legal ethics. The fundamental question of this book is how the life of a lawyer can be worthy of

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13. MARKOVITS, *supra* note 1, at 1.

commitment, how being a lawyer can be integrated into a life well-lived. This is an interesting ethical question about lawyers and Markovits has interesting things to say in answering it. However, Markovits does not simply say that this is the question he happens to have chosen. Rather, he argues—from the very first sentence of the book—that in taking up this question, he is taking up *the basic task of legal ethics*.

But is this the basic task of legal ethics? Is it the basic task of medical ethics to figure out how traits of character typical of doctors may be integrated into a life well-lived? Presumably, such a task would require answering the question of whether a commitment to heal, a proclivity for hard work, and a devotion to a combination of science and practical knowhow can be integrated into a life well-lived. Aside from the fact that this is an easy question (the answer is “Yes”), answering this question is plainly not the task of the subject called “medical ethics.” Medical ethics is about informed consent and end-of-life decisions and dealing with delicate questions about treatment choice and autonomy of patients. Medical ethics is not centrally concerned with doctors’ life choices, but is about the distinctive and challenging moral dilemmas that arise for members of the profession. Is legal ethics not the same? Certainly those of us who teach legal ethics focus on the distinctive moral problems faced by lawyers, such as which information must be kept confidential, which conflicts are permissible or consentable, and when client autonomy is threatened. These issues do not have to do with lawyers having lives that are worth leading, but rather with the moral questions that lawyers face in legal practice and how various legal authorities answer—or fail to answer—those questions.

What is going on here? Why does Markovits begin his book with what might seem like such an idiosyncratic claim? Is this simply a Yale Law School professor trying to address students who began law school thinking they would save the world and left deflated by the thought that they are now just corporate clones doing the bidding of the Fortune 500 for the rest of their lives? Why else would he frame as his central question whether a lawyer can really lead a life worthy of commitment, rather than the questions that are really at the heart of legal ethics? In the end, the delineation of the subject matter of legal ethics might not matter because the issues Markovits confronts turn out to involve *both* questions about acceptable conduct in the practice of law *and* questions about whether and how a lawyer can lead a good life. There are other works in the area with a similar emphasis. Charles Fried’s classic

article *The Lawyer as Friend*<sup>14</sup> and William Simon's riveting book *The Practice of Justice*<sup>15</sup> are two leading examples. But the strength and prominence of Markovits's specification of legal ethics in terms so centered on lawyers' lives is unusual and I believe it is useful to see how and why Markovits ended up starting where he did. The intellectual history of Markovits's project, set forth in the following Section, will shed light on Markovits's unusual orientation in legal ethics.

*B. Influences on Markovits: Williams, Kronman, and Virtue Ethics*

*A Modern Legal Ethics* displays the impact of two of Markovits's major influences in two separate fields: the late Bernard Williams, an extraordinarily significant philosophical theorist of ethics at Oxford University (where Markovits did a doctoral degree in Philosophy) and Professor Anthony Kronman, former Dean of the Yale Law School (where Markovits studied law and is now a Professor). Kronman's 1993 book, *The Lost Lawyer*,<sup>16</sup> is a contemporary classic of legal ethics. Kronman utilized the widespread perception in the bar during the 1980s and early 1990s that practicing lawyers were increasingly unhappy and unfulfilled with their work to sketch an idealistic picture of the role that lawyers once played in American society, and to document the social, political, economic, and intellectual forces that led to the decline of that role. Kronman's sociological and historical narrative was secondary to his philosophical account of what makes being a lawyer special and worthwhile. On Kronman's view, the lawyer was once fundamentally a sort of counselor, who served as an essential guide in public and private affairs by dispensing a type of wisdom that comes from taking others' perspectives and integrating them into a workable detached perspective. The satisfaction of being a lawyer emerged both from the intrinsic value of the personal and intellectual virtue of good judgment and the rewards of playing this special role in public and private life. In the 1990s, when his book was published, it created a new and important space in the spectrum of thinking in the field of legal ethics, which at that point was fractured between hired gun advocates and progressive justice advocates. Kronman carved out a place for the "lawyer-statesman," potentially reorienting a number of standard legal ethics problems.

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14. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

15. SIMON, *supra* note 5.

16. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

Kronman's account of how to conceive the role of a lawyer so that being a lawyer was having a particular kind of good life also plausibly constituted a larger vision of legal ethics in the more standard sense. In addition to offering an account of the social value of lawyers and the personal satisfaction that comes from being a lawyer, the lawyer-statesman model offered a perspective on how the tension between client loyalty and social welfare might be reconceived. Markovits expressly acknowledges Kronman's supervision of his student work, which was the origin of this book.<sup>17</sup>

Of at least equal importance is the influence of Bernard Williams, whose conceptualization of the problem of "integrity" lies at the core of Markovits's book. Serious moral theory in the English-speaking world during the first two-thirds of the twentieth century was dominated by utilitarians. Although John Rawls's extraordinarily well-developed neo-Kantian thinking,<sup>18</sup> and a variety of other contractarian approaches, probably had the largest influence in challenging utilitarianism, a critique published by Williams in 1973 had a major impact for quite a different set of reasons.<sup>19</sup> In that critique, Williams argued that even where utilitarianism might be getting the right answer about what a person ought, morally, to do, it went about the whole enterprise of analyzing moral questions in an untenably simpleminded way, by specifying which outcomes are best in the long run (taking into account the negative side effects of bringing about those outcomes) and then prescribing the particular actions that people should take to bring about those outcomes. Markovits repeatedly draws from Williams's hypothetical example of Jim in South America, which illustrates this point well. Jim's predicament is one in which saving lives appears to require committing a homicide.

Jim finds himself in the central square of a small South American town. Tied up against the wall are a row of twenty Indians, most terrified, a few defiant, in front of them several armed men in uniform. A heavy man in a sweat-stained khaki shirt ["Pedro"] turns out to be the captain in charge and, after a good deal of questioning of Jim which establishes that he got there by accident while on a botanical expedition, explains that the Indians are a random group of the inhabitants who, after recent acts of protest against the government, are just about to be killed to remind other possible protestors of the advantages of not protesting. However, since Jim is an honoured visitor from another land, the

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17. MARKOVITS, *supra* note 1, at xi.

18. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE (1971).

19. Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 77 (1973).

captain is happy to offer him a guest's privilege of killing one of the Indians himself. If Jim accepts, then as a special mark of the occasion, the other Indians will be let off. Of course, if Jim refuses, then there is no special occasion, and Pedro here will do what he was about to do when Jim arrived, and kill them all. Jim, with some desperate recollection of schoolboy fiction, wonders whether if he got hold of a gun, he could hold the captain, Pedro and the rest of the soldiers to threat, but it is quite clear from the set-up that nothing of that kind is going to work: any attempt at that sort of thing will mean that all the Indians will be killed, and himself. The men against the wall, and the other villagers, understand the situation, and are obviously begging him to accept. What should he do?<sup>20</sup>

Williams's point is not that utilitarianism yields the answer that Jim should kill one in order that Pedro will not kill twenty and that this is the wrong answer. Killing one may well be the right answer. Rather, Williams's point is that utilitarianism provides too crude a depiction of the moral question facing Jim. For the utilitarian, it is immaterial to whether Jim should kill that the killing of the innocent person would, in a straightforward way, be Jim's own act. Human agency is simply the pulling of a causal lever (or the failure to pull such a lever) that results in various other events occurring. What the utilitarian fails to see is that it matters whether one's action springs from one's own values and choices. It is relevant—even if not necessarily dispositive—that for a moral theory to tell Jim he must kill in this situation is for that theory to demand that Jim permit himself to be used in a certain way by Pedro. Utilitarians do not recognize that by demanding that Jim kill an innocent person, they are also demanding that Jim permit Pedro to use him to carry out his bloodthirsty intentions and transform Jim into a killer. Although Williams never makes it clear what he means by "integrity," it appears that integrity involves maintaining an appropriate and normal connection between one's values, goals, ambitions, and projects (at one end) and one's acts (on the other). The point is not that the lack of such a connection—the lack of integrity—is so devastating as to outweigh all the pluses achieved on the moral ledger by killing one (that is, saving nineteen). Rather, the claim is that it is important if one is going to put forward an ethical theory of how a person ought to act that the course of conduct prescribed be compatible with the actor's values and commitments, which are the basis of a meaningful and valuable life. All of this drops out of the picture entirely for utilitarians, or if it

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20. *Id.* at 98-99.

enters, it does so in an instrumentalist way that fails to capture the fundamental point.

Markovits uses Jim's story not simply to resist utilitarianism, but to resist impartialist moral theories generally.<sup>21</sup> This includes Kantian moral theory, both Kant's own and that of his contemporary followers, such as Christine Korsgaard.<sup>22</sup> Markovits believes that Kantians, like utilitarians, are incapable of capturing the importance of integrity in moral theory, a view he spells out both in *A Modern Legal Ethics* and elsewhere. Kantians rightly reject the third-person point of view in ethics, the idea that the ethical permissibility of conduct is to be judged by looking at the states of affairs reached by that conduct, from a detached point of view. However, Kantians adopt a second-person point of view; a person must live up to the moral demands upon him or her that arise from the claims of other persons, one by one, upon him or her. According to Markovits, what is needed is an ethics that adopts a first-person point of view and for which the fundamental question of ethics is: how should I live my life? Fittingly, the philosophical orientation of the ancients—especially Aristotelian virtue theory—provides the framework within which Markovits addresses moral questions.<sup>23</sup>

This intellectual history illuminates Markovits's reasons for framing the central task of legal ethics as he does. His affinity to Williams explains his anti-impartialist, first-person conception of ethics. His affinity to Kronman explains why he thinks that legal ethics problems are fruitfully understood by thinking about what the good life would be for a lawyer. Bringing both together, one sees an overall view of ethics that leans toward Aristotelian virtue theory. On this view, it is striking how alien the characteristic activities of the lawyer engaged in advocacy are from a way of treating other human beings that one could take pride in and deem virtuous.

### C. *Reframing the Issue Less Provocatively*

In Part III, I will challenge Markovits's claim that legal ethics should be understood in terms of whether lawyers can lead good lives. In this Section, I use the prior discussion of Kronman and Williams to suggest a less provocative

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21. MARKOVITS, *supra* note 1, at 121-33.

22. See, e.g., CHRISTINE M. KORSGAARD, *CREATING THE KINGDOM OF ENDS* (1996).

23. Markovits's attraction to the ancients' phrasing of ethical questions appears to have been influenced by Williams. MARKOVITS, *supra* note 1, at 109 (describing the "venerable Aristotelean tradition" in ethics and citing Williams in support of this tradition). See generally BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985) (arguing that the tradition of the ancients is superior to the modern, impartialist tradition).

way to understand Markovits's framing of the central issue of the book. Markovits faults "the adversary system excuse" for lying and cheating in two ways: First, he argues that it is not credible as a consequentialist matter that the adversary system does a good job producing a set of just outcomes by having each lawyer lie and cheat. Second, he argues that, even apart from the inefficacy of the adversary system in generating good results, the *form* of the justification of the adversary system excuse is unacceptable because it runs into the integrity problem. The legal system would be asking too much of lawyers by asking them to spend five days a week lying and cheating, even if, contrary to fact, this led to more justice in the long run. Those who parade just results as the reason that lawyers are obligated to lie and cheat are akin to the utilitarian who tells Jim that he is obligated to kill one Indian because killing one is so much better than letting twenty die.

The problem with the utilitarian's claim is not so much that Jim is acting wrongfully if he kills one Indian. The problem is that it is untenable to expect a story about the long run benefits of conduct that is seriously *prima facie* wrong, and a violation of what the agent believes in and is committed to, to produce an adequate account of why the agent should engage in that conduct. The question raised by Jim's predicament is not *whether* the act in question is permissible or impermissible or whether the actor is leading a good or bad life. The question is whether the nature of the connection between the conduct and Jim's commitments, attributes, and qualities<sup>24</sup> is such that the action is both permissible and a reflection of qualities, commitments, and a general orientation to action that an ethical person should have.

Kronman's greatest contribution in *The Lost Lawyer*, in my view, is not his argument that lawyers are worthwhile or that they do good things: it is not his defense of lawyers. What was most important was his analysis of what lawyers do, what qualities and capacities they have, how lawyering is an exercise and expression of those capacities, and how the presence of such figures in our society fits into our political structure.<sup>25</sup> Overwhelmingly, however, Kronman presented lawyers engaged in counseling and negotiation, not in adversarial advocacy,<sup>26</sup> which is the much harder task Markovits takes up.

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24. Williams, *supra* note 19, at 99-100; see also Bernard Williams, *Persons, Character and Morality*, in *MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980*, at 1 (1981) (criticizing Kantian moral theory for failing to specify the connection between a person's actions and what gives a person character and identity).

25. KRONMAN, *supra* note 16, at 53-108.

26. *Cf. id.* at 146-54 (discussing advocacy, but explaining why lawyer-statesman capacities play some role in litigation, not explaining the legitimacy of the advocate's partisanship).

With this background in mind, the fundamental question of *A Modern Legal Ethics* can be reframed. The fundamental question is not whether lawyers can lead a good life or a life worthy of commitment, but what capacities are exercised in adversarial advocacy and what function professionals who exercise such capacities serve in our political and legal system. Whether this is *the* basic question of legal ethics (which I doubt there is, in any event), it is clearly *a* basic question of legal ethics and one that Markovits is to be credited with articulating. Markovits's strategy is to reject the consequentialist justification for the behavior of adversary advocates and to redescribe what adversary advocates do so that it can be recognized as the exercise of important capacities that lawyers have, and must have in order for our legal system to function as part of a legitimate modern democracy.

## II. ON LAWYERS' SUPPOSED OBLIGATIONS TO LIE

### A. Bold Claims About Lawyers' Conduct

The most striking assertions in *A Modern Legal Ethics* come very near the beginning of the book and are repeated throughout it. On page three, Markovits bluntly states that "lawyers must lie"<sup>27</sup> and on page four that "lawyers must cheat."<sup>28</sup> He boldly defends the claim that "lawyers are professionally obligated to lie and to cheat, both under the positive law of lawyering as it stands and under any alternative regime of professional regulation that remains consistent with adversary adjudication's basic commitment to a structural separation between advocate and tribunal."<sup>29</sup> Moreover, while Markovits recognizes that there are features of the ABA's Model Rules of Professional Conduct that are meant to combat lying and cheating, he argues that

the pressures to lie and to cheat that the positive law exerts on lawyers arise out of broad and organic rules that establish the necessary foundations of adversary lawyering, whereas the constraints that the positive law imposes on lawyers' professional vices arise out of rules that are narrow, technical, and contingent.<sup>30</sup>

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27. MARKOVITS, *supra* note 1, at 3.

28. *Id.* at 4.

29. *Id.*

30. *Id.* at 4-5.

As a result, the ABA's Model Rules of Professional Conduct do not go any distance in defeating the claim that lawyers are professionally obligated to lie and to cheat.

What are Markovits' arguments in support of these broad and alarming claims? He states, quite simply that "to deceive others by asserting a proposition that one privately (and correctly) disbelieves is to lie; and to exploit by promoting claims or causes that one privately (and correctly) thinks undeserving is to cheat."<sup>31</sup> Surprisingly, Markovits's argument regarding cheating is barely developed in the book and is much weaker than his argument that lawyers are obligated to lie;<sup>32</sup> I shall focus on his argument that lawyers are obligated to lie.

*B. What Is the Evidence that Lawyers Lie?*

It is surely true that lawyers make statements on their clients' behalf with the intention of causing judges and jurors to believe these statements, and often the statements are false. This is not enough, however, to make Markovits's point. In order to show that lawyers lie, he must show that lawyers make assertions on behalf of their clients with the intent of causing judges and jurors to believe statements, even though they believe those statements to be false. The question is: are lawyers trying to persuade judges and juries *by making statements that they actually believe to be false*? If so, then certainly the prima facie argument that lawyers lie is at least on its way, although there might be a number of responses to it. But what is the evidence that this is so? Markovits puts forward no evidence for this claim whatsoever, he merely takes it as a given. Undoubtedly, one could go out and find many disciplinary

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31. *Id.* at 35.

32. Cheating would seem to be intentionally violating the rules that govern a rule-governed activity in order to gain an advantage. Breaking of the rules—even if implicit—is essential and deservingness inessential. A stellar baseball team undeservingly robbed of a genuine double play that should have ended a game because of a bad call by the umpire would nonetheless be cheating if it altered the next batter's bat to ensure its deserved win. Conversely, the other team's assertion that the umpire's decision cannot be revisited by television replay would not be cheating, even if this amounted to advocating for an undeserved benefit. Similarly, in adversarial litigation if there is an entitlement to assert a claim or a defense that one believes is sufficiently strong to be successful, and one complies with the rules, one is not cheating. But, to replace a date stamp on a document in order to comply with a statute of limitations—even if the underlying claim is deserving—would be cheating (as well as lying). Cf. Ted Schneyer, *The Promise and Problematics of Legal Ethics from the Lawyer's Point of View*, 16 *YALE J.L. & HUMAN.* 45, 63 (2004) (criticizing Markovits's argument, as presented in an earlier article, on the ground that calling something "cheating" entails that rules or expectations governing an activity have been violated to obtain an advantage).

hearing records and other cases in which it is clear that lawyers have lied; that some lawyers lie is beyond contention. But this is plainly insufficient, for we are not talking about whether, as an empirical matter, there exist lawyers who lie. The question is whether there is lying by the good lawyer, the lawyer who behaves as lawyers are supposed to behave—whether *lying is part of what is done by a competent adversary advocate representing his client well and complying with the rules and norms of legal ethics*. Empirical evidence about the lies told by bad apples is simply beside the point.

### C. *Shades of Belief*

Markovits often purports to be drawing his claim from the “organic character” of lawyers’ duties<sup>33</sup> or the “genetic structure of adversary advocacy.”<sup>34</sup> His point is that lawyers are obligated to present their own clients’ version of the facts and the law, and would be even if the lawyer “privately [found] the opposing positions more compelling.”<sup>35</sup> But organic conception or not, Markovits is evidently assuming that sometimes lawyers are in a situation where they privately find opposing positions to be more compelling. Why does he assume this? And what is it for a lawyer to “privately find” the opposing position to be more compelling? The idea seems to be that, even as the lawyer represents his own client’s position avidly, he may at some level appreciate the (perhaps superior strength of the) adversary’s. But, again, Markovits has given us no reason to believe that this empirical claim is true. Admittedly, lawyer/scholars who are steeped in a life of litigation often replace more formally empirical evidence in their articles with a more anecdotally based assertion. Whether this is ever justifiable, as to a central empirical claim in a book devoted to how a certain group of professionals behave, is an interesting question. However, Markovits does not draw from a lifetime of experience as a litigator (nor do I), and so this is an occasion on which legal scholars who like to shoot methodological arrows at armchair philosophers should really have a field day. Being at least part armchair philosopher myself, I will leave that to others, and assume for the purposes of argument that there are frequently lawyers who confront the experience of having real doubts about the truth of their client’s claims. Let us turn to an example.

Suppose one of O.J. Simpson’s lawyers awoke at 3 a.m. one morning during the days of the criminal trial and his mind was flooded with images of

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33. MARKOVITS, *supra* note 1, at 44.

34. *Id.* at 77.

35. *Id.* at 34.

his client stabbing Nicole Brown Simpson and Ronald Goldman. Lying there, sweating, his mind ran through the testimony of the prior day's witnesses, at each point imagining that the alleged facts asserted by the witness really were true. Let us suppose that, at that moment, in the privacy of his own home, and quite against his own internal campaign of fidelity to his client (even in his own mind), he privately finds the prosecution's position to be more compelling. By the time he turns up in court that morning, showered, shaven, and bedecked in a suit—and by the time he opens his mouth—he is back with the program. He eagerly tries to impeach one of the witnesses in cross examination. Has this lawyer lied?

The answer is “No,” and would be whether one was referring to the criminal trial or the civil trial. To begin with, during cross examination, the lawyer is not necessarily making any representation; he is not necessarily putting forward any statement as true. That is certainly what the verb “to lie” normally connotes, and it is missing here. Even if there is some proposition that the lawyer is trying to cause the jurors to believe (for example, that a witness is unreliable), it is far from clear that merely engaging in an effort to cause someone to believe something untrue qualifies as “lying.” Second, and more to the point, the lawyer's private moments of finding his adversary's position more compelling do not constitute the lawyer's actually arriving at the belief that his client is guilty of the crime in question or the lawyer's actually arriving at the belief that the prosecution witness is testifying truthfully and reliably. Doubts, misgivings, imaginings, internal representations at moments of time in which the lawyer “sees” the facts the way the other side is claiming they ought to be seen, or at which he finds himself not readily conjuring up the representation of the facts that his client's account entails do not amount to forming the belief that the assertions one is advocating are false. Markovits, whose language is as exquisitely nuanced as his theory, seems to recognize this distinction because he uses several different phrases to describe the mental state of the lawyer who is supposedly lying. We have already seen one such instance. Markovits describes the lawyer as “*privately find[ing] the opposition positions more compelling.*”<sup>36</sup> On another occasion, Markovits describes the lawyer as “asserting a proposition that one *privately (and correctly) disbelieves.*”<sup>37</sup> The verb “to disbelieve” is an unusual one; much more common is the cognate adjectival phrase “in disbelief.” One typically sees the phrase “in disbelief” in a context like the following: “he stood there in disbelief as his wife revealed that she had been having an affair with his best friend for the past eighteen

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36. *Id.* at 34 (emphasis added).

37. *Id.* at 35 (emphasis added).

months.” Here, the point is that the thinker in question is momentarily unable to arrive at the cognitive state of representing some state of affairs, even though he is aware of evidence in light of which it would be epistemically rational to arrive at that cognitive state. If the husband were to tell a therapist, “My wife is having an affair with Jack. I am still in a state of disbelief,” what he would be asserting he is in a state of disbelief *about* is that *his wife is having an affair with Jack*. As to the statement that his wife is having an affair with Jack, he would hardly be lying, even though, by hypothesis, he is in a state of disbelief about it, and he is trying to get his therapist to believe it.

The larger point here is that there are many shades of belief and suspension of belief, knowing and not knowing, that vary in depth, constancy, and consistency among other things. To establish that X lied when X asserted that p it is not enough to show: (1) not-p and (2) X intended that the listener believe that p. Perhaps it is not necessary to show that (3) X has a confident and settled belief that not-p. But it is not sufficient to show that (4) X lacks a confident and settled belief that p. As a legal ethics scholar writing a book that constantly and confidently proclaims that lawyers lie and have a professional obligation to do so, Markovits bears the burden of actually explaining which places on the spectrum between (3) and (4) count as lying, why we should believe this to be so, and why we should accept the claim that lawyers frequently occupy that space and are professionally obligated to do so.

This is not a burden that Markovits even tries to carry, and in any event it is unlikely that he would succeed in doing so if he were to try. While there are no doubt moments or times when what is running through a lawyer’s mind is a representation of the adversary’s position or even a representation of the falsity of the client’s claims, this falls far short of a standing or settled belief that the assertions he puts forward are false. Indeed, it seems far likelier that the typical lawyer does believe that p and does so because the client said so, the lawyer is taking the client’s account seriously, and the lawyer does not have dispositive reason to believe that not-p. If all of these claims are true, and if we accept that lawyers are entitled to take their client seriously unless they have dispositive reasons to reject their client’s accounts, then these claims add up to an argument that the typical lawyer who says that p has a good faith (if sometimes shaky) belief that p and, therefore, is not lying.

Of course, if the lawyer actually holds a confident and settled belief that the content of his client’s account is false but asserts his client’s account, then (subject to the caveats of the subsequent arguments Markovits considers) he is lying. Markovits provides no reason to think that lawyers actually hold a confident and settled belief that their client’s account is false, but assert it nonetheless, and no reason to think there is a professional obligation to do so.

*D. The Relevance of Model Rule 3.3*

The most obvious argument against Markovits's claim that lawyers are obligated to lie is that the ABA Model Rules of Legal Ethics actually say that lawyers are obligated not to lie. Rule 3.3, which is titled "Candor to the Tribunal," states:

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
  - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.<sup>38</sup>

Markovits considers this argument and provides what appears to be quite a powerful response to it. Rule 3.3 forbids a lawyer from suborning perjury, from failing to disclose controlling legal authority, and from presenting false evidence. When the question has arisen whether a lawyer's belief that the testimony or evidence is false will suffice for a rule violation, the answer given by the bar, the courts, and legal ethics experts, and the text and comments of the rule itself, is that the rule forbids the presentation of such testimony or evidence only where the lawyer *knows* that it is false, and *not when the lawyer reasonably believes it is false*. This seems to render the presentation of evidence that the lawyer believes to be false permissible. Given the background assumption of a duty of zealousness, then the permissibility of offering such evidence—if the client's case would benefit from doing so—would arguably render its presentation obligatory. This seems to support the argument that lawyers are obligated to lie.

The problem with this reply is two-fold. First, as Markovits recognizes, Rule 3.3(a)(3) makes clear that even if it is permissible for the lawyer to choose to present evidence she does not know to be false (but reasonably believes to be

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38. MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (2007).

false), it is also permissible (outside of the criminal defense context) to decline to present such evidence.<sup>39</sup> Hence, even if it were justifiable to read Rule 3.3(a) as *permitting* an advocate to lie, it would not follow that advocates were obligated to lie.

Second, and most importantly, the issue of whether Rule 3.3(a)(3) should really be read to license lying ultimately turns on how best to interpret the distinction between a lawyer “knowing” that the evidence is false and her “reasonably believing” it to be false, and, again how one analyzes lying. For most philosophers, a critical distinction between saying “X knows that p” and saying “X reasonably believes that p” is that the first statement entails that p is true while the second leaves open whether p is true. For the most part, this is irrelevant to what the distinction is being used to do in Rule 3.3; in one sense, neither term is really meant to go to the truth issue. It is worth noting here because it leads us to see that the rule is not really about the truth of propositions; it is about the veracity of evidence. In particular, Rule 3.3(a)(3) is largely about when a lawyer may and may not put on certain witnesses. The question is whether a lawyer must not put on a witness whose veracity she doubts. Of course, lawyers are sometimes concerned about whether their own client is lying. Rule 3.3 is unwilling to forbid a lawyer to put on a witness who strikes her as dishonest even if she does not know that the witness is lying. This can be understood as a variation of the distinction offered in the previous Subsection: a lawyer counts as lying if she puts on a witness and has a secure and well-founded conviction that the witness is lying. But what if the lawyer finds herself with reasonable misgivings about the witness’s truthfulness that fall short of such a well-grounded conviction?

A lawyer deciding to put this iffy witness on the stand does not count as lying under the Rules. To be sure, the Rules give the lawyer a bit more leeway here than with regard to a representation she makes herself. This is probably for three reasons. First, perceptions of whether someone is being truthful as a witness—absent firm evidence on the other side—are particularly mercurial and individual. The Rules hesitate to give the lawyer the obligation to pull the plug on a witness simply because of such a perception. Second, the witness that the lawyer might have to pull the plug on could be the client herself, and this could trigger a number of serious autonomy concerns. Third, and perhaps most importantly, the lawyer herself is not making the representation. Rather,

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39. See *id.* R. 3.3(a)(3). As the Comments to the Rules indicate, there are numerous reasons—including those sounding in the Sixth Amendment—to suppose that the criminal defendant’s right to counsel should be read to entail a broad obligation of the criminal defense counsel to give her client the benefit of the doubt in deciding whether to offer evidence of his innocence. See *id.* R. 3.3 cmt.

she is enabling another person (who, after all, takes an oath to tell the truth) to make the representation. The Rules understandably choose not to assign the lawyer the same responsibility for the representations made by others as would be assigned to her if she made them herself.

*E. Equating Lack of Candor and Forthrightness with Lying*

Markovits's last major line of argument that lawyers lie (and cheat) is in many ways the most revealing of his attitude toward the whole topic of lawyers and the vice of lying (and the vice of cheating):

The forms of manipulation and disrespect that make lying and cheating immoral can arise quite apart from any active misrepresentation or affirmative misuse. They arise whenever a person fails to correct a false belief in circumstances in which respectful relations required shared knowledge of the truth or fails to undo an undeserved advantage in circumstances in which respectful relations require equality. The morality of truthfulness and fair play imposes duties to correct as well as duties not to deceive or to exploit, which lawyers transgress whenever they allow others to remain mistaken or disadvantaged in the face of these duties. Certainly, the duties of truthfulness and fair play extend well beyond purely formal obligations to make only true assertions and to play by the rules.<sup>40</sup>

There is a great deal to agree with in this eloquent passage. And it is no doubt true that if the level of candor and communication that a lawyer uses within the adversary advocacy context were used by her outside of that context, she would often be regarded as immoral, and properly so. But to say that the values underlying the norm against lying normally entail a far broader duty of candor and the values underlying the norm against breaking rules to gain an advantage normally entail a far broader duty of fair play is not to say that lawyers lie and cheat if they do not comply with these broader norms of candor and fair play.

A larger question, of course, is whether the broader norms of candor and fair play of the sort articulated apply to lawyers who function as adversary advocates, either as a matter of positive law, institutional ethic, or morality. I think it is clear that the broader norm of candor does not apply as a matter of positive law or institutional ethic. One might think that the essential question for Markovits is whether such a norm *should* apply to lawyers. In fact, I do not

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40. MARKOVITS, *supra* note 1, at 40.

believe that the essential question for Markovits is whether such a broad duty of candor morally should apply to lawyers engaged in such activities. The question, rather, is whether, when a lawyer fails to live up to such a duty of candor in order to operate as an adversary advocate, she is betraying her own values in a way that creates an integrity problem. One can certainly see the relevance of the example of Jim in South America to Markovits's contention that to be an adversary advocate, one must lie. Markovits is suggesting that asking someone to become a full-fledged liar in order to be a lawyer is really asking for a sacrifice of that person's basic moral commitments; it is akin to asking Jim to become a killer. But, as the discussion below illustrates, the analogy to Jim's predicament loses its force when the claim is that to be an adversary advocate, one must fail to live up to a high standard of a duty of candor in certain circumstances.

Returning to Jim in South America, suppose Pedro has wounded a boy, who was among the twenty he intends to shoot. Jim, who has medical training and a clean knife and a first aid kit with him, has the capacity to save the boy from bleeding to death by cleaning and closing the wound. As Jim kneels on the ground to begin doing so, Pedro says "If you leave the boy alone and let him bleed to death, I will spare the other nineteen." This is not the same dilemma as the original, for killing and letting die are not the same. Normally, respect for life imposes a moral duty to save a life when one is able to do so, and it is the value of human life that, to a great extent, underlies the duty not to kill. But this does not add up to an argument that declining to perform a rescue under such circumstances simply is killing. More relevant, for our inquiry, is that the impartial moral theorist's demand that Jim desist from saving the boy in order to spare nineteen other lives does not force Jim to abandon his personal commitment to be a person who never kills. Consequently, this demand does not constitute an attack on Jim's integrity of the same magnitude.

In the same way that killing and letting die are distinguishable, the adversarial advocate who remains less than candid is distinguishable from the advocate who lies to the judge and the jury. The requirement that advocates be less candid than a virtuous person would in his daily, nonprofessional interactions, is not an attack on integrity in the way a requirement to lie would be. In either case, a morally sensitive person will see that there is an alternate path of conduct that is more attractive from the point of view of a general conception of virtue and more observant of an important value that pertains to respecting persons. But saying that an adversary advocate must, under certain circumstances, select the path of lesser forthrightness in order to do her job is a far cry from saying that one must lie to be a lawyer.

The root of Markovits's conception of the moral status of what advocates are required to do is a refusal to draw certain kinds of lines around moral

agents and their actions—a refusal to recognize the significance of *others' responsibilities* in arriving at a correct characterization of the lawyer's own action. For example, when Markovits equates lying with failing to correct, he is ignoring the adversary's responsibility to present the other side. When he equates lying with putting on a witness whose credibility one doubts, he is ignoring the witness's responsibility to testify truthfully. And, when he equates lying with making a representation that lacks a statement of one's own misgivings, he is ignoring the jurors' responsibility to weigh the evidence themselves and the judge's responsibility to contextualize the lawyers' representations within the framework they know to be adversary advocacy. All of these ways of behaving are really quite different from lying, but can seem like lying if one ignores other agents' responsibilities. Common sense notions of morality, lying, and truth-telling do consider the role of others, as does conventional legal ethics, which is what the "organic" conception of the advocate's role builds upon. Ironically, it is the refusal to take seriously the respects in which others' actions bear on an agent's own moral responsibilities that lies at the core of Williams's critique of utilitarianism.<sup>41</sup>

*F. Reservations About Frugality with Information*

This completes my argument against the claim that lawyers are obligated to lie. Making this argument did not require an account of fidelity or negative capability. It principally involved showing that Markovits has not adequately defended the claim that lawyers who continue to represent their clients' positions even when they have misgivings are not lying. A similar argument can be run with respect to truthfulness about the law.<sup>42</sup>

Nevertheless, we should not pretend that adversary advocacy has been brought to a good place by my refutations of the "lawyers lie" argument. From an impartial point of view, there is nothing admirable about the adversary

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41. See Williams, *supra* note 19, at 99 ("[Utilitarianism ignores] that each of us is specially responsible for what *he* does, rather than for what other people do. This is an idea closely connected with the value of integrity.").

42. And, indeed, the argument that lawyers are lying about the law is, I believe, much weaker to begin with. It rests on the claim that lawyers are lying when they take positions before judges that they would not take outside of the particular representation. As to the judicial context, where there are adversaries, this falls far short of an argument that lawyers are lying. Although the "actor" argument is not quite correct, the addressees of lawyers making legal arguments are judges and other lawyers, who perfectly understand that the context of speech is intrinsically framed by mutual understanding that each lawyer is taking an adversarial stance. In this sense, it is no more like lying than bluffing in an expert game of poker.

advocate's frugality with the truth. If honesty is conceived of as a virtue, as an excellence of moral character, then it is hard to believe that one should characterize the adversary advocate as an exemplar of the virtue of honesty. Indeed, while the adversary advocate does not, contra Markovits, possess the vice of being a liar or being a dishonest person and she has not violated the moral obligation not to lie, it certainly appears that her conduct on such occasions is not of a sort that exemplifies the virtue of honesty, conceived as an excellence. Part of where Markovits has gone wrong is in equating conduct that would not be selected as exemplary of the virtue with the possession of the vice or the violation of the obligation not to lie. Similarly, while the lawyer does not possess the vice of a cheater and has not violated the obligation not to cheat, the lawyer's conduct in these instances would not be selected to exemplify the virtue of fair play either.

The word "integrity" is the closest term we have in English for the virtue of being honest and straight-shooting in one's interactions and actions, such that others view one as wholly reliable and trustworthy. In this sense, Markovits is right to suggest that the conduct of adversary advocates in those scenarios where they are not very candid, frugal with the truth, and willing to file claims whose merits are open to serious challenge, is conduct that would often be taken to display a lack of the virtue of integrity. But while integrity, so understood, is an important virtue, and a person's commitment to be an exemplar of integrity may be one of great importance in her life (and that of her community and those immediately around her), this concern does not generate nearly the sort of problem that Markovits derived from Williams. Williams was looking at the lack of integrity as a kind of defect in a person that went beyond even having a vice; the problem is that the person is alienated from himself, and is not the author of his own actions. We shall, nonetheless, return to the question of whether integrity in the sense of displaying the excellences of honesty and trustworthiness is something that must be unavailable to the adversary advocate, in her work life or beyond.

### III. IS A LAWYER'S LIFE WORTHY OF COMMITMENT?

I argued in Part I that it is possible to interpret Markovits's central question so that it is not about whether one can "render the legal profession worthy of commitment"<sup>43</sup> or whether lawyers can live their lives in a manner that permits them "to sustain their integrity."<sup>44</sup> Yet there is no doubt that Markovits himself

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43. MARKOVITS, *supra* note 1, at 211.

44. *Id.* at 10.

believes these to be good questions; he believes that there are good reasons to doubt the existence of a positive answer; he believes the answer he defends is satisfying; and he believes that because the bar has changed over the past several decades, the path to integrity may be closing down. We shall later examine in detail Markovits's reasons for this worry and his proposed path to redemption. For the moment, however, it is important to place Markovits's supposedly realistic challenge in a more realistic context.

First, the integrity challenge, as Markovits describes it, only arises for lawyers engaged in adversarial advocacy. The overwhelming majority of lawyers have a transactional, business, or bureaucratic practice that does not principally involve adversarial advocacy. So we are only talking about a fragment of the legal profession to begin with. Of those, some are lawyers who represent the government.<sup>45</sup> A strong case has been made—and is generally accepted—that the norms of adversarial advocacy do not plausibly apply to such lawyers to the same degree, even assuming that Markovits is generally correct about adversarial advocates.

As to the remaining litigators, let us be careful not to assume that the value sets of such individuals are at odds with those of their clients in the way that Markovits sometimes suggests generates his worries.<sup>46</sup> In-house lawyers for big and small companies, hospitals, universities, and many other enterprises in many respects *are* the client. Moreover, as David Wilkins' recent work has demonstrated,<sup>47</sup> many lawyers who are formally members of a law firm that is independent of all of its clients are nevertheless deeply aligned with a small number of very significant clients over a period of years. Indeed, Markovits himself depicts the increased specialization of the bar, and recognizes (in footnotes) that many lawyers either choose their particular occupation with their sympathies in mind, or come to share their clients' sympathies over time, or both.<sup>48</sup>

In this light, consider the public defender or the private criminal defense lawyer who frequently represents individuals accused of violent felonies or drug-related offenses. Many such lawyers have as a project to slow the heels of the government as prosecutor and to protect the rights and the well-being of populations who are especially vulnerable to government overreaching.

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45. *Id.* at 173.

46. *Id.* at 219-21 (describing as part of the change in the legal profession that more lawyers are shifting to jobs in which their interests are more closely aligned with their clients' interests).

47. David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney/Client Relationship*, in 62 CURRENT LEGAL PROBLEMS 478 (Colm O'Cinneide ed., 2009).

48. MARKOVITS, *supra* note 1, at 220 n.†.

Whether this is a laudable commitment is not the question (I happen to believe it is); the question is whether the lives of such litigators present the kind of conflict Jim faced in South America. Does the aggressive position of criminal defense lawyer Jones representing probably-guilty client Smith conflict with Jones's larger commitments in life or in law or in justice? Hardly. Jones is not simply representing Smith and acting upon his loyalties to Smith; Jones is also realizing his personal commitment to shield the vulnerable against the aggression of the state. The same may be true of mass media defense lawyers or, for that matter, medical malpractice or products liability defense lawyers, trial lawyers for injured persons, tax and labor litigators, and so on.

Finally, and on a somewhat different but perhaps more realistic note, Markovits—probably like many academics—appears to presume that what one chooses to do in order to earn a living must play a large role in defining one's basic commitments and one's identity. A person who represents debtors or creditors or personal injury claimants insurance companies in court all day may not define herself principally by this activity, just as an accountant or a clothing store clerk or a family physician or a grade school librarian—or a law professor—might not. These are jobs. The question of whether one's life is a good life may not largely be about the nature or quality of the job. Indeed, the fact that the job brings in more money rather than less is normally thought to help make life easier and, in some cases, better. Markovits's critique does not rely on the time commitments and high-pressured nature of being a lawyer today. Unless there is something genuinely immoral or degrading or hypocritical involved in doing the job, or unless one places the job as the star feature of one's life, it is hard to see why features of the job undercut the possibility of having a good life, a life of integrity.

Markovits would argue that the point that litigators identify with their clients really misses the problem of integrity he is spotting.<sup>49</sup> The integrity problem arises not because of conflicts between lawyers qua representative of the client of the moment and those individuals' commitments more generally. The problem arises because being an adversary advocate requires lying and

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49. Markovits anticipates this objection and responds to it. He writes:

[T]he suggestion that a division of labor might save lawyers' integrity misconstrues the nature of the threat against their integrity that lawyers face, specifically by locating that threat, incorrectly, in lawyers' discomfort with their clients' ultimate purposes rather than, as I have been arguing, in tensions between more general first-personal ethical ideals of truth-telling and fair play and the methods that lawyers must employ in serving their clients' purposes, whatever they are.

*Id.* at 221 n.†.

cheating, and lying and cheating are vicious. If the only way to justify viciousness is consequentialist in the way that the utilitarian dictates Jim should be, then a commitment not to lie and cheat is being overridden in a manner that leaves no place for integrity. This is true even for the lawyer whose professional life is not the center of her commitments if she is committed to not being a liar or cheater. In other words, the integrity critique arises only if one accepts the claim that lawyers are performing immoral acts—lying and cheating—as part of their work as adversary advocates.

It should now be clear that the refutation of Markovits's "lawyers lie" argument in Part II puts to rest whatever remained of Markovits's argument that there is a serious question about whether a lawyer can lead a life worthy of commitment. However, it would be a mistake to brush away the issues Markovits has raised. There are three reasons to take seriously Markovits's worry about the clash between adversary advocacy and the lawyer's deepest ethical convictions. First, it is right that for at least some lawyers, the inability to see themselves as exemplars of the virtues of honesty and trustworthiness when they are being adversary advocates leads to a kind of anxiety and personal disappointment; we have seen that this might even be called a problem of "integrity." Second, Markovits is right that if the adversary system excuse fails, as many of the leading figures in this area think it does,<sup>50</sup> we need some other justification for why lawyers should be willing to veer from the ideal of true integrity when acting as advocates. Third, once one begins to think about the obligation to remain loyal to one's client in advocacy, and one reflects on the symmetrical conduct of other attorneys, and one loses faith in the strength of the adversary system as a truth-discovery tool, the question may arise whether one is doing justice at all. This pattern of private deliberation can give rise to a kind of soul-searching and even self-reproach, sometimes softened by the material rewards of being a lawyer, but sometimes exacerbated by the high pressures of the litigator's job. The characteristic internal dialogue of the lawyer engaged in such self-reproach may well be:

How did I get here? . . . What is the point of what I am giving my life to? . . . I tell myself that I am a part of a system of protecting rights and doing justice, but I am really telling myself a lie, because I do not really see that I am making the world a more just place.

At these junctures in the lawyer's life, the lawyer is, in an important sense, questioning his own integrity. Markovits points out that legal ethics ought to grapple with the question of whether the lawyer's self-reproach at such

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50. See sources cited *supra* note 5.

moments is justified. This, too, is fairly described as a question of *integrity*, and it is one worth taking seriously even if it does not threaten the possibility of lawyers leading lives worthy of commitment with anything like the breadth or depth he argues.

#### IV. JUSTIFYING THE ADVERSARY SYSTEM

The most original claim of Markovits's book is that the role that lawyers play in adversary advocacy can be rendered justifiable to lawyers in a manner that will overcome the integrity problem by recognizing the capacity of the adversarial system to legitimize the authority of adjudication.<sup>51</sup> In a wonderful phrase reminding the reader of Markovits's equal comfort in the domains of private and public law theory, he writes: "What democracy is to political legitimacy at wholesale, adjudication is to political legitimacy at retail."<sup>52</sup>

The argument begins with a wide-ranging discussion of political legitimacy that initially appears to be Rawlsian but, on closer inspection, embraces a conception of legitimacy more closely aligned with Habermas.<sup>53</sup> This discussion produces what Markovits calls a "practical" conception of political legitimacy, rather than a theoretical one.<sup>54</sup> The pertinent point is Markovits's suggestion that the need to resolve disputes and disagreements in a democracy by adjudication presents an especially difficult problem of legitimacy, in light of the very diverse ends and values of the individuals who come into conflict with one another, and that a practical conception of legitimacy in adjudication is superior to a theoretical one.<sup>55</sup> It then asserts that when individuals are represented by lawyers exercising fidelity and negative capability in adversarial proceedings, that representation and those proceedings enable lawyers to connect with their clients in a manner that permits a transformation of the legal dispute through adjudication.<sup>56</sup> Transformation through the legal process, in turn, permits litigants to understand the legal system as *legitimately*

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51. See MARKOVITS, *supra* note 1, at 184-211.

52. *Id.* at 185.

53. *Id.* at 173-84, 314 n.16 (citing RAYMOND GEUSS, *THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* (1981)).

54. *Id.* at 176.

55. See *id.* at 184-87.

56. See *id.* at 187 ("[T]his practical account places lawyerly fidelity and negative capability at the center of the transformative power of the legal process and therefore at the foundation of its legitimacy.").

adjudicating and resolving their disputes.<sup>57</sup> Thus, adversary advocates exercising fidelity and negative capability permit the legitimacy problem inherent in adjudication in a democracy to be solved. Because the attribute of fidelity and the capacity for negative capability make possible the solving of the legitimacy problem, and because they can be understood as doing so by lawyers themselves, lawyers can engage in a role-based redescription that ultimately leads them to see what they are doing as worthy of commitment. The integrity problem is therefore solved.<sup>58</sup>

Preliminarily, it is important to try to grasp what the “lawyerly virtues” of fidelity and negative capability are really supposed to be. As to the meaning of the terms “fidelity” and “negative capability,” Markovits says less about each than one would like.<sup>59</sup> This is unfortunate, especially as to the latter term, for while “fidelity” has a deep and freighted history in jurisprudence,<sup>60</sup> “negative capability” is largely an import from an entirely different field.<sup>61</sup> Negative capability is a concept drawn from the letters of nineteenth-century Romantic poet John Keats. Keats himself used the term in writing only once, in an oft-cited letter written to his brothers George and Thomas: “[A]t once it struck me what quality went to form a Man of Achievement, especially in Literature, and which Shakespeare possessed so enormously—I mean *Negative Capability*, that

57. See *id.* at 189.

58. *Id.* at 210–11.

59. But see *id.* at 90–98.

60. See, e.g., Lon L. Fuller, *Positivism & Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

61. Two caveats are needed on this point—one large and one small. The large caveat is that while there appears to be consensus that John Keats introduced the term “negative capability,” one of the most prominent jurisprudential articles of the past several decades actually makes extensive use of this term. See Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 650 (1983). Moreover, negative capability is one of the large overarching themes of Unger’s book, ROBERTO MANGABEIRA UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* (1987). Unger mentions that the phrase “negative capability” comes from Keats, Unger, *The Critical Legal Studies Movement*, *supra*, at 624, and indicates that his usage of it differs from Keats’s, notwithstanding some connections, *id.* Markovits indicates in a note that his usage of “negative capability” bears “some similarity” to Unger’s. MARKOVITS, *supra* note 1, at 297 n.71. The smaller caveat is that the body of legal scholarship prior to Markovits—including legal scholarship about the nature of legal thought—includes some discussion of Keats’s “negative capability.” See, e.g., Peter Read Teachout, *The Soul of the Fugue: An Essay on Reading Fuller*, 70 MINN. L. REV. 1073, 1107 (1986) (articulating negative capability themes—although not by that name—in the thought of Lon Fuller). These observations do not take away from the originality of Markovits’s use of the Keats idea in thinking about legal ethics, for the prior uses do not pertain to the legal thought of practicing private lawyers advocating for clients.

is, when a man is capable of being in uncertainties, mysteries, doubts, without any irritable reaching after fact and reason . . .”<sup>62</sup> Markovits, apparently following a quite widely shared understanding among Keats scholars, interprets passages in a subsequent Keats letter to be elaborations of the concept of negative capability:

Begin with the service that the poet provides his subject. Keats argued that the negatively capable poet is unusually able to efface himself, maintaining “no identity” of his own, and (through this self-effacement) to work continually as a medium, “filling some other body—The Sun, the Moon, the Sea . . .” and rendering this ordinarily mute body articulate. The lawyer is similarly required, by the sword-like component of professional detachment, to efface herself, or at least her personal beliefs about the claims and causes that she argues. . . . Just as the self-effacing poet enables his otherwise insensible subjects to come alive through him, so also the lawyer enables her otherwise inarticulate clients to speak through her.<sup>63</sup>

Even assuming this evocative romantic metaphor is aptly applied to the context of what litigators really do, there are serious problems getting from this conceptualization of the lawyerly role to the powerful defense of the political status of adjudication—Markovits’s target. First, and perhaps most importantly, we must be clear about whether the “legitimacy” problem of adjudication refers to how outcomes of adjudication are perceived by those involved or whether they are actually legitimate. Even assuming that a perception of legitimacy by disputants is, in and of itself, a *prima facie* good because it fosters social cohesion, it would be at most a *prima facie* good. The actual legitimacy of the resolution is surely important. Markovits takes up the idea that lawyer fidelity and negative capability make possible the actual legitimacy of the outcome, but as a general matter, he makes clear that his assertion falls short of the ambition to justify the actual legitimacy of adjudication.<sup>64</sup> Although appropriate and justifiable, this is an odd concession, given that Markovits’s inquiry was motivated, in great part, by a recognition that the justification-consequentialist defense of the adversary system is very weak. Moreover, one might think that the value of perceived legitimacy

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62. Letter from John Keats to George and Thomas Keats (Dec. 21, 1817), reprinted in *THE SELECTED LETTERS OF JOHN KEATS* 102, 103 (Lionel Trilling ed., 1951).

63. MARKOVITS, *supra* note 1, at 93 (quoting Letter from John Keats to Richard Woodhouse (Oct. 27, 1818), in *THE SELECTED LETTERS OF JOHN KEATS*, *supra* note 62, at 165, 166.

64. *See id.* at 201.

actually declines to the extent that we have less reason to believe there is actual legitimacy.

Second, Markovits presents no evidence and no real argument that the negative capability of adversary advocates permits the adjudication system to have a transformative effect on litigants. The transformativeness of the law has been an interest of a wide range of important legal scholars.<sup>65</sup> And, of course, there is a great deal of controversy over whether our adversarial litigation system really enhances the possibility of transformativeness, or whether the antiooperative nature of standard litigation tends to forestall the possibility of transformativeness. Markovits offers no reason to believe that transformativeness through the adversarial process really does happen or that if it really does happen, that is because attorneys' fidelity and negative capability are at a level that leads them to conduct that ordinary people would consider failures of truthfulness and fair play.

Markovits does contend that fidelity and negative capability permit the client to have a voice and to have his concerns expressed and translated into legal terms and legal concepts. Citing to work by Tom Tyler, he argues that without this voice, litigants would be less likely to regard the process as legitimizing.<sup>66</sup> Even if one accepts this important point, as I am inclined to do, it falls far short of what is needed. At most, it shows that lawyers' providing their clients with fidelity and negative capability is necessary for the perception of legitimacy by clients. It does not show that providing voice is *sufficient* for their perception of legitimacy, or even that it goes a significant distance toward producing it. It does not show that the degree of adversariness that is the subject of the book is necessary to providing voice (or enough voice). It does not show that providing voice is *necessary*, or *sufficient*, or *contributing to actual legitimacy at all*.

These concerns come together in a fourth point. The focus of this part of Markovits's argument is on the question of whether there is genuine value in playing the adversary advocate's role in such a way as to exercise a full-blown version of fidelity and to exercise negative capability. We know what motivates Markovits to ask this question: he is anxious that lawyers be able to redescribe what they are doing so that it is not simply a matter of cheating and lying. However, even if one assumes that these are worthwhile concerns, they cannot be met simply by redescribing what the lawyer is doing in such a way that it is

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65. See, e.g., Robert Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

66. MARKOVITS, *supra* note 1, at 318 n.60 (citing TOM R. TYLER, WHY PEOPLE OBEY THE LAW 105 (1990); Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, 3 NEGOTIATION J. 367 (1987)).

seen by the lawyer to reflect a valuable kind of commitment (that is, fidelity to the client). We must remember that the adversary system is still under attack. We need an argument that the adversary system is itself justifiable, notwithstanding the extensive critiques it has been subjected to apart from the integrity critique. And unless the entire process of adjudication Markovits describes reliably produces legitimate resolutions in addition to engendering perceptions of legitimacy there is no reason to think this defense of the adversary system succeeds. Many of the reasons Markovits uses as grounds for questioning the justice of the results achieved under the adversarial system—especially inadequate and inegalitarian allocation of resources for those who enable litigants to have a voice—are also reasons for questioning the legitimacy of the results of our adjudication system.

Here, as with prior claims, Markovits is onto something important, however. Ironically, the problem with his legitimacy argument is that he has not been ambitious enough, or at least not been clear enough about his ambition. Legitimacy, not the perception of legitimacy, is the point he should be focusing upon. Of course, the fact that a system can provide (some, or even all) individuals with a voice in representation, translating their claims or defenses or concerns or needs into the language of the law, does not make it a legitimate system; this is a point about which Markovits is admirably clear. However, as Markovits indicates, the capacity to provide voice and a meaningful connection with the law may well be a *necessary* condition for the legitimacy of our legal system, as Charles Fried,<sup>67</sup> Stephen Pepper,<sup>68</sup> and David Luban,<sup>69</sup> in different ways, have argued. Moreover, Markovits makes a substantial contribution to our understanding of how lawyers are able to provide voice and a meaningful connection with the law. He gives us a vivid sense of how these things not only seem to be, but are, important to the disputants' dignity and their vulnerability to the state, and to the other legally empowered persons around them. And he gives us a sense of why it is that legal ethics rules regarding the detachment of lawyers from their clients are essential to those capacities.

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67. See Fried, *supra* note 14, at 1075.

68. See Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613. As Andrew Kaufman points out in his response to Pepper, Pepper's structural account does not entail that it is always impermissible for a lawyer to diverge from what Pepper refers to as the lawyer's amoral role, or that some extraordinarily high standard must be met to justify such a divergence. Andrew L. Kaufman, *Commentary on Pepper's The Lawyer's Amoral Ethical Role, A Symposium on The Lawyer's Amoral Ethical Role*, 1986 AM. B. FOUND. RES. J. 651, 653-54.

69. See David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, in LEGAL ETHICS AND HUMAN DIGNITY 65 (2007).

The story – which, as presented below, is perhaps closest to that articulated by Stephen Pepper<sup>70</sup> – goes like this: legal rights are critical to our capacity to maintain a rule of law and a domain of governance and conflict resolution that is legitimate and just; legal rights in a sophisticated society like our own are sufficiently complex that empowerment to exercise such rights depends on having the representation of a lawyer; a lawyer’s taking the client largely on his or her own terms and enabling the client to have a voice are critical to the empowerment of the client to use his or her rights; the virtue of fidelity and the attendant negative capability of the adversarial lawyer are mature versions of the lawyer taking the client on his or her own terms, and enabling the client to have a voice. This argument is hardly trouble-free, but its core point is clear enough: meaningful rights are necessary to the legitimacy of governance in our society and lawyers exercising the sorts of virtues Markovits refers to are necessary, though hardly sufficient, for these rights to have meaning. The adversariness of the advocate is not the purpose but the predictable side effect of a system of rights representation that takes client voice seriously.

#### **V. THE CHANGING BAR AND ITS CONSEQUENCES FOR A LAWYER’S INTEGRITY**

At one level, Chapter 9 of *A Modern Legal Ethics* is the best documented and the least controversial. Markovits claims that over the past few decades, being a lawyer has become increasingly high pressured; advocacy has become increasingly sharp; legal practice has become increasingly segmented; the demographics of who becomes a lawyer has broadened enormously; and the membrane separating law and business becomes thinner and more porous with each passing day. Lawyers are increasingly identified with their clients’ interests and decreasingly detached in their own values; for better or worse, the way that lawyers approach their jobs is increasingly difficult to distinguish from the way that business people approach theirs. These trends and their significance have generated a rich legal profession literature including the work of Robert Gordon,<sup>71</sup> Russell Pearce,<sup>72</sup> Deborah Rhode,<sup>73</sup> Tanina Rostain,<sup>74</sup>

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70. Pepper, *supra* note 68, at 615-19. Markovits’s account differs from Pepper’s in innumerable ways. Critically, while Pepper states that law is “intended to be a public good which increases autonomy,” *id.* at 617, Markovits’s justification looks to the role of law in dispute resolution in a democracy. Moreover, Markovits would reject both the public good conceptualization, as such, and the autonomy consequentialism Pepper seems to accept.

71. Robert W. Gordon, *The Legal Profession*, in *LOOKING BACK AT LAW’S CENTURY* 287 (Austin Sarat, Bryant Garth & Robert A. Kagan eds., 2002).

David Wilkins,<sup>75</sup> and numerous others. Anthony Kronman's *The Lost Lawyer*, although written at a time when these changes were not as far along, parallels Markovits's book to a closer extent on these issues, wistfully lamenting these changes because he believes they undercut the capability of lawyers to exercise the very capacities that make their profession worthwhile. While one might wish that Markovits had engaged this literature to a greater degree, the empirical claims upon which his "Tragic Villains" chapter relies are more than adequately substantiated.

What makes Chapter 9 riveting is not its empirical claims but its assessment of the significance of those changes. In a few respects Markovits's response is quite conventional: he welcomes the broadened demographics and deplores the increased pressure and increased sharpness of the conduct of adversaries in litigation. Strikingly, however, he claims that the decreased insularity of the bar—the diminution in the clubishness and the "we are special" ethos—is a devastating problem for the integrity of lawyers.

Because the bar has become a less discrete entity and lawyers have become more identified with their clients' interests and less likely to shift in whom they represent, the redescription of role that once "worked" to avoid the integrity critique will no longer work.<sup>76</sup> If lawyers see themselves as betraying their commitment as human beings to honesty and fair play, then the integrity problem hits with full force. The only way out is for lawyers to see themselves as exercising the virtue of fidelity and the capacity for negative capability, rather than seeing themselves as liars and cheaters. But they cannot do this unless they can shift their cognitive mindset so that they are in the grip of a powerful role redescription of a sort the bar purveys. The capacity of the bar to effectuate this cognitive shift, and the capacity of individual lawyers to sustain the shift in themselves is sensitive to the social and cultural context in which the legal profession has situated itself. As we move into the future, lawyers will become tragic villains;<sup>77</sup> although striving to play a role that utilizes fidelity and negative capability to legitimize adjudication, they will increasingly be unable to do so, and—with all good intentions—will revert to understanding

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72. Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995).

73. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000).

74. Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273 (1998).

75. Wilkins, *supra* note 47.

76. MARKOVITS, *supra* note 1, at 245.

77. *Id.* at 246.

themselves as the equivalent of liars and cheaters (and, since they will no longer be able to play that role, will to that extent be liars and cheaters).

While most legal ethics scholars reading Markovits might pardon the melodrama of the “Tragic Villains” chapter, they will bridle at the inversion of ordinary moral thinking it represents. Markovits comes perilously close to saying that self-deception is the key to integrity. If too much exposure to the real world impact of one’s conduct and its actual entrenchment in the intercourse of life turns out to spoil the story that lawyers are telling themselves—their role redescription—then so much the worse for the story. A cognitive mindset that can only be retained by artificial barriers to experience and knowledge would seem to be a cognitive mindset not worth keeping. Transparency, not insularity, preserves integrity. When lawyers exceed the bounds of what a plausible conception of fidelity to clients would warrant, we want them to recognize what is happening, not to keep humming along cheerily because their professional norms insulate them from moral self-awareness.<sup>78</sup>

For all of the reasons indicated in prior sections, I am in some ways even less receptive to Markovits’s argument than those who accept his earlier conclusions would be. I do not think that lawyers lie and cheat or, therefore, that there is an integrity problem that runs as deep as Markovits suggests or that there is a serious concern as to whether lawyers can lead a life worthy of commitment. Furthermore, I do not think that the negative capability resuscitation of lawyers’ integrity that Markovits constructs would work, if it worked, by virtue of a role-based redescription lawyers tell themselves. As a result, it should be unsurprising that I also reject his insularity argument.

But here, as with his other claims, I think Markovits leads us to a profoundly important concern—indeed, three important concerns—about the perils of lost insularity. In outlining them below, I do not mean to affirm Markovits’s conclusion that we should mourn the loss of insularity, all things considered, let alone his conclusion that lawyers are doomed to be tragic villains. I do, however, wish to affirm the contention that the loss of insularity provides a kind of threat to the legal profession, a threat that can be expressed in the language of integrity.

First, an important aspect of integrity is knowing who one is and who one is not. Perhaps somewhat counterintuitively, this aspect of self-knowledge is enhanced if lawyers are more detached from the parties they represent and

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78. See generally Luban, *supra* note 69, at 19–63; Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

more aware that what they are doing is providing voice and representation to another, rather than working side-by-side with that other. A lawyer in the litigation section of a law firm that does products liability defense for one or two drug manufacturers, for example, will have a harder time than the jack-of-all-trades litigator knowing whether, in his day-in-day-out representation of the client in a particularly long and drawn out case or set of cases, he is the client or is only the client's mouthpiece. This does not make him a liar or a cheater or a person whose life is unworthy of commitment. And, indeed, if he comes to share his client's goals and values fully, he will likely feel less conflict and less self-reproach. As psychologists who study cognitive dissonance tell us, this is partly why such transformations occur.

Transformations are not always as complete or as clear as they might seem, however, and partial or incomplete transformations may be personally costly. For one thing, in the event that the lawyer's client does make a choice he would not have chosen himself as a legal actor (for example, to make a certain motion, assert a certain defense or counterclaim), because as an individual he would judge it to be too weakly founded or too close to being exploitive to be justifiable, his do-not-judge-the-client mindset will be less available because of his higher degree of identification with the client. And yet, because he is the lawyer and not the client, he is obligated to behave as if he fully inhabits that mindset of professional detachment. The lawyer may have trouble judging how identified he is with his client, and in this sense, he may be unclear on who he is as a person and what he himself stands for.<sup>79</sup>

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79. The psychological costs of personal change are, interestingly, one of the central themes of Chapter 6, and play a very large role in Markovits's philosophical defense of Williams. MARKOVITS, *supra* note 1, at 143-50. Indeed, Markovits's defense of Jim's decision not to kill is oddly based on a kind of cost-of-change argument. The question is why it might be rational for a person to have ethical commitments—such as the commitment not, through one's acts, to bring about another person's death—that are so deeply entrenched that one would be unwilling to violate those commitments even if one saw what appeared to be a strong impartialist justification for doing so. Markovits's answer is that leading lives that amount to something and being a person who has some goals and substance would not be possible unless at least certain commitments are so deeply entrenched that we are incapable of revisiting them; it would be simply too psychologically costly to rethink commitments every time there would appear to be reasons to rethink them. Hence, a rational person makes such commitments. Given that it is rational to make commitments of this form, given that the commitment not to take other lives is a commitment that it is entirely justifiable for a person to have, and given that Jim has made such a commitment, it is not true that Jim is ethically required to take the life of another. The point would not be that one was asking Jim to betray his basic commitments (although one would be), but that one would be asking Jim not to have this basic commitment, or, perhaps, any basic commitments of this strength, and those would be unjustifiable demands.

A second sense in which the diminution in the insularity of the bar tends to amplify integrity problems pertains to issues of the sort discussed at the end of Part II. I commented there that the lawyer's failure to disclose misgivings about the accuracy or truth of his client's account is not *dishonesty* and that the pursuit of nonfrivolous but questionable claims is not *cheating*, but that neither of these actions exemplify the traits of honesty and trustworthiness that one ordinarily associates with the virtue of integrity. If we abstract away from the role of adversary advocacy, this is not "pillar of the community" or "punctilio of honor" conduct, on its face; rather, it is conduct that would appropriately give rise to pangs of conscience.

Yet, as Fred Zacharias and Bruce Green have argued,<sup>80</sup> lawyers have not conceived their role as one that requires the abandonment of conscience. And, of course, many lawyers—including adversary advocates—pride themselves on being men or women of integrity in the sense of being beacons of honesty and trustworthiness. Part of the explanation for how this is possible is that honesty and trustworthiness are to a significant extent virtues that depend on a person's generating clear expectations that turn out to be justifiable; they are "truth-in-advertising" virtues. The adversary advocate defending a client in criminal or civil litigation is not putting forward all the misgivings he might have about the case, but no one expects the lawyer to do this. Lawyers are understood to be acting in a manner that toes a particular line of affirmative truthfulness without full candor, and there are both rules of professional conduct and conventions of lawyering that help to define where this line is. Friends who play poker together every month can trust one another and regard one another as honorable not because the poker playing is done in full candor, but because their perception of one another is entrenched within a set of special norms of conduct relative to which honesty and trustworthiness can be restored.

If change, expansion, and dissolution of subcommunity boundaries become too great, social conventions that anchor the expectations of lawyers may begin to dissolve. Lawyers may lose a grip on just where the line is that they—and their adversaries in litigation—are carefully trying not to cross. When this occurs, members of the profession may begin to lose the availability of the virtue of integrity as an *excellence* of honesty and trustworthiness within their profession, even if they do not become liars and cheaters. Whether this has occurred is an empirical question whose answer I do not pretend to know. But Markovits is right that the way lawyers understand their profession and one

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80. Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1 (2005).

another has, in principle, an impact on the set of ideals they are able to hold out to themselves as possible.

## VI. THE PROBLEM OF THE INCONGRUITIES OF JUSTICE

The challenge presented to lawyers in our political and legal system is but the sharpest version of the challenge that exists for our political and legal system as a whole, and for everyone in it. The problem is that a system that takes legal rights seriously, as does ours, will almost inevitably be found deeply disappointing in its capacity to perform what would seem to be the single most important function of a legal system: securing justice. This is not because legal rights have nothing to do with justice or only bear some antagonistic relationship with justice; it is because the concept of justice covers more than one ideal, and the ideal to which our conception of legal rights is fundamentally connected fits uneasily with the conceptions of justice to which the notion of securing justice is connected.

As Markovits has rightly emphasized, democracy requires that individuals and entities whose conflicts are disposed of by the state through coercive means need to be respected and their dignity recognized. Moreover, in our liberal democracy, we have undertaken to interpret this requirement so as to parcel out a wide variety of legal rights to individuals, and have done so in a manner that is both intended to realize a variety of rule-of-law values and aimed to serve a variety of substantive ends. As Stephen Pepper and others have pointed out, legal rights are extraordinarily complex, and, as a result, the promise of respect and dignity that underlay the crafting of such rights into the law is largely hollow without the promise of legal representation. Markovits argues that lawyers serving with fidelity play a role in realizing this promise. Building on Fried's work, Markovits indicates that this activity is a substantial good. As all of these scholars would be happy to admit, and as a broad tradition of legal scholarship over the past several decades has passionately contended, client-centered representation is an integral part of the justice of our legal system, not simply a means to an end.

It is tempting to refer to the form of justice that legal representation permits as *procedural* justice, but this would be misleading on several fronts. The right to recover compensation from a tortfeasor is not procedural justice, nor is the right to remain free of liability if one has not committed the tort. Both of these rights are, when all is said and done, quite meaningless without an adversary advocate. The right to a lawyer in civil cases is typically less dramatic than the Sixth Amendment right to counsel in a criminal proceeding. However, having access to a lawyer is of similar importance in that having access to a lawyer is critical to the meaningfulness of other substantive rights,

such as the right to remain free of criminal punishment absent a showing by the state that convinces a jury of the violation of an appropriately announced law. The right to legal representation is significant to the meaningfulness of the substantive rights. The justice that legal representation permits is therefore the substantive justice that goes hand in hand with having a rule of law that allocates legal rights to individuals on many different levels. Within adversary advocacy, these are legal rights that involve empowerment (from the point of view of the plaintiff) and freedom from liability as a result of another's exercise of empowerment (from the point of view of the defendant). Within other areas of legal practice, these are legal rights to engage in transactions, transfer property, create companies, marry, et cetera. Because these are the very legal rights—legal powers and legal liberties and legal protections—that constitute having a legal order that operates in a rule-like manner in a system that has a rule of law, I shall refer to the form of justice that is committed to seeing to it that these rights are given substance *constitutive justice*. Although this is perhaps too lofty a phrase, its excessive loftiness will only help to make my point.

Respecting legal rights is no doubt essential to some forms of justice but there is more than one form of justice, even if “justice” is defined broadly. Without purporting to cover all forms of justice, it is useful to designate at least three broad categories: constitutive justice, dynamic justice (which includes both retributive justice in criminal law and corrective justice in private law), and distributive justice. To say that a certain trial in which a defendant was acquitted of homicide was a miscarriage of justice is not necessarily to say that the system failed to respect anyone's legal rights: it is entirely possible that each side was represented well and that the jury decided for the defendant. However, it is entirely cogent for someone who believes the defendant was guilty and that there was adequate proof of such guilt to describe the result as a miscarriage of justice. What such a person might mean is that defendant ought to have been convicted and punished; retributive justice required the conviction and punishment of an actor who deserved such punishment. Justice was not done, even if rights justly allocated were properly respected.

Although retributive justice is typically reserved for criminal law, it is quite easy to speak of the civil law in terms of corrective justice. If one wonders whether a manufacturer who marketed a defective product that hurt someone has been forced to pay the victim, one is wondering whether corrective justice has been done. Conversely, if the manufacturer's product never even went near the plaintiff, and could not have done so, then a jury that decides to hold the defendant liable anyway is not doing corrective justice. Both retributive justice and corrective justice are species of what might be called “dynamic justice”: the conception of justice as something that is *done*, a legal disposition meted out in light of what others have done in the past.

A lawyer who faithfully represents his client and asserts his client's rights is, to the extent articulated above, doing constitutive justice, but there is no guarantee that dynamic justice will be done as a result of his participation. Constitutive justice is what lawyers work at, but dynamic justice is what lawyers are often aspiring to, at a private level. Adversarial lawyers stand right at the interface between different kinds of justice. Because their normal participation is to give heft to legal rights, they frequently find themselves in the midst of frustrating the doing of dynamic justice.

It is not only adversarial lawyers who face the awkward fit of their own rights-representing professional activity and a distinct but equally powerful conception of justice. Transactional lawyers do too. Although one of the things members of a society often hope for in their legal system is the capacity to *do justice*, which is a dynamic notion, another ideal is that benefits and burdens, goods and ills, will be justly distributed in society. Distributive justice and dynamic justice are no doubt connected in various ways but they are hardly the same. While purely transactional lawyers deal less frequently with tribunals whose ideal function is to do dynamic justice, they deal on a daily basis with the allocation and reallocation of goods. In their work, they must attend to and protect their clients' rights, typically in transactions. Those transactions can be unjust by failing to respect their clients' rights, and a lawyer is there in part to protect such rights. But even if she succeeds in doing so—indeed, sometimes because she has succeeded in doing so—the alterations in holdings or power created by the transaction will often have no claim to be increasing distributive justice in any palpable sense, and sometimes the lawyer—stepping out of her role as lawyer for a time—will end up anxiously wondering whether distributive justice has been diminished.

The problem is that, of the three different ideals that go under the name “justice”—dynamic justice, distributive justice, and constitutive justice—only one of them, constitutive justice, is the central focus of the practicing lawyer with clients. It is essential to a liberal democratic state to have a fair scheme of legal rights for individuals; this is, in itself, a significant form of justice, and a form that lawyers—operating one by one—are essential to preserving and protecting. Yet members of society—and this includes those members who happen to be lawyers—also want our legal system to deliver dynamic justice and distributive justice. There is no guarantee that the lawyer's role in protecting her client's rights—preserving our system's constitutive justice—will wind up promoting dynamic justice or distributive justice. Indeed, there are many reasons to suppose that it will often not do so. The several forms of justice are incongruous with one another. Because there is no reason to believe that all of the forms of justice can be integrated with one another, justice itself is not a whole.

I suspect that the incongruities of justice are a large part of what leads an adversary advocate to engage in self-reproach, and that it is part of what leads lawyers to become anxious about who they are, where they stand, what they are doing with their lives, and whether they have really lost whatever integrity they had to begin with. If one sees oneself as seeking justice, and representing clients' legal rights for that reason—which, I believe, is how lawyers often do want to see themselves—one might still end up wondering whether one has facilitated dynamic or distributive justice, and one might well answer “No.”

One way in which lawyers can respond to the incongruities of justice begins with the ideal of fidelity to the client. Markovits is right, I suspect, to think that a certain kind of passion for fidelity and negative capability—a purism about the infinitely pliable and formless adversary advocate—can help to smooth over the discomforts that others perceive in the incongruities of justice. This kind of ultracommitted advocate makes as his top project the serving of clients and his top normative commitment the doing of what I have called constitutive justice, albeit in a manner that takes the division of labor very seriously. If Markovits is correct about the diminishing insularity of the bar, then it may be that this role is becoming less available and that one comfortable place for the lawyer to stop and to take pride in herself is vanishing. The increased adversarialness of the bar is likely to lead many lawyers to identify more closely with their clients' interests. By bringing their views of what constitutes dynamic or distributive justice closer to that of their clients, lawyers can reduce the conflicts they perceive between constitutive justice and dynamic and distributive justice.

I suspect that many legal ethics scholars are like myself in that they are skeptical about the purist ideal of the adversary advocate who holds constitutive justice as an unchallenged top priority and unconvinced that there is really an integrity problem of the sort Markovits claims that would even begin to justify such a singleminded view. From this perspective, the purist ideal of the fidelity of the adversary advocate was never necessary, and in any event always quite dangerous, for it entrenches, rather than exposes, what is in the end admitted to be a kind of illusion. Many such scholars, like William Simon, are rather pleased to see the illusion crumble, if it will help us to recognize how poorly we are doing at realizing other forms of justice.

The solution—and that is far too grand a term, for I have no solution, only a suggestion—is not to wish away the incongruities of justice we perceive or to accept them as they are. It is to recognize that the incongruities of justice can be greater or lesser and that we lawyers are better situated than anyone else to effect practical changes aimed at harmonizing the many forms of justice, such as modifying the legal ethics rules, modifying procedural rules, modifying institutional and economic structures determining the allocation of legal

services, and, critically, modifying the substantive law creating and allocating legal rights. To this end, the perception that one's integrity is under attack—the pangs of conscience and self-reproach felt, from time to time—may actually be a positive force in the life of the lawyer. Someone must stand ready to identify the systemic problems of our adversarial system, and to do so in a manner that does not spring from one interest group or political cause or another, nor from a point of view that idealizes the virtues of fidelity and negative capability, which, after all, only go so far. None are better suited to this job than lawyers themselves, including the slightly self-reproaching hired gun.

## CONCLUSION

*A Modern Legal Ethics* is an intellectual whirlwind, sweeping from Aristotle and Kant to contemporary debates about impartial moral theory to the details of the Model Rules without stopping to take a breath. What is most arresting in the book is the charge that lawyers lie and cheat, a charge that turns out to be indefensible. What is most defensible is the claim that the morally troubling aspects of adversarial advocacy derive from a lawyer's obligation of fidelity and her ability to provide the client with a voice, the very capacities that arguably allow the legal profession to serve a legitimizing role in a democracy. What is most engaging is the question that drives Markovits throughout: is it possible for an adversary advocate today to have integrity?

At one level, the answer to Markovits's question is too obvious to merit asking. One's inclination is to answer:

Of course an adversary advocate can have integrity. I know many such individuals. They are people of integrity: they are honest and trustworthy; they have a set of worthwhile commitments in their life that motivates them, and with respect to which they remain committed; and, their goals and values ground their actions and their life plan in a way that makes them whole. If you want more, you are not looking for integrity but for something else.

Markovits does want more, which is not to say he wants a better person than those just described. He wants—as I suggested in Part I—a philosophical account of what set of values is operating in the adversary advocate such that conduct that would normally be viewed in a negative light—limited candor and a high level of willingness to employ the legal system in ways that generate questionable advantages and disadvantages—can actually turn out to be justifiable, even obligatory conduct. And he wants an account of what the normative structure of our political and legal system is that such a set of values

does rise to this level. To his great credit, he has begun to deliver such an account: fidelity, detachment, and empowerment are the values; practical legitimation of adjudication in a democracy is the structural feature. My largest concern about *A Modern Legal Ethics* is that, despite its concern to preserve integrity, its most natural reading points away from integrity. The virtues of honesty, trustworthiness, candor, and constancy that lie at the core of integrity do not permit a lawyer to ignore the incongruities of justice or to wrap herself in the cocoon of client fidelity. They demand judgment, moderation, sensitivity to community understandings and expectations, and—as thinkers from Aristotle to Williams and Kronman have recognized—practical engagement.