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Criticizing the Obligatory Acts of Lawyers: A Response to Markovits's *Legal Ethics from the Lawyer's Point of View*

Alec Walen*

INTRODUCTION

It is tempting to think that if the role of being a lawyer is justified, then a lawyer who occupies that role in a way consistent with its justification cannot be ethically criticized for what he does. But Daniel Markovits rightly points out that we cannot rest our ethical inquiry so easily. Even if we suppose that something like our current adversary system, as an institution, is morally justified, something is still ethically askew. Lawyers engage in, among other ethically dubious practices, "sharp practices — papering cases, filing implausible claims and counterclaims, and delaying or extending discovery — in order to force advantageous settlements." And it is not simply descriptively true that lawyers act this

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way; their jobs sometimes require them to act this way. Putting the point more generally and more provocatively, Markovits claims that "the duties attached to their professional roles require lawyers to lie, to cheat, and to abuse." \(^2\) Even if the adversary system as a whole is justified, and even if such practices are an essential part of an adversary legal system, we should expect lawyers to be subject to criticism for such behavior. For how can lying, cheating, and abusing be ethically beyond reproach?

But this raises a puzzle. How can we make sense of the thought that certain actions are ethically obligatory, and at the same time that one can be ethically criticized for taking them? Doesn't criticism imply that one should be acting differently? And if one should be acting differently, how can one also be obliged to act that way?

Markovits offers an answer. He suggests that there are two potentially conflicting frameworks of moral justification: a third-person framework in which morality is concerned fundamentally with treating people impartially as equally worthy of respect; and a first-person framework in which morality is concerned fundamentally with personal integrity, or the coherence of one's actions with one's values and character. \(^3\) An action justified in one framework may not be justified in the other. \(^4\) On this suggestion, if a lawyer has a duty to lie, cheat, or abuse, it is due to her role in the impartially justified adversary system. But such a duty will likely conflict with her first-person, integrity-based reasons. The moral criticism directed at lawyers, and a good lawyer's ethical discomfort with her job, reflects this failing of integrity.

Although Markovits's answer is superficially plausible, and is presented with a high degree of sophistication, I think Markovits both exaggerates and misdiagnoses the problem. He exaggerates the problem insofar as he argues that in an ideal adversary system, lawyers are ethically obliged to lie, cheat, and abuse. He misdiagnoses the problem insofar as he argues that the tension arises out of a tension between first-person and third-person frameworks for moral justification.

Regarding Markovits' exaggeration of the problem, I believe we should distinguish two models of the adversary system. In an ideal adversary system, lawyers aid their clients by making legal and factual arguments that appeal to reason. They avoid using intentionally misleading rhetoric and manipulative appeals to emotion. They also take on clients only when they are not seeking to pursue immoral ends or to exploit unfair

\(^2\) Id. at 219.

\(^3\) Markovits does not frame the problem as I have. He distinguishes two grounds for criticizing lawyers: their partiality and what he calls their lawyerly vices. His concern is to argue that even if lawyerly partiality can be justified impartially, lawyerly vices cannot. See id. at 220. At bottom, however, I think we are concerned with the same problem.

\(^4\) As Markovits puts it, he is investigating "the independent, and possibly divergent, demands of third-personal and first-personal ethical justification." Id. at 222.
advantages in a morally objectionable way, or when there is some other moral end that can be served only by serving those clients—ends such as protecting fundamental rights or keeping the power of the state in check. On this model, lawyers take sides and aim to serve the interests of their clients when those interests can morally be served. But they aim to serve the interests of their clients only insofar as those interests would be served by a defensible understanding of the law applied to an honest representation of the facts. In such a system, lawyers are not truly zealous advocates, for though they work on behalf of their clients, they temper what they will do for their clients so as not to undermine the moral rights of others or the functions of the judge and jury. In such a system, there is never an obligation to lie, cheat, or abuse.5

On the other model of the adversary system, lawyers do whatever they can within the law to help their clients win. I call this the zealous adversary system. The zealous adversary system is more or less the model of our actual adversary system. It does, at least sometimes, call for lawyers to lie, cheat, and abuse. However, even with such a system in place, lawyers still have an ethical duty to refuse to help unscrupulous clients unless there is some other overriding good at stake. And even when their clients are pursuing morally permissible or even morally laudable ends, the permissibility and propriety of using ethically troubling means is limited. A lawyer may use these means only insofar as using them is made necessary by others using them too—necessary in the sense that without using such means, it would not be possible to serve good people or to prevent them from being put at an unfair disadvantage. Thus, the need to lie, cheat, and abuse, and to face the criticism that seems to attach to such practices, arises only in limited circumstances and only in the zealous adversary system.

Markovits misdiagnoses the tension between the justification for the adversary system and the criticism of legal practices that it demands by arguing that it arises from a gap between what he calls “third-personal impartial moral justification” and “first-person ethical” justification.6 Markovits goes wrong, I argue, in thinking that morality is usefully carved up into these two distinct domains of justification. Morality is always concerned both with impartiality and partiality. It takes into account the way we each must see ourselves as just one person among many and as an individual who has his or her own life to lead.7 It is a deep mistake about

5. The view I embrace as ideal is essentially the view articulated in David Luban, Lawyers and Justice (1988), especially chapter 8. I do not share all of Luban’s concerns with corporations as especially problematic, see id. at 156-57, nor his distinction between weighty and pragmatic justifications. See id. at 148-49. But his conception of the lawyer as having no special moral permission to promote immoral cause is, I think, deeply right. See id. at 155.

6. Markovits, supra note 1, at 222, 221.

7. As Thomas Nagel puts the point, when we reason consistently with morality, “We are
morality to assume that it can be broken into two distinct domains of justification. Furthermore, it is a deep mistake in philosophy to assume that there is a first-person point of view that is fundamentally separate from the points of view of others.

With regard to the misdiagnosis, it may be tempting to say that Markovits cannot be that far off base. One might want to argue that all he is saying, really, is that there is a difference between ethical theories that focus on one's relation to others and ethical theories that focus on what it means to lead a good life. Teleological theories like utilitarianism and deontological theories like Kantianism are both examples of outward looking theories that deal with oneself in relation to others, while virtue ethics focuses inwardly on what it means to lead a good life. Markovits is merely stressing, one might think, the importance of virtue ethics. But difference in focus should not be confused with difference in subject matter. Utilitarianism makes room for partial concern with one's own life in an instrumental or derivative way; Kantianism makes room for it as a fundamental feature of morality. Looking at morality from another perspective, virtue ethics holds that among the necessary conditions for living well is that one respect the value and claims of others. In this way, though they have different starting points, both the outwardly focused and the inwardly focused theories try to take into account, and make sense of, the proper place of both partiality and impartiality. It would be a mistake to treat these differently focused theories as presenting different and conflicting frameworks of justification.

I think a better diagnosis of the puzzle regarding how there can be obligatory actions that nonetheless merit criticism is that the obligations reflect what must be done in the actual world, and the criticisms reflect the way the real world deviates from the ideal. The real world deviates from the ideal world due to a kind of race to the bottom. This race towards zealous advocacy is driven by various pressures, including the desire to keep unscrupulous clients with unscrupulous lawyers in check, the economic pressure to win, and the temptations of a false ethical ideology according to which lawyers should do whatever they can do and get away with doing that will help their clients win. The criticism that still attaches to sharp practices, even when they are justified as necessary means of preventing morally deserving clients from being put at an unfair disadvantage, reflects a disgust with the race to the bottom in general. But it also reflects a discomfort with letting the ends justify the means.

simultaneously partial to ourselves, impartial amongst everyone, and respectful of everyone's partiality." THOMAS NAGEL, EQUALITY AND PARTIALITY 38 (1991). Nagel is pessimistic that the demands of partiality and impartiality can both be met. But he does not think we can abandon or diminish the importance of either standpoint. Rather, his pessimism leads him to ask "Under what circumstances is it possible to live as we should." Id. at 52.

8. Markovits himself seems to view his point this way. See Markovits, supra note 1, at 224-25.
I proceed as follows. First, I review Markovits’s two-pronged approach to the ethical problems of lawyers — one dealing with partiality, the other dealing with lawyerly vices. I suggest that he mislabels the problem which he calls the problem of partiality. What Markovits sees as the problem of partiality is really a two-pronged problem: 1) following the dictates of the law when the law requires an unjust result, a problem as much for impartial judges as for partial lawyers; and, 2) choosing to serve undeserving clients. The second prong can lead to problematic partiality when lawyers are overly zealous in the pursuit of victory for their clients. But the underlying problem is a failure to use discretion properly. As for the lawyerly vices, I suggest that these are not best viewed as “vices” or character defects. Rather, they are better viewed simply as ethically problematic actions. And the problem of lawyers performing such actions is not as extreme as Markovits makes it out to be. Lawyers in our zealous adversary system surely do regularly lie, cheat, and abuse, but I argue that the adversary system does not intrinsically require any such behavior.

Second, I explain why I think the distinction between third-person and first-person justificatory frameworks is implausible. I argue first that the idea of first-person justification simply does not make philosophical sense. I then argue that morality, or at least a Kantian take on morality, takes into account both the partial and impartial perspectives. I wrap up this part of the essay by exploring possible reasons why Markovits would fail to see how Kantian morality can properly take partiality into account. I focus particularly on the objection Markovits draws from Bernard Williams — that Kantian morality cannot make sense of personal integrity — and on Markovits’s misreading of the Kantianism of Christine Korsgaard.

Third, I move from the ideal to the real. I offer an explanation for why lawyers in the real world participate in a zealous adversary system. I suggest that the ethically problematic behavior of good lawyers in the non-ideal world is the result of a race to the bottom that, while deviating from the ideal, is also, at least to some extent, unavoidable. I then suggest that the moral picture that results is one in which the criticism directed at lawyers can be taken as an indictment of the race to the bottom, and a call for constant attention to the possibilities for structural reform to raise the profession as close as possible to its ideal. But at some level it also reflects the inherent moral difficulty that all good people have accepting that the ends can justify the means.

I: ETHICAL PROBLEMS IN LAWYERING

A. The Underlying Causes of Problematic Partiality

Markovits thinks there are two distinct kinds of ethical problems that lawyers confront: partiality and lawyerly vices. In this section, I argue
that the problem Markovits identifies as partiality is really grounded in two other problems, and that lawyers are not obliged to do anything that would subject them to criticism on these grounds.

Markovits puts the charge of partiality, at its core, this way:

[L]awyers are called on to engage their talents in support of outcomes their clients favor even when those outcomes are themselves unfair. . . . [A] tort lawyer, for example, might help a client avoid liability by pleading a technical defense involving a statute of limitations even though she knows the client committed the tort in question and has a moral duty to compensate the victim.9

Markovits seems to believe that if the adversary system can be justified, then so can the partiality that comes with it.10 He does not say as much explicitly, but the thrust of his argument as a whole is that even if the system is impartially justified, lawyerly vices cannot be justified by that kind of argument. The implication by contrast is that their partiality can be justified.11 In other words, if an ideal system would be an adversary system, then in the ideal system, “[l]awyers will remain advocates rather than judges.”12

As I just indicated, however, I think that the problem Markovits finds—that of serving clients’ interests even when doing so would be unfair and would help them escape a moral duty—is not fundamentally a problem of partiality. It is, instead, a two-pronged problem reflecting the gap between law and morality, and the morally unjustifiable choice to serve clients in the pursuit of immoral ends.

A little reflection on what judges must do shows that partiality could not be the whole problem. Consider Markovits’s example of a tort lawyer who invokes the statute of limitations to prevent his client from having to pay damages that he morally owes the plaintiff. If the lawyer makes that case to the judge, and the judge agrees that the statute of limitations has run, the judge then has a legal obligation to tell the plaintiff that he has no

9. Id. at 214-15 (first emphasis added; second in the original). David Luban offers a real case along these lines: Zabella v. Pakel, 242 F.2d 452 (7th Cir. 1957), concerned “a wealthy man attempting to evade a five thousand dollar debt to an ‘old friend, countryman and former employee’ by pleading the statute of limitations.” LUBAN, supra note 5, at 9.

10. Markovits does not commit himself in the main text to the view that the adversary system, perhaps in some modified form, is or would be justified. He does say that “[n]early all the critics [of the adversary system] agree (at least their positions entail) that some version of the adversary system should remain in place.” Markovits, supra note 1, at 264. But he does not embrace their view. On the other hand, he says in a note, “I should say, however, that although I am sympathetic to the suggestion that there is (much) too much adversariness in the practice of lawyering as it stands, I do believe that some adversariness has intrinsic value and I am skeptical of efforts to eliminate adversariness from lawyering altogether or to confine adversariness to such levels as can be defended, insecurely, by purely pragmatic argument.” Id. at 217 n.18.

11. Markovits also notes that “the mainstay of academic legal ethics”—a position he does not disavow—is that “the adversary lawyer’s seemingly partial behavior is impartially justified because the adversary system is impartially justified.” Id. at 262.

12. Id. at 265.
legal remedy for his damages. The judge is meant to be the paradigm of an impartial figure, yet he may be obliged to tell the morally deserving plaintiff that he loses. If telling the morally deserving plaintiff that he loses is the problem, then the problem is not one of partiality.

The problem as it concerns the judge and the lawyer obviously reflects the gap between law and morality. This gap is not hard to explain. The law relies on rules to guarantee certain values like efficiency and predictability. More specifically, it adopts rules such as that one has to file a suit within a fixed period of time in order to "giv[e] individuals repose from ancient breaches of law." Rules of this sort limit a judge's ability to look to the underlying moral values that justify a tort system in the first place on a case by case basis. The law allows a limited amount of flexibility in the name of equity. But as the Supreme Court has noted:

PROCEDURAL REQUIREMENTS ESTABLISHED BY CONGRESS FOR GAINING ACCESS TO THE FEDERAL COURTS ARE NOT TO BE DISREGARDED BY COURTS OUT OF A VAGUE SYMPATHY FOR PARTICULAR LITIGANTS. IN THE LONG RUN, EXPERIENCE TEACHES THAT STRICT ADHERENCE TO THE PROCEDURAL REQUIREMENTS SPECIFIED BY THE LEGISLATURE IS THE BEST GUARANTEE OF EVENHANDED ADMINISTRATION OF THE LAW. Clearly this reasoning applies in state courts as well as federal. And the upshot of adopting this reasoning is that some morally deserving plaintiffs will be denied recovery by procedural bars such as a statute of limitations. Such failures to provide a legal remedy may be unjust in particular cases, but if judges had the legal power to overlook procedural bars, there is a danger that they would undermine their point. The law has to decide what discretion to give judges in what contexts. Cynical realists may argue that judges have a choice whether to allow their discretion to be so controlled. But any judge who takes the law seriously will be confronted with cases in which he will feel that the law demands that he deny a party what that party morally deserves.

I am not suggesting that judges are always morally obliged, or even permitted, to follow the dictates of the law. Some laws are too far from just. To take the most well-worn of examples, consider the fugitive slave laws that operated in the U.S. prior to the Civil War. Arguably, judges should have done more than they generally did to undermine or to refuse to enforce such laws. My point is only that there are some times when a system of rule-like laws, even in an ideal form, cannot help but deviate from morality. And in such cases, the moral value of the law as a

necessary system for social coordination and conflict resolution provides moral justification for upholding the law even when it leads to an injustice in a particular case.

One might suggest here that lawyers are in a different position from judges because lawyers would do such things as making the argument that a plaintiff cannot recover due to a statute of limitations even when it’s not true. But in an ideal adversary system, lawyers would make such an argument only if the statute of limitations arguably does apply. In such cases, they would be playing a crucial role in determining what the law is. The lawyers on each side make the argument for why the statute of limitations applies or does not apply so that the judge can weigh the arguments and decide which is more compelling. For the judge to act with legal integrity, the lawyers have to do that job. Thus, partiality does not really seem implicated in the actions of the lawyer who argues for the statute of limitations. In an ideal system, the lawyers on each side can be seen more as aids to the judge who is trying to understand the law than as zealous advocates, one of whom is serving an immoral client who wishes to use the law to shirk a moral duty.

The problem with my response here is that it treats the lawyer too much as though the ideal adversary lawyer is really a lawyer in an inquisitorial regime. Lawyers in adversary systems are officers of the court, and in an ideal system would see their job as helping the court do its job well. But they are also advocates, and indeed agents, for their clients. As agents, they work on behalf of their clients, helping to achieve their clients’ ends. Thus, among the most basic rules of legal ethics, as codified by the American Bar Association’s Model Rules, is that, with certain limited exceptions, “A lawyer shall abide by a client’s decisions concerning the objectives of representation.” If a lawyer cannot in good conscience serve the objectives of a particular client, the lawyer should withdraw from the client’s service, rather than take it upon himself to deny the client what might well be his legal rights.
What distinguishes lawyers from judges, then, is an element of partiality that comes with serving a particular client’s partial interests. But tempering any obligations that might arise out of this partiality is a freedom to take or not to take a client’s case that judges do not have. As the ABA’s Model Code of Judicial Conduct says: “A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.”\(^2\) In other words, judges have no discretion. If a case is on a judge’s docket, he must either disqualify himself if so required, or hear the case. Of course, certain appellate judges have at least a vote on deciding whether to hear cases. It could be imagined that judges who feel that the lower court ruled in a morally sound but legally unsound way would refuse to hear the case on appeal and thereby use their discretion to avoid applying the law when doing so would lead to an injustice. But such opportunities are at best the exception for judges. They are the norm for lawyers. Unless ordered by a court to serve a client,\(^2\) lawyers can choose not to work with clients with immoral aims. Thus, the choice to advocate for someone who wants to pursue immoral aims is normally the lawyer’s responsibility. He cannot pass it off on the law or on the adversary system.

One might object on three grounds. First, one might object that lawyers should not be judging the moral worth of their clients’ ends. As Judge George Sharswood said nearly 150 years ago, “The lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury.”\(^2\)\(^2\) We may want to allow such usurpation in extremely morally troubling cases. If the legal rights are sufficiently egregious, then a lawyer may have a moral duty to interfere. But in a run of the mill case of a client pursuing immoral but legal ends, the lawyer has no more right than a judge to rectify the moral failings of the law on a case by case basis. And he certainly should not take himself to have even more freedom than a judge to undermine his client’s legal rights.

The problem with this objection is that it blurs the line between interfering with the exercise of a legal right and failing to aid in the exercise of a legal right. A lawyer who has not induced another person to rely on him to that person’s detriment, and who is not for some other reason legally obliged to help that other exploit the other’s legal rights — and who refuses to help the other unfairly or immorally exploit rights

\(^{20}\) MODEL CODE OF JUD. CONDUCT Canon 3(B)(1) (1990). Disqualification arises when “the judge’s impartiality might reasonably be questioned.” \(^{Id.}\) at Canon 3(E)(1).

\(^{21}\) See MODEL RULES OF PROF’L CONDUCT R. 1.16(c) and 6.2.

\(^{22}\) George Sharswood, An Essay on Prof’l Ethics 83-84 (1854), quoted in LUBAN, supra note 5, at 10.
granted by the law - does not interfere with the exercise of those rights. The person in search of a lawyer's help is free to go elsewhere. And even if, contra human nature, all lawyers were to refuse to argue for a client, and the client were left either to argue for himself or to abandon his case, this should not be viewed as too harsh a prospect. For were it to be the case that no lawyer would take a client's case - and were this fact to reflect the independent judgment of all lawyers, rather than a conspiracy of some sort, or the existence of a threat - the case would have to be so clearly heinous that all would agree that it is morally improper to satisfy it. How could it be unethical to deny a client help in such circumstances? 23

A second objection would be that it is often morally worthwhile to help clients who have immoral ends. Two kinds of examples come readily to mind. First, in the civil context, there are those who want to exercise an important right, even though they want to exercise it in a morally repugnant way. Consider, for example, an obnoxious group seeking to put on an offensive parade. Vindicating such a group's free speech rights can be justified by the value of protecting such rights against a possibly overly censorious state. Second, there are criminal cases in which the lawyer defends a person he believes or even knows to be guilty. Even if one knows that one's client is guilty, it is important to put on a defense in order to keep the power of the police state in check. 24 In both cases, one helps people secure immoral ends: parading offensively and avoiding deserved punishment. Thus, it might be thought that it was morally naive to conclude that one should not serve clients with immoral ends.

The problem with this objection is that it over-generalizes a more limited point. Yes, there are classes of cases in which lawyers can morally serve clients with immoral ends. But those are cases in which some other important social goal is at stake. The service a lawyer provides in those cases can be justified despite the immoral ends because of the counterbalancing moral ends. If those other ends were missing, then the lawyer could have no such justification for working on behalf of a client's immoral ends. In the tort case that I started this section by discussing, there is no other moral goal that would justify serving the client.

Some may believe that the importance of providing people with the means of vindicating their legal rights is itself always reason enough for a lawyer to offer her legal services to a client. But that claim is too

23. In a sufficiently homogenous society, we could imagine no lawyer would take a deserving case because all mistakenly believe that it is undeserving. Imagine a sexist society in which a woman sues to be able to exercise some liberty reserved only for men. But I assume that in a society as large and heterogeneous as ours, no position that can plausibly be morally defended would lack for defenders. Indeed, the problem is that no position, no matter how heinous, would lack for defenders.

24. To be fair to criminal defense lawyers, their job is not simply to try to gain an acquittal for their clients; it is also to ensure that if a client is convicted, he is convicted of the least egregious crime possible.
sweeping to be plausible. As already noted, the law sometimes deviates from morality. It sometimes allows people to do things that they ought not to do. A judge may be obliged to rule with the law. But a lawyer cannot plausibly take herself to have a similarly strong reason to help a person vindicate legal rights he ought not to exercise. A page from Abraham Lincoln’s legal practice illustrates this point better than I possibly could. Speaking to a potential client, Lincoln once said:

Yes, we can doubtless gain your case for you; we can set a whole neighborhood at loggerheads; we can distress a widowed mother and her six fatherless children and thereby get you six hundred dollars to which you seem to have a legal claim, but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you. You must remember that some things legally right are not morally right. We shall not take your case, but will give you a little advice for which we will charge you nothing. You seem to be a sprightly, energetic man; we would advise you to try your hand at making six hundred dollars in some other way.  

A third objection is that it is unrealistic to expect lawyers not to serve clients with immoral ends. As David Luban puts the point, assuming that the lawyer in question has already been working with a client, “resignation is a very drastic step, causing the lawyer financial loss, generating hard feelings, and tagging her with a reputation as a quitter.” This practical issue may indeed excuse certain lawyers in marginal cases. But the scope of the practical problems here should not be exaggerated. One will not be tagged as a quitter for not taking on clients with immoral ends. Nor would one be tagged a quitter for dumping a few clients who prove to be unscrupulous. People sever such business relations all the time. One might be tagged as a quitter if one dumped clients on a regular basis, but then one should probably be more particular in choosing one’s clients in the first place.

As for hard feelings, even if they might arise, it is worth questioning how much they matter if the person who will have them is a client bent on pursuing immoral ends. Doubtless, the “sprightly energetic” man whom Lincoln addressed came away from the meeting with some “hard feelings.” But so it must sometimes be.

This leaves the financial aspect of Luban’s pragmatic argument. Young
lawyers, fresh out of law school and heavily in debt, may feel that they have no choice but to work at a firm where, again, they may feel that they have no choice but to work on the projects the firm assigns them to work on. Again, however, we should be wary of exaggerating the scope of the problem. Most firms allow associates to decline to work on morally problematic cases, and most law graduates are not economically coerced into working for firms that would not give them such freedom. But in those possible rare cases in which young lawyers are essentially coerced into serving undeserving clients, the blame can be shifted onto the partners in the firm for taking on such clients and for failing to give associates the choice not to serve them.

In sum, the proactive choice to serve unscrupulous clients is, I think, the real source of worry about the partiality of lawyers. But this choice is not fundamentally a problem of partiality. Yes, a lawyer is problematically partial insofar as he chooses to advocate on behalf of someone whose ends are morally undeserving of aid. But the underlying problem is the lack of good moral judgment in deciding to work with a client who does not deserve the aid. There are a number of reasons a lawyer might make such a moral mistake. Perhaps she is greedy and wants the money. Perhaps she is overly ambitious and values too highly the opportunity to get a challenging victory and discounts too readily the disvalue of the harm she helps to perpetrate. Perhaps she operates under a false ideology according to which she has an obligation to serve any client who can pay, no matter how noxious his goals. Whatever the cause of the mistake, the problem here really precedes partiality — it is the immoral choice to serve clients who do not deserve the benefits of a partial advocate. This kind of choice is neither required by nor excused by practicing law in an adversary system. Indeed, whether the system is ideal or zealous, responsibility for aiding an undeserving client rests with the individual lawyer who chooses to do so.

B. Unsportsmanlike Conduct Underlying Lawyerly Vices

Markovits wants to emphasize that even if lawyerly partiality can be justified by justifying the adversary system, there are various lawyerly vices that are still morally problematic. What are these lawyerly vices? Markovits's triad is lying, cheating, and abusing. These would persist, Markovits believes, even in an ideal adversary system because lawyers "will continue to persuade others of arguments they do not themselves believe, to exploit unfair strategic advantages, and to discredit and attack honorable and truthful opponents." Markovits claims that these things that they would be obliged to do in their professional capacity are vices.

27. Markovits, supra note 1, at 265.
because such acts "would ordinarily be immoral."28

Now there is no denying that the tendency to lie, cheat, and abuse would indeed be a character defect and thus vicious. But it is worth pointing out that it is at least odd to say that doing these things is vicious if one does these things only when one is obliged to do them. It is conceivable that they would be justified as acts, yet would be done in a vicious way. But the more natural expression of vice is through a tendency to do things that are, as a matter of fact, unjustified. Markovits presents this less natural picture of vice because he thinks we need to carve off character issues from the justification of behavior. He assumes, at least for the sake of argument, that these behaviors are impartially justified, and his strategy for explaining how these actions can be both obligatory and worthy of criticism is that they are also expressions of vice. But, as I will argue in Part II of this paper, Markovits's strategy of carving morality up into possibly competing domains of justification trades on a species of philosophical nonsense. On my view, then, these behaviors are not best seen as vices. On my view, they are morally problematic because there is at least some ethical strain involved in justifying them.29

In this section, I start with a preliminary question: Are these behaviors even called for by adversarial legal practice? My answer is that in an ideal adversary system, they are not called for. The view that they are called for is, in essence, a view that embraces poor sportsmanship. Poor sportsmanship represents, I believe, a perverse norm that has been generally embraced in our zealous adversary system. But that shows only how far we have deviated from the ideal.

To see whether lying, cheating, and abusing are really called for in the adversary system, we need to be clear on what these terms really mean. Unlike Markovits, I do not think we can talk about "redescribing" the actions in question in a way that leaves some conflicting description applying as well.30 Actions may be capable of many descriptions, but the various descriptions should all be consistent. My concern here is not with redescription but with accurate description – with accurately using the labels "lying," "cheating," and "abusing." It is inaccurate to say that a surgeon assaults a patient who has consented to the surgery in question, even though he cuts her. Likewise, it is inaccurate to say that a boxer commits a battery upon his opponent, even though he batters him.31 And

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28. *Id.* at 213.
29. I explore why and in what sense these behaviors are morally unjustified, given that they are also sometimes obligatory, in Part III.
30. Markovits thinks lawyers can take advantage of redescribing to try to save their moral integrity from the first-person point of view. See, especially, *id.* at 275-76. Because I think the first-person point of view is actually nonsense, I reject Markovits's use of redescribing in it, as well.
31. Markovits misrepresents this issue when he says, "Prize-fighters . . . think of themselves as boxing rather than assaulting their opponents." *Id.* at 275 (emphasis added). The implication is that.
it is inaccurate to say that an actor lies when she speaks in the first person on stage and makes claims that are not true in the real world. Question: is it likewise inaccurate to say, for example, that a lawyer who tries to convince others of arguments that she does not herself believe is lying?

I think the answer is yes. The charges that Markovits levels are inaccurate, at least in the ideal adversary system. Markovits anticipates the kinds of arguments I am about to give to that effect. But he thinks that there is another point of view from which lawyers, even in the ideal adversary system, will still be lying, cheating, and abusing. I think that is mistaken.

I start with the charge of lying. When a lawyer makes an argument about the law, he argues that a certain law should or should not be controlling in the case at hand. Suppose he thinks that the position he takes is, as a matter of fact, the weaker of the two positions. Were he the judge, he would rule for the other side. Does that make him a liar? I think not. We should not interpret his argument as a statement of what the lawyer actually believes is true, but as an attempt, at least in an ideal adversary system, to put the argument on one side as convincingly as possible. It is, in a way, acting. It might be clearer if the lawyer prefaced his remarks by saying: “I am now going to give the best argument I can for the view that this law should apply in this case, but I warn you not to conclude that I personally accept the argument I am about to express.” But there is no need for such a preface. People familiar with the context of legal argument know that this disclaimer applies just as people familiar with theatre know that actors often do not personally endorse the things they say on stage. And if the intent is not to deceive in this way, then the act is not properly called a lie.

Now a lawyer in our real world might not limit himself to making the argument as rationally convincing as possible. He might also play on the emotions of the judge. Or, more likely, when presenting the facts to a jury, the lawyer may be tempted to try various techniques more designed to mislead than to inform, such as appealing to racial stereotypes, racial fears, or racial solidarity; putting on weeping witnesses; or showing gory photographs to engage the jury’s sympathy or indignation. Judges have an obligation to monitor their courtrooms so that the evidence and arguments offered appeal to reason and avoid the distorting effect of appeals to emotions. But many lawyers will seek to push that line, hoping to get away with crossing it as often as possible. They thus seek to mislead the

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32. See id. at 277.
33. See id.
jury and to undermine its capacity to act as a reliable fact finder. Although such techniques may not literally count as lying, they may have much the same effect of leading the audience to a false conclusion. Such techniques have an obvious place in a zealous advocacy system. They have, however, no place in an ideal adversary system.

I turn now to the charge of abuse. To abuse a witness is to treat her in a way that she should not be treated. So the question is: do witnesses have a right not to be treated in the way they are treated during cross-examination? In the ideal adversary system, I think the answer is no. A lawyer may believe that the witness whom he examines is truthful and honorable. But the nature of a trial is to ensure as much. The fact finder needs to see whether the witness’s story stands up to pressure. The lawyer’s job is to provide that pressure. This requires the lawyer to probe the various ways the witness’s story can be doubted, which includes probing the character of the witness insofar as doing so is relevant to the witness’s credibility and is not likely to be more prejudicial than probative. The lawyer should not be taken to be attacking the witness personally, to be literally impugning her character or veracity. The lawyer should be taken as exposing any grounds for doubt that the law, as equitably interpreted, considers it appropriate to expose, so that the judge or jurors can make up their mind or minds. The experience may be unpleasant, even offensive, to the witness. But the witness has no right not to be so treated in that context. Just as presenting an argument in the strongest possible light—even if the lawyer thinks it is the weaker argument—is not lying, so cross-examining a witness, even one that the lawyer believes to be truthful and honorable, is not abusing.

Again, a lawyer in our real world might not limit himself to cross-examining in ways that point out only the rational grounds for doubting the veracity and reliability of a witness. Consider the practice—reined in only in recent years by rape-shield laws—of bringing up the sexual history of a woman who claims to have been raped. Defense attorneys’ would argue that the woman could not be trusted to be moral enough to tell the truth, or even to reject an offer of sex by the defendant, if she was otherwise having extra-marital sex. This argument might have resonated with juries far beyond its rational merits. Insofar as that was the problem, such a tactic fits into the previous concern with lying. But exposing a woman’s sexual history on the witness stand raises another issue, as well: it would have kept women from coming forward to report rapes. The danger of their sexual behavior being outing would be too intimidating. In that way, this tactic, which serves little or no legitimate role in

34. See FED. R. EVID. 608 (regarding impeaching the character of witnesses) and 403 (regarding the need for evidence to be more probative than prejudicial).
35. For federal courts, the rape-shield law is embodied by FED. R. EVID. 412.
determining the actual guilt or innocence of defendants, would have counted as witness, or potential witness, abuse.

One might argue that since the advent of rape-shield laws, this tactic is a thing of the past. But that position is mistaken in two ways. First, rape-shield laws contain exceptions for introducing a woman’s sexual history. In the federal law, in a criminal trial, a woman’s sexual history with respect to particular people can be introduced into evidence “to prove consent.” This kind of exception can eat the rule if not handled with care. Second, even if we grant that rape-shield laws are fairly effective, they only remove one kind of witness abuse. They don’t change the underlying attitude. This attitude is that every tactic that is not against the law – and that seems more likely to help than to hurt one’s client – should be used. If this means badgering witnesses, or introducing embarrassing but logically irrelevant facts, to make them either back down or seem unreliable, then the zealous lawyer will use these tactics. Again, judges have an obligation to monitor their courtrooms so that witnesses are not mistreated. But many lawyers will seek to push the line, hoping to get away with crossing it as often as possible. Again, however, abusing witnesses is the kind of technique that I think lawyers in an ideal adversary system would put aside.

This leaves the charge of cheating, or exploiting unfair strategic advantages. Again, we need to be careful with terminology. Literally, cheating is violating the rules of a game or competition to gain an unfair advantage. Using the rules to win is not cheating. But Markovits’s point can’t be dismissed that quickly. Taking advantage of unfair rules, or gaps in the rules, although not literally cheating, is clearly morally problematic and may operate on the same level as cheating. Consider the story of how Clarence Darrow used to try to distract juries when the other side was making its closing argument: he would unfold a paper clip, stick it down a cigar, and then smoke the cigar which would get an unnaturally long ash on the end. Once someone in the jury noticed the ash hanging off the end of the cigar in a way that it should not have been able to do, the jurors as a group would tend to focus on the ash rather than on the other side’s argument. Clearly, this is a form of cheating.

The question is, how are we to understand strategic moves generally? Are they generally cheating, like Darrow’s ash? Clearly not. I suggest, however, that there is a difference, one not always easy to discern, between legitimate and illegitimate uses of strategy. Appeal to procedural

37. This story is repeated by Michael Craig in Law and the Cigar, Cigar Aficionado <<http://www.cigarafeionado.com/Cigar/CA_Archives/CA_Show_Article/0,2322,493,00.html>>(No v./Dec. 1997). Thanks to Athena Dahl for finding this citation to support a story that I picked up long ago, who knows where.
bars such as the statute of limitations is clearly within the non-cheating end of the spectrum. If the law says that a plaintiff has, say, two years to sue, and the plaintiff does not sue in that time, then he has no legal right to recovery. On the other end of the spectrum are phony counterclaims, sometimes known as “SLAPP” (Strategic Lawsuits Against Public Participation) suits, which aim merely to bankrupt plaintiffs who do not have deep pockets.\(^{38}\) In the middle are things like discovery requests that have marginal relevance to the case, but that also serve to bog down one’s opponent and thereby gain from him a more favorable settlement than one would otherwise get.

It is this murky middle area where the charge of cheating may seem to be most problematic, for it is there that it may seem that something like cheating would go on even in an ideal adversary system. On the one hand, even in an ideal adversary system, lawyers may have an obligation to use any legal resources that have legitimate relevance to the case at hand. If the law allows a party discovery, and if the discovery requested in a particular case is actually relevant to arguing the case, then the lawyer should feel obliged to make the discovery request. Moreover, negotiated settlements cannot fail to reflect the best available alternatives that each side has. If one side is in a weak position, that party cannot expect to get as much from a negotiated settlement as a party negotiating from a position of relative strength. On the other hand, to let a party’s inability to endure a lawsuit determine what substantive rights that party has is surely a moral failing of the law. It may be an inevitable failing in a free society in which people will necessarily have different amounts of wealth and power, but exploiting that failing in the law smells like cheating.

Is there any way for a lawyer in an ideal system to serve her clients as they deserve to be served and to avoid engaging in behavior that smells like cheating? I think the answer is yes, and the solution is analogous to that offered in the previous section. A lawyer should feel free not to serve an unscrupulous client, and unless there is some serious moral value hanging in the balance, a lawyer should feel obliged not to serve an unscrupulous client. In the previous section, our concern was with a client pursuing immoral ends. Here the concern is with a client wanting his lawyer to use unfair means to gain an unfair advantage in the pursuit of what may be an otherwise morally justifiable end. I am suggesting that these positions should be treated as on a par. The thought is that a morally reasonable client would not seek to exploit unfair advantages which he happens to have under the law. And a lawyer should feel free to resign the

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38. The term “SLAPP suit” was coined by George W. Pring and Penelope Canan. See generally Canan & Pring, Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches 22 LAW & SOC'Y. REV. 385 (1988). See also Davis v. American Taxpayer’s Alliance, 125 CAL.RPTR.2d 534 (2002).
I am not suggesting that lawyers should refuse to help clients enrich themselves in ways that may, in some cosmic sense, be unfair. But if a particular settlement of a particular dispute would clearly amount to exploitation of an unfair advantage such that a moral client would not push for it, then a lawyer should not help an unscrupulous client obtain it.  

Again, we can contrast the ideal adversary system with the zealous one. In the zealous system, "cheating" is the name of the game. Indeed, one can look at lying and abusing as just two instances of cheating. Almost every tool available to lawyers can be, and often is, abused. Discovery was meant to allow parties to obtain from each other information relevant to legal disputes, but now it is often abused in two ways. Meaningless discovery motions can be made to drive up the expenses of the other party, and, from the other side, parties can comply by sending over huge volumes of material that the other side will have to sort through at great expense to use. Peremptory challenges, which allow lawyers to strike potential jurors from the jury, exist in theory to allow lawyers to rely on their inarticulate gut-level reads of people to exclude jurors who will be unfair to their client. But peremptories are in practice used by each side to try to get rid of jurors who will not be biased in their favor. Choice of forum is afforded parties to try to make trials mutually convenient, but the power to choose the forum is often used either to make litigation too difficult for one party to endure, or to pick a forum in which the choosing party is likely to have an advantage, even an unfair one. 

Frivolous counter-suits are often abused in the form of SLAPP suits to force plaintiffs to abandon legitimate lawsuits. The list goes on. 

The problem arises at many levels. At one level, it reflects the fact, as David Luban puts it, that "the law is inherently double-edged: any rule imposed to limit zealous advocacy . . . may be used by an adversary as an offensive weapon." At another level, it reflects the zealous nature of our adversary system. The ethos of that system is to try to win in any way that one can get away with. As noted above, the model for this zealous system is poor sportsmanship. Sports all have rules that define the game and

39. One might wonder whether my point here applies in the case of criminal defense. I think it does not apply in a straightforward way. If, for example, the government is strapped for cash, or in need of information that only a particular defendant has, the defendant's lawyer should use that leverage to get as good a deal as possible for her client. If we start with the assumption that a defense lawyer's job is to keep the state in check and not to judge the guilt or desert of her client, then there is no way to determine when the state should be given a break. It is up to the state to decide what its priorities are and to provide the resources to investigate and prosecute crimes. It is not up to the defense attorney to help the state out of a bind at the expense of her client.

40. For example, much large tort litigation against major corporate defendants is brought in obscure backwaters where juries are known to award plaintiffs large sums of money, arguably much larger sums than the plaintiffs really deserve.

41. LUBAN, supra note 5, at 51.
determine what counts as cheating. But almost all human activity is too complicated to be governed by mechanical rules. Some level of judgment is almost always brought to bear. Nowadays, we tend to think of poor sportsmanship in narrow terms, primarily in the sense of being a sore loser or a disrespectful winner, but the notion is really broader than that. It has to do with treating the rules as Holmes’s bad man treats the law. A bad sportsman seeks to win in ways that violate the spirit of the rules and the game. For example, he tries to find drugs that will enhance his performance in an illicit way but that cannot yet be caught by drug testers. Such is the behavior of a cheater—and of zealous adversary lawyers.

But again, that is not how it has to be, not in the ideal sense. In the ideal sense, lawyers would be good sports. They would neither lie, nor cheat, nor abuse. They would be no more ready to use unscrupulous means on their clients’ behalf than they would be ready to do an unscrupulous client’s immoral business.

There is a difference between the conclusion of this section and the last, however. I said at the end of the last section that the choice to serve unscrupulous clients was always a lawyer’s choice and a lawyer’s responsibility. A lawyer cannot fob that responsibility off on the existence of the adversary system, not even if it takes the shape of our current zealous adversary system. The same cannot necessarily be said for the problems of poor sportsmanship—of cheating and the other abuses. In the non-ideal zealous adversary system, one may have to play dirty to stay competitive. This is a real problem, and there may not be a real solution. Indeed, it seems a rather long-lasting problem as lawyers have been reviled for their cheating and misleading methods from at least the time of Plato.42

I will, in Part III, explain why this problem arises. That is, I will explain why the problem is one of more or less intractable non-ideal theory. I will also try to offer an account of the ethical significance of the problem. But first I want to explain, in Part II, why Markovits’s conception of first-person ethics is not helpful in understanding the problem of how cheating can be both obligatory—even if only in the non-ideal real world—and worthy of criticism. And I want to defend the use of Kantian ethics against his criticism that it cannot adequately handle the proper role of partiality and integrity in our moral lives.

42. Socrates is himself ironically accused of the “crime” of acting like a lawyer when, in the *Apology*, he is charged with, among other things, making “the weaker argument appear the stronger.” PLATO, *Apology*, in *THE COLLECTED DIALOGUES* 5 (Edith Hamilton & Huntington Cairns eds., 1961) (the quoted phrase actually appears twice on the page).
II: THE IMPLAUSIBLE DISTINCTION BETWEEN FIRST- AND THIRD-PERSON ETHICS

A. First-Person Justification Makes No Sense

At the core of Markovits’s paper is the thought that there are two independent domains of ethical justification, the first-personal and the third-personal. These, Markovits claims, can lead to “independent, and possibly divergent, demands.” Importantly, contrary to the title of the second section of Markovits’s paper, “Two Ethical Points of View,” he is not merely discussing two points of view that one who is thinking about ethics can take on one and the same subject matter — he is not merely describing the same thing from different perspectives. Rather, he is talking about possibly conflicting demands that arise from different domains of “justification.”

The problem with this dichotomy is that the idea of first-person justification, as Markovits uses it, makes no sense. He uses it as a kind of private space for justification, dealing in reasons that may matter only to the agent, and even worse, dealing in reasons that need to make sense only to the agent. Thus, he says things like: “The only person this form of role-based redescription must persuade is the lawyer who employs it to preserve his integrity....” When a person engages in integrity-preserving role-based redescription, she may proceed in the first-person, addressing only herself.” “The lawyer who employs role-based redescription to preserve his integrity need not worry that his accusers continue to reject the values and descriptions in terms of which he conceives of his activities as long only as he finds these values and descriptions persuasive himself.” All of these quotes deal with role-based redescription, an ethical move that Markovits thinks can help people reconcile the demands of first-person ethics with those of third-person ethics. But that is not what I am concerned with here. My immediate concern is with the fact that Markovits thinks that description, persuasion, and justification can be addressed to an audience of one or more, but not all.

The problem with such notions has been the subject of much of the most important work in epistemology in the twentieth century. Perhaps the most famous attack against this way of thinking comes from Ludwig Wittgenstein in his Philosopher Investigations. Wittgenstein starts

43. Markovits, supra note 1, at 222.
44. Id.
45. Id. at 284.
46. Id. at 285.
47. Id. at 287-88.
what is known as “the private language argument” – i.e., the argument against the possibility of a private language – by imagining someone who tries to construct a private concept for a private sensation.\textsuperscript{49} This person writes an “S” in a calendar every day that he has this particular sensation.\textsuperscript{50} Wittgenstein then asks:

What reason have we for calling ‘S’ the sign for a sensation? For ‘sensation’ is a word of our common language, not of one intelligible to me alone. So the use of this word stands in need of a justification which everybody understands. – And it would not help either to say that it need not be a sensation: that when he writes ‘S’, he has something – and that is all that can be said. ‘Has’ and ‘something’ also belong to our common language.\textsuperscript{51}

The point is this: for S to be a sign for a private concept, the speaker still has to be able to say what it is a concept of. But once he starts down that road, he is on the road to using a public language, full of public concepts.

Wilfred Sellars made essentially the same point in his landmark essay, “Empiricism and the Philosophy of Mind.” Discussing someone who claims to know that he sees green, Sellars says: “The essential point is that in characterizing an episode or a state as that of knowing, we are not giving an empirical description of that episode or state; we are placing it in the logical space of reasons, of justifying and being able to justify what one says.”\textsuperscript{52} What is it to be in a “space of reasons”? It is to be able to deploy a whole battery of concepts related to the concept that one is using. For example, to be able to say that something is green, one has to be able to distinguish colors from shapes and textures; one has to be able to discuss proper lighting, because a green thing may not look green in the wrong light; etc. And again, the point about publicity is that such justifications do not take place in a private language. They take place in the public sphere of shared experience and shared language.

Markovits can reply that he is not talking about strictly private description, persuasion, and justification. Rather, it is his view that “very few people have the imagination and force of personality to create a genuine role all on their own.”\textsuperscript{53} He is, therefore, not suggesting that (most) people can use a private language for justification. Instead, it is his view that most people can adopt a kind of first-personal justification only by being part of a rich culture in which such justifications are accepted.\textsuperscript{54}

\textsuperscript{49} The private language argument is typically located in §§ 258-302.
\textsuperscript{50} \textsc{Wittgenstein, Philosophical Investigations, supra} note 48, at § 258.
\textsuperscript{51} \textit{Id.} at §261.
\textsuperscript{52} \textsc{Wilfred Sellars, Empiricism and the Philosophy of Mind} 76 (1997) (§36) (emphasis added).
\textsuperscript{53} \textsc{Markovits, supra} note 1, at 286 n.139.
\textsuperscript{54} What about the very few who can create a role on their own? They would seem to run into the private language argument.
But his point is, nonetheless, that these forms of justification are immune to criticism from those outside the group, and that they are so immune because the justification matters only to those who embrace the relevant concepts. Thus, Markovits does embrace relativism of conceptual scheme. And this kind of relativism fares no better than the more extreme relativism of a private language.

Indeed, the private language argument was generalized to cover conceptual relativism by another of the most important philosophers of the twentieth century, Donald Davidson. In his essay, “On the Very Idea of a Conceptual Scheme,” Davidson discusses the idea of a conceptual scheme that is somehow so different from other conceptual schemes that it cannot be translated.55 As he puts it, “[c]onceptual relativism is a heady and exotic doctrine, or would be if we could make good sense of it.”56 Why can’t we make sense of it? Davidson’s argument is essentially that any evidence that others are using a radically different conceptual scheme would have to be presented in such a way that we would have reason to accept that they are using a conceptual scheme of some sort. This would require making sense of others as concept users, engaged in practices like describing and justifying. But then we would have to make sense of their activities in our conceptual scheme. As Davidson notes:

The dominant metaphor of conceptual relativism, that of differing points of view, seems to betray an underlying paradox. Different points of view make sense, but only if there is a common co-ordinate system on which to plot them; yet the existence of a common system belies the claim of dramatic incomparability.57

The point is not that people cannot have different conceptions of the world, but that we are all dealing with the same world, and any one language for describing the world has to be the kind of thing that others can learn to understand too. Indeed, even to make sense of others as having a language and using concepts, we have to be able to make sense of their behavior, which commits us to “count[ing] them right in most matters.”58 And this commits us to viewing them as using concepts that are ultimately translatable into ours.

An implication of the intertranslatability of different languages or conceptual schemes is that when we learn to understand the conceptual schemes others use, and we reject some of the claims made in them, then there is a straightforward question of who is right. Think, for example, of the belief some may hold that spirits, rather than germs, cause sickness.

56. Id. at 183.
57. Id. at 184.
58. Id. at 197.
People who accept the authority of modern science reject the claim that there is some conceptual scheme in which it is true that spirits cause disease. They think that people who hold that view, insofar as it is different from the view that one’s mental states can cause sickness, are simply mistaken. Of course, it is conceptually possible that diseases are caused by both spirits and germs, or by neither. But whatever the truth is, it is the truth for everyone. The question of who is right cannot really be avoided with “heady” talk of truths for some and not for others.

If these arguments, which I have just briefly summarized, are right, then Markovits’s claim that description, persuasion, and justification can be addressed to an audience of one, or of some few but not all, makes no sense. Contrary to what Markovits says, a lawyer must in some sense worry if others reject his descriptions of what he does. For to reject descriptions is to say that they do not really apply. This kind of claim cannot be true for one and not for another. It is either true or not. Likewise, one should be concerned if one can persuade only oneself that one is behaving well. Justification and persuasion are public acts, using a shared language. If others are not persuaded that one is behaving well, then somebody, or perhaps everybody, is missing something.

It might be objected that I have taken arguments that apply to the realm of science and misapplied them to the realm of ethics. Drawing on Kant’s distinction between practical and theoretical reason, one might suggest that persuasion can be relative to a community (or, for the extraordinary person, only to oneself) in the practical realm, even if not in the theoretical realm. But this is certainly not as Kant would have seen the distinction. For him, both practical and theoretical reason are just different applications of reason. And indeed, it is hard to see not only why but how we should take ourselves to use concepts like justification, persuasion, and description differently when dealing with practical issues than when dealing with theoretical issues. Finally, this suggestion is also incompatible with Markovits’s view of third-person ethics as involving the same kind of universal justification used in theoretical reason. For this suggestion to help Markovits, then, it would have to be the case that a certain kind of ethical reasoning involves essentially degenerate, relativistic notions of justification, persuasion, and description. I find this impossible to credit.

To be clear, I am not rejecting the thought that ethical disputes are hard to resolve. Clearly, they often cannot be resolved by appeal to empirical research the way many other kinds of questions can. And disputes

59. “[W]e should be able . . . to show the unity of practical and theoretical reason in a common principle, since in the end there can only be one and the same reason, which must be differentiated solely in its application.” IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 59 (H.J. Paton ed., 1964) (Academy page 391).
between conflicting ethical views are often very recalcitrant. These facts lead some - for example, Richard Posner - to conclude that ethical argument is nothing but more or less thinly veiled attempts to promote one's own preferences over those of others. But I find that view too dismissive of the ethical convictions most of us have. We think certain actions are right and good, and others wrong and bad. And we try our best to make sense of those judgments by appealing to basic moral principles, and by showing how these principles cohere with other judgments we make, and with basic facts about human nature and the world in which we live. Ultimately, we may not succeed in persuading others very often, but then again, the same thing can be said for scientists when rival theories vie for adherents. Science too must appeal to judgments about what kind of theory makes most sense, and these judgments are no more empirically grounded than moral judgments. Ultimately, in both the practical and the theoretical realms, reason is left with appeals to judgment, and on matters of judgment, reasonable people will differ. But that should not be taken to impugn the aspirations of reason to describe the one world we all share.

I also don't mean to deny that different people care about different things. For example, I may care a lot about fitness and little about dress, and another may care a lot about dress and little about fitness. Neither of us need make any claims that the other should reject, however. We can make sense of our each caring about different things by reference to other differences between us - e.g. different histories, different sensitivities, and different talents - that allow us to make sense of these differences in a common framework for justification. If one of us does make claims that the other rejects, however, then we have a real dispute in which at least one of us must be wrong.

This way of handling difference is in sharp contrast to Markovits's picture of how a lawyer should view moral differences from the first-person perspective. Markovits imagines a lawyer who makes claims about how to describe what he is doing that others could very well reject as false or as inadequate justifications for his actions. But Markovits thinks he should treat his predicament as if the only question is whether he has the strength of character to like what he likes despite others' not joining him in this matter of taste.

Finally, by way of clarification, I am not denying that different people can legitimately have different moral options open to them with regard to

61. This is the process John Rawls calls "reflective equilibrium." See JOHN RAWLS, A THEORY OF JUSTICE 48 (1971).
62. See, e.g., THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 150-52 (2d ed. 1970) (discussing the fact that scientists often are not converted to a new "paradigm," and that the arguments which persuade some to change their minds do not amount to "proof").
the same set of effects. Consider a variation on the moral case that Markovits discusses, that of Jim meeting a dictator who gives him the choice to kill one person himself in order to prevent the dictator from killing all twenty. In the variation on the case, Jim has to kill another innocent person — call him John — who is not already threatened by the dictator, in order to save twenty threatened by the dictator. I introduce this variation because it is clearer in this example than in the original that Jim may not kill the one. His doing so would not be a Pareto improvement — it would shift the threat to John in a way that almost all would regard as impermissible. Now the person whose moral options are different from Jim’s, given the same set of possible effects, is John. Although it is clear that Jim may not choose to kill the one to save the twenty, John presumably does have the right to sacrifice himself if by doing so he could save the twenty. That is, imagine that the dictator told both Jim and John that if John were to die, he, the dictator, would release the twenty unharmed. It is impermissible for Jim to choose to trade John’s life for the twenty, but it is presumably permissible — indeed presumably heroic — for John to trade John’s life for the twenty.

This variation with Jim and John does not show that they each confront different and conflicting moral truths. Indeed, all should agree on that Jim may not sacrifice John, but that John may sacrifice John. Amartya Sen describes this as positional objectivity. Positional objectivity makes perfect sense. It involves no commitment to private or culturally relative domains of justification. Private or culturally relative domains of justification, however, make no sense.

B. Morality Takes into Account the Partial and the Impartial Perspectives

The previous section can be summarized this way: “[T]he only reasons that are possible are the reasons we can share.” These are the words with which Christine Korsgaard ends the postscript to her essay, “The Reasons We Can Share.” Markovits discusses this essay at some length, but fails to take the point. Instead, he mistakenly thinks he needs to describe a domain of first-personal justification because he interprets the rest of ethics as fundamentally concerned with impartiality to the exclusion of the partiality we all naturally and properly take toward our own affairs.

My aim in this section is to demonstrate that Markovits takes too narrow a view of the rest of morality. It is true that utilitarian or consequentialist moral theories (from here on, I use the term “utilitarian” to cover all such

63. See Markovits, supra note 1, at 226 (introducing this scenario, which was originally created by Bernard Williams). I discuss the case in greater detail below.


teleological theories) make all moral justification depend on an impartial concern with maximizing the good from some impartial point of view. Insofar as partiality can ever be justified on those theories, it is instrumentally – as a means of achieving some impartially justified goal. But Kantian moral theories do not operate the same way. Indeed, as one leading contemporary Kantian, Thomas Nagel, has put it, the Kantian moment in ethics is based on the question: “What, if anything, can we all agree that we should do, given that our motives are not merely impersonal?”

He continues describing the Kantian standpoint: “[I]t attempts to see things simultaneously from each individual’s point of view and to arrive at a form of motivation which [people] can all share, instead of simply replacing the individual perspectives by an impersonal one reached by stepping outside them all.”

Markovits distorts this Kantian project. He lumps it with utilitarian morality under the heading “modern moral thought,” and says that “the modern moral idea [is] that a person’s ethical duties are measured in the third-personal currency of self-sacrifice.” The problem with such a view, says Markovits, is that it underplays the idea that even with equality and impartiality in place, each person continues to need to identify specifically with his own actions, to see them as contributing to his peculiar ethical ambitions in light of the fact that he occupies a special position of intimacy and concern – of authorship – with respect to his own actions and life plan.

My first point in reply is that this claim, that modern moral thought emphasizes self-sacrifice and makes no room for a person’s particular connection – as author – to his actions and life plans, is simply false. We have already seen that it does not apply to Nagel. But Nagel is far from unique. Another leading contemporary Kantian, Barbara Herman, puts her views this way:

For morality to respect the conditions of character (one’s integrity as a person), it must respect the agent’s attachments to his projects in a way that permits his actions to be the expression of those attachments. Kantian morality, understood as a morality of limits, can do this. What it cannot do is honor unconditional attachments.

For Herman, morality may require one to sacrifice one’s projects if they

66. NAGEL, supra note 8, at 15.
67. Id. at 15-16.
68. Markovits, supra note 1, at 223.
69. Id. at 224.
70. Id. at 225 (emphasis in original).
are truly morally impermissible. But that is as it should be. Who could expect morality to say otherwise? Requiring one to sacrifice one’s projects if they are truly morally impermissible should not, however, be taken to imply that Kantian morality is a morality based on self-sacrifice. Rather, as Herman points out, the starting point for a Kantian is an agent’s maxim or statement of the principle on which he acts. In other words, the starting point is the agent’s own sense of what makes his action meaningful. And morality comes into play, in the first instance, to check the tendency we have to tell ourselves that actions we disapprove of in others are ones we are allowed to take because we are somehow special. The moral categorical imperative warns us not to treat ourselves as entitled to special dispensations just because we are the agents acting. In this sense, the categorical imperative does provide a kind of impartial check on partiality. But it is not a check that requires us to put away our partiality. It is merely a check that requires us to be partial only when partiality is impartially acceptable.

To illustrate the point, consider the example of doing good things for one’s friends, but not, or not to the same degree, for strangers. Kantian morality holds that one can properly prefer doing good things for one’s friends. It does not hold this because such a preference would help in the pursuit of some impartial goal, such as maximizing the general welfare. It accepts that this preference is grounded in the way one naturally values one’s friends. The moral issue arises when one checks to see if acting on this natural preference is permissible. Kantian morality would hold that it is permissible to prefer one’s friends as long as this kind of partiality is impartially acceptable. Because there is no reason to think this kind of preference runs afoul of some impartial constraint on the way we can each be partial, it is a permissible preference.\(^7\)

Having discussed the views of two prominent Kantians on the way partiality is integrated into a Kantian moral theory, I offer now a general argument that any plausible deontological theory based on rights has to embrace partiality. At the core of any deontological theory is the claim that we all have a duty to respect the rights of others. These rights are not themselves limited by utilitarian concerns with optimizing welfare. One’s right to one’s property, for example, does not give way whenever another could make better use of it.\(^7\) One’s rights to one’s life and liberty, likewise, are more robust than that. Consider the variation on Jim’s case

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\(^7\) Consider, for one last piece of evidence, this statement by another leading Kantian, Thomas Hill: “[T]his idea that we should live with our eyes fixed on abstract, impartial principles seems quite the opposite of what autonomous moral legislators would recommend.” THOMAS HILL, AUTONOMY AND SELF-RESPECT 45 (1991).

\(^7\) At a certain point, property rights may give way, but not whenever it would maximize utility. Also, utilitarian types of reasons may affect the allocation of property rights in the first place, but rights, once vested, cannot be displaced for utilitarian reasons on a case by case basis.
introduced in the last section. John does not lose his right to life simply because twenty others would live if he were killed. In sum, rights protect people against impartial utilitarian optimization as well as they protect people against more partially motivated attacks. But this protection would be meaningless if people did not also have the moral authority to be partial. There would be no point in having rights if one were morally prohibited from exercising them. Indeed, there would be no point in having rights if one were always subject to criticism if one used them in a way inconsistent with some impartial utilitarian-type of standard. I am not saying that impartiality is irrelevant to rights. Any plausible deontology has to treat the allocation of rights as responsive to the thought that all humans are fundamentally of equal moral status. But from the point of view of an individual who has rights, he should view his rights as providing him with a morally protected space in which to lead his own life with his own priorities. Thus, at the very foundation of deontology is a protection of partiality.

C. Sources of Markovits’ Misreading of Kantian Ethics

Why, then, does Markovits think the Kantian cannot handle the personal point of view? This is not the place to speculate psychologically, but I do want to emphasize two ways that Markovits’s paper goes astray. One is by following Bernard Williams’s influential but mistaken critique of Kantian ethics in terms of integrity. The other is by misreading the work of Christine Korsgaard, who Markovits looks to, plausibly enough, as a spokesperson for Kantianism.

1. Markovits and Williams on Kantianism and Integrity

Markovits, like Williams, thinks that Kantian morality alienates a person from his basic projects and thus from his integrity. And Markovits takes up Williams’s example of Jim and the dictator to argue the point. We’ve been using a variation on that example, in which Jim would have to kill John, who is not already threatened. But in the original version, the dictator tells Jim that if he, Jim, kills one of the twenty people, then he, the dictator, will free the rest. In other words, the difference between the original and the variation we’ve been discussing is that in the original, the one who would be killed would die anyway. And that seems to make a difference. It is at least arguable that one should be permitted to shoot the one if he is going to die anyway and many other lives can be saved.

75. See Markovits, supra note 1, at 227. See also Williams, supra note 74, at 98.
76. Korsgaard points out that it makes a difference if we imagine Jim communicating with the twenty. Korsgaard, supra note 65, at 296. I discuss this further in the next subsection, at notes 93 to 96.
The point of the example, for both Williams and Markovits, is that impartial morality seems to dictate that Jim should kill one to save the other nineteen. But both rightly insist that Jim should not see this as a simple opportunity to maximize the good. Even if, all things considered, he should kill one to save nineteen, he should still recognize that his interest in not killing has moral weight. Yet, according to Markovits, third-person morality, including Kantian morality, “recommend[s] that Jim should accept the dictator’s offer and kill.”

The problem with relying on this example to beat up Kantians is that Kantians can handle it in stride. Nothing Markovits says about the example is something that can’t be said by a Kantian. He says, for example, that “a person who thinks it straightforward that Jim should kill the one . . . places his own decisions at the mercy of other people’s projects and thereby attacks his own moral personality.” But a Kantian can acknowledge that it is not clear what Jim should do, and can acknowledge that the reason it is unclear is that Jim may have a strong interest in not killing. Indeed, as a Kantian myself, it seems to me that the most plausible thing to say about Jim’s choice is that if killing the one was sufficiently respectful to be permissible, then it would be a beneficent act that Jim would have an imperfect duty to consider performing. An imperfect duty of this sort is a duty grounded in the general duty to take seriously the welfare of others. It is imperfect because it leaves one at liberty to weigh the importance of the welfare of others against other competing ends. The Kantian, then, need not put Jim at the mercy of the dictator. Jim is, as we all are, at the mercy of circumstances, always vulnerable to being confronted with difficult moral choices. But the Kantian can recognize the weightiness of the choice and leave the weighing to Jim.

It might be objected that I am taking too superficial a read on Williams’s integrity objection. At the core of integrity, as Williams uses it, is the fact that people have certain “ground projects,” “the loss of all or most of [which] would remove meaning” from a person’s life. The objection to Kantianism is that its demands might conflict with a person’s ground projects and thereby leave a person without the possibility of leading a meaningful life.

But if anything, seeing the objection in these stark terms helps the Kantian. It is unreasonable to expect that one can have an ethical life and not have to run the risk that moral constraints will prevent one from

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77. Markovits, supra note 1, at 229.
78. Id.
79. Id. at 246, quoting Bernard Williams, Persons, Character and Morality, in MORAL LUCK 13 (1981).
pursuing one's basic projects. Suppose, for example, that one becomes ill and can pursue one's ground projects only if one can find a cure. Further suppose that the only cure one can find would require one to kill another and use his organs. Clearly, one simply has to reconcile oneself to abandoning those projects. One cannot justify treating another as expendable in this way. Morality need not allow one to do whatever it takes to pursue the ground projects one has adopted. It need only allow one to form, and to have a reasonable expectation of being able to carry out, plans and projects that give one's life meaning. The caricature of an evil person, common in popular movies, TV shows, and other media, is of a person who pursues his own projects no matter what the cost. A good person, by contrast, knows how to pursue his projects within the bounds of morality, and knows how to let go when morality gives him no other choice. Interestingly enough, not only can many people still find meaning in their lives after letting go of what was once a ground project; many can even find the experience of having to let go to be a profound and in some ways positive growing experience.

The above response is really a response to Williams and not Markovits, however. Markovits recasts Williams's integrity argument from one based on "ground projects" to one based on the need to have an integrated and coherent character, and to act in ways consistent with and grounded in it.  

For Markovits, the important point is that people should see themselves "as independent agents [acting on] first-personal reasons [that are], at least sometimes, self-authoritative and first-personal all the way down, that is, not merely applications of third-personal ideals to peculiar facts about particular persons but rather independent of the third-personal at every level."  

Or, putting it another way, respect for integrity requires recognition of the fact that "[t]he separateness of persons as agents is inconsistent with understanding persons as mere locally interchangeable delegates or representatives of a single over-arching scheme of third-personal impartial ethical ideals."  

The rhetoric here sounds, borrowing a phrase from Davidson, "heady and exotic." But as we have seen, it just doesn't make sense. It trades on the bogus contrast between first-person and third-person justification. Markovits is right to reject the thought that people should conceive of themselves as "delegates or representatives of a single over-arching scheme of third-personal impartial ethical ideals." But this is the kind of point that Herman points out Kantians can take perfectly in stride. They are not asking people to treat themselves as mere representatives of some

80. See id. at 248, 253.
81. Id. at 254.
82. Id. at 255.
83. See Davidson, supra note 57.
impersonal "kingdom of ends." Kantians, or at least Kantians such as Herman, Nagel, and myself, ask only that people recognize that the reasons they have—grounded in their core life projects and the desires central to their character—are not unconditionally valid. They don’t have to see these reasons as grounded in impartial reason. They only have to ensure that the reasons pass moral muster as reflecting the kind of partiality that is impartially acceptable.

What about Markovits’s thought that integrity concerns coherence of actions and character? He is concerned for lawyers because he thinks that many of them do not have characters that are capable of dealing coherently with the demands of being a lawyer. He is worried that a lawyer’s “self-effacing loyalty [to his client], his commitment to speaking his client’s part rather than his own, means that no advocate can be a sincere . . . man in the performance of his daily business, something that can have remarkably deep, absolutely chilling consequences for the lawyer’s character.”

I don’t want to deny that Markovits is onto something here. Many lawyers do struggle with the role of being a self-effacing advocate. And rightly so; if taken as far as it is often taken, it is an ethically degenerate role (more on that in Part III). But there is no reason a lawyer, even in our real-world zealous adversary system, need be so self-effacing as to lose the possibility of sincerity in his life as a whole. Indeed, the thought that a lawyer would lose the possibility of sincerity in his life as a whole seems to reflect a peculiar psychological premise in Markovits’s view. As Markovits puts it in an analogy: “Prizefighters, for example, cannot be gentle . . .” Who, other than Markovits, says? I can at least imagine that some prize-fighters channel all of their aggression into the ring and are otherwise completely gentle. Likewise, I am convinced there are lawyers who argue views that they don’t personally believe or respect on the job, but who are perfectly sincere in other areas of their lives. People have a remarkable ability to compartmentalize and contextualize.

So much, then, for Markovits’s concern with integrity. But there is another aspect of Williams’s critique of Kantianism, one that Markovits does not pick up but that may nonetheless still be motivating his belief that Kantianism cannot properly make room for the personal. The aspect of Williams’s critique I am talking about deals with the thought that Kant says one’s actions have moral worth only insofar as they are done “from duty.” Williams objects that this does not leave humans properly in touch with their natural motivations. We do not want spouses, for example, to do good things for each other out of duty, but out of affection.

84. Markovits, supra note 1, at 281 (internal quotations omitted).
85. Id.
86. See KANT, GROUNDWORK, supra note 60, at 65 (Academy page 397).
Williams describes this charge against Kantians by saying that Kantians want moral agents to have “one thought too many.”87 It is one thought too many to care about duty in many situations where other motives, like affection, should be the only motives in play.

Herman has given, I think, the proper response from the Kantian point of view. In her response, she discusses one of the cases Williams uses to try to show that a Kantian would have “one thought too many,” that of a husband who has the choice to save his wife or someone else.

Suppose we asked, after the fact, “Why did you save her [rather than others who you could have saved]?” We would get the answer, “Because I love her” or “Because she’s my wife.” It is morally appropriate (not in any way inappropriate) in these circumstances to act on these reasons. None of this is undermined by the agent’s awareness (he need hardly be thinking of it) that in some circumstances the reason would not be sufficient to justify his action. (Suppose he would have to throw a child overboard to reach her [his wife].) It is in this sense that “the thought that it was his wife” is not separate from moral considerations. It would be one thing if the husband paused to weigh the claims of his wife against those of others he might save; that would speak against his having the kind of attachment that might be hoped for by his wife. What the Kantian requires is only that he not view his desire to save his wife as an unconditionally valid reason. This does not stand in the way of the direct expression of attachments in action.88

I take it, then, that there is nothing devastating in Williams’s or Markovits’s critique of Kantianism in terms of integrity. Jim can accord moral weight to his interest in avoiding the trauma of killing another. Even if, all things considered, he has sufficient reason to kill the other, it is hard to see how he could be required to kill the other. Were Jim not to kill the other, the worst thing a Kantian should say is that he is too squeamish. But such a criticism does not imply that he had no business being squeamish, or reluctant to kill, at all. And lastly, when one does act on non-moral reasons, as one would in most circumstances, one need not have “one thought too many,” actively wondering whether it is morally permissible to do so. One need only be aware, at some level, that one’s non-moral reasons are conditionally valid.

2. Markovits’s Misreading of Korsgaard

The failure of the integrity criticism notwithstanding, one might make the following objection: the position I embrace, the position just sketched by Herman, seems to rely on what Nagel calls agent-relative value. This

87. Williams, supra note 80, at 18.
88. Herman, supra note 71, at 42.
is the kind of value that Korsgaard, in some sense, rejects. Since Korsgaard is arguably the leading Kantian of the age, it is at least controversial that a Kantian can avail herself of such a notion. Indeed, Markovits seems to think Kantians cannot handle Jim's case precisely because Korsgaard rejects agent-relative value – which Markovits locates in the first-personal domain of ethics89 – and because she seems to get Jim's case wrong. She seems to get Jim's case wrong because she seems to think that if it is permissible for Jim to kill the one, then he is obliged to do so, regardless of his own values. Markovits thinks these points are linked and telling against Kantianism.

My response is two-fold. First, while Korsgaard does reject agent-relative value in the sense that Markovits wants to use it – value that registers only in first-personal justifications – she is on solid ground in doing so. This much was established in the previous section. Moreover, there is a sense in which Korsgaard accepts a notion of agent-relative value, and it is all we need to let us understand the kind of position just sketched by Herman. Second, Markovits reads Korsgaard on Jim uncharitably. On a charitable and ultimately more plausible reading, there is no reason to think Korsgaard is blind to the moral relevance of Jim's desire not to kill.

On the first point, Korsgaard illustrates her position on agent-relative values with the example of someone who wants to climb a mountain. If the climber is articulate, according to Korsgaard, she can explain why she climbs in terms that make sense generally. “She may tell you things about the enlarged vistas, the struggle with the elements, the challenge of overcoming fears or surpassing physical limitations. She takes her desire to climb mountains to be a motivated desire, motivated by recognizably good features of the experience of climbing.”90 In other words, she will be able to explain her desire in terms that are part of a generally shared conception of what makes action worthwhile.

The fact that her reasons should make sense to everyone does not mean that everyone should then want to climb mountains just like her. Her reasons may appeal particularly to her. How can that be if they make sense to everyone as reasons to climb a mountain? The answer is that her reasons concern not just the act of climbing a mountain, but the way that is good for a person like her. Her reasons may thus have to refer to her history, her tastes and pleasures, her relationships. They show how her actions reasonably connect to her history and nature. They still constitute her story, even if they should, ideally, make sense to any listener.91

89. Markovits, supra note 1, at 236.
90. Korsgaard, supra note 65, at 289.
91. Korsgaard wants also to argue that reasons are “intersubjective” rather than objective. Id. at 289-91. I don’t think I need to engage her on this issue to embrace her use of agent-relative reasons.
This kind of account of agent-relative reasons is all we need to understand Herman's point about saving one's spouse rather than another. Recall that what we expect a healthy person to say in such a situation is that he saved his spouse because he loves her. His love for her explains his desire to save her; it explains why he had a reason to save her rather than someone else. Spelling it out in this way should make sense to any listener. His reason for saving his spouse is his reason, just as she is his spouse. But all can share in the thought that that is a good reason for him to act. Moreover, there is no reason to think the reason should be in any way more private than that.

Regarding the claim that Korsgaard gets Jim's case wrong, my response is that Markovits reads Korsgaard's position on Jim's case uncharitably and implausibly. Here is what Korsgaard says. She wants to establish that is it important to know what the twenty people whom the dictator threatens want Jim to do. So she says, "Suppose the oldest Indian steps forward and says, 'Please go ahead, shoot me, and I forgive you in advance.'" She contrasts that with a case in which the twenty are pacifists who say to Jim, "We would rather die than ask you, an innocent man, to commit an act of violence." Regarding this second case, in contrast to the first, Korsgaard says, "Now the decision not to shoot looks much more tempting, doesn't it? Now you can at least imagine refusing." It is this last line that can make Korsgaard's position seem too strict. It seems to imply that she does not make any room for Jim's own values. For the implication of saying that now you can imagine refusing is that in the other case refusing is unimaginable. That, in turn, seems to imply that Jim has a clear obligation to shoot in the first case, when the "oldest Indian" asks Jim to shoot him to save the others. Markovits latches onto this, saying that for a Kantian, "once the innocent consents to being killed, Jim is obligated to do the killing regardless of his own ideals."

I think this reads too much into Korsgaard's statement. Her point here was simply to focus on the reasons the agent confronts when he concerns himself with the welfare of others and the question of whether they have consented to what he might want to do. I see no reason to think she would want to deny Jim the freedom to refuse to shoot, even if the oldest Indian asked him to, if he were a committed pacifist himself. Perhaps she would want to say that pacifism in such a case is unreasonable – that it shows a form of self-indulgence. But I can see no reason to think she would say it is impermissible. That is, I can see no reason for her to say to Jim in that case that he "is obligated to do the killing regardless of his own ideals."

92. Id. at 296.
93. Id.
94. Id.
95. Markovits, supra note 1, at 247.
Indeed, to interpret what she says correctly, it is important to see it in light of her larger purpose in discussing Jim’s case. Her larger purpose is to show that Nagel was confused when he tried to locate the ground for deontological restrictions in the kind of first-personal agent-relative reasons that Markovits refers to. She says, “If the deontological reason were agent-relative, merely *my* property, my victim would not have the right to demand that I act on it.”\(^9\)

Her point is that deontological restrictions have to be grounded in the respect others are due, a respect that registers in “reasons we can share.” Thus, her focus in Jim’s case was on the reasons grounded in the claims of the possible victims. But this focus, in one section of one article, provides no reason to take her, or Kantians in general, to be blind to the relevance of an agent’s own ideals in determining what, all things considered, the agent should do.

In sum, Kantian ethics is built around the need to balance the partial with the impartial. It aspires to make sense of the conditions by which one can be “worthy of happiness.”\(^97\) The ultimate goal of Kantian morality, therefore, is not self-sacrifice. It is finding a way to integrate the demands of impartiality into a life that is fundamentally partial, fundamentally aimed at the agent’s own happiness. This is the project Markovits wants to carve up into two separate domains of justification. But since the first-person domain is conceptually incoherent, the better approach for Markovits, or anyone, to take is the Kantian one.

### III: LEGAL ETHICS IN THE REAL WORLD

In Part I, I argued that, even in the real world, a lawyer can’t rely on the fact that he operates in an adversary system to give him reason to work for an unscrupulous client. There may be sufficient reasons to help certain clients obtain their immoral ends. This is generally true of criminal cases, and often true of civil cases that involve protecting basic liberty rights. But these reasons outweigh the general reason not to help people obtain immoral ends. They do not imply that lawyers have ethical *carte blanche* to serve any client’s ends.

I also argued that in an ideal adversary system, there would be no reason for a good lawyer to lie, cheat, or abuse. But I admitted that this would be different in our real world zealous adversary system. As I said, in the non-ideal zealous system, one may have to play dirty to stay competitive. And this playing dirty is the ground of a real ethical taint.

In Part II, I argued that we cannot understand the nature of the ethical tension that good adversary lawyers face as Markovits suggests. His attempt to understand the problem of criticizing obligatory acts in terms of

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97. See *KANT*, *supra* note 60, at 61 (Academy page 393).
the possible conflict between first-person and third-person frameworks for moral justification is based on a fundamental philosophical confusion. A first-person framework for moral justification makes no sense. Moreover, a proper moral theory finds a way to take both the partial and impartial points of view into account.

In this Part, I offer a different explanation of how obligatory acts could nonetheless merit criticism. First, I explain why the problem is one of more or less intractable non-ideal theory. I argue that the problematic behavior of even good lawyers in the real world results from a race to the bottom. I then suggest that the tension even good lawyers feel reflects the gap between the ideal and the real world. The criticism that even good lawyers face registers our moral discomfort with the non-ideal world both in general and in a number of specific ways.

A. The Race to the Bottom

As we saw in the end of Part I, the inescapable problem in the non-ideal world is the need to play dirty to prevent deserving clients from being put at an unfair disadvantage when going up against unscrupulous lawyers. The question is, why is this need as pervasive as it is? The answer might seem simple: playing dirty is legal and it helps lawyers get ahead. At another level, however, there is a puzzle. Why should bad sportsmanship be the norm? This question can, in turn, be broken down into two questions: Why is bad sportsmanship legal? And given that it is legal, why do lawyers act that way?

If one simply read the rules governing the ethics of lawyers, one might wonder whether bad sportsmanship was even legal. The ABA’s Model Rules seem to require that lawyers avoid a lot of the shenanigans that I described above as cheating. For example, Rule 3.4 says that “A lawyer shall not . . . in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.” This is clearly inconsistent with the dilatory tactics lawyers use when they seek unnecessary discovery just to prolong cases and drive up expenses for the other side. And Rule 3.3 says that “A lawyer shall not knowingly make a false statement of material fact or law to a tribunal.” The official comment on this rule says that the “underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.” This is exactly the concept of legal argument I relied on in describing an ideal adversary system, so it would seem that zealous,

98. MODEL RULES OF PROF’L CONDUCT R. 3.4(d).
99. Id. at R. 3.3(a)(1).
100. Id. at 3.3 cmt. [3].
misleading arguments are contrary to Rule 3.3.

Yet the clear reality is that lawyers often, and perhaps generally, flout these rules in spirit if not in letter. Why? Again, at one level the answer is easy: there is a gap between the letter and the spirit of the law, and lawyers are trained – if not officially by their law schools, then unofficially by their legal peers – to think like Holmes’s bad man. They are trained, that is, to avoid breaking the letter of the law (taking this to be what will be enforced with sanctions), while at the same time flouting its spirit to get every advantage possible. Consider these guidelines for cross-examination, stated by Irving Younger, once a popular lecturer on legal tactics:

Never ask anything but a leading question.

Never permit the witness to explain his or her answers.

Don’t bring out your conclusions in the cross-examination. Save them for closing arguments when the witness is in no position to refute them.101

Clearly, these guidelines, meant to educate young lawyers, do not direct the lawyer to help the jury learn the truth. Instead, they are concerned solely with teaching a lawyer how to win. But they can be followed because they flout only the spirit of the law, not the letter.

Why is there a gap between the letter and the spirit of the law? Why shouldn’t one get severely sanctioned whenever one flouts the spirit of the law? In part, the answer is that the law is a cumbersome machine, and to sanction a lawyer is just to add litigation to litigation. The expense of compounding litigation this way, for the legal system, not to mention the parties, means that only the worst abuses will result in sanctions. But the answer is also, in part, that we need rules. We don’t trust judges to administer sanctions without some guidance from rules that limit their discretion. Rules that limit discretion, however, will necessarily be somewhat mechanical. And being mechanical, they will be over- and under-inclusive with regard to their underlying principles or spirit.

This may explain why bad sportsmanship is often legal. But something else is going on here. It does not explain why lawyers are often such bad sports, disrespecting the spirit of the rules that govern their profession. This phenomenon is somewhat anomalous, and therefore calls for explanation. Of course, society has bad men who walk the line, but it also has good men who seek to obey the spirit of the law – who take their legal obligations seriously as moral obligations. Our society, in fact, seems to be one governed by law, which means that most people take their legal

obligations seriously. One might hope, even if naïvely, that people trained in the law would appreciate and respect its moral weight more than the population at large. Why, then, is it that the legal profession seems dominated by bad men? Why does it seem that even the good men act like bad men?

The answer here, I think, has many parts. First, there is the economic pressure on lawyers. In a free market economy, clients shop around for lawyers. And obviously clients want to win. They will pay more for a lawyer who they think is more likely to win for them. A lawyer who scrupulously maintains the moral high ground is less likely to win than one who is at least willing to play the game hard and dirty. Obviously, the more clever, articulate, and knowledgeable a lawyer is, the more likely it is that she can do well without playing dirty. But, unfortunately, sound arguments— even if clearly stated— often pale in comparison with emotional rhetoric, appeals to prejudices, nasty tactical maneuvers, and trickery. Consider again Younger’s advice on cross-examination. All else being equal, a lawyer who allows witnesses to refute his arguments will be at a disadvantage compared with a lawyer who follows Younger’s advice. And the lawyer at a disadvantage—the lawyer who is less likely to win, all else being equal—will be less sought after and less well paid.

The economic factor also plays into two psychological factors. First, a lawyer is not only likely to feel more successful if she wins than if she loses, but in addition, she is likely to feel more successful if she is more sought after. Being sought after because one is a winner, and being overlooked even though one has moral integrity, reinforce the ethos of the profession that a winning lawyer is a good lawyer. Second, if a majority of the profession adopts the ethos which holds that cheating is the norm, then a lawyer will be socially reinforced by her peers for cheating, and may even be socially shunned as a sort of prude if she refuses to cheat. Still, these same things can be said of sports, yet many in sports, even professional sports, hold onto a norm of good sportsmanship. Why the difference? I think the biggest factor is that poor sportsmanship in sports can rarely give an athlete a serious leg up unless it is so clearly a violation that it can be caught and sanctioned. Consider, for example, steroid use. It can give an athlete a serious leg up, but it can also often be detected. The threat of detection undermines the incentive to cheat that way, and as long as cheating is not generally accepted, there is social pressure not to cheat. In law, by contrast, cheating is more likely to be effective without being sanctioned. A more talented lawyer is more likely to be able to win without resorting to cheating than an untalented lawyer. But in a close case, if a talented lawyer is confronted by a less talented but competent lawyer who also plays dirty, the talented lawyer might lose if he does not play the same games.

The pressure to play dirty is exacerbated by a number of additional
Walen factors. First, the context of litigation is one in which goodwill has broken down and at least one of the parties is looking to the state to force the other party to do as he wants. Of course, much lawyering takes place outside of litigation. But litigation colors the whole process. A good lawyer is always trying to make sure that if litigation should arise, her clients will come through the process as well off as possible. Thus, all lawyering is colored by a mindset of distrust that is inevitably at the core of litigation. Goodwill between the parties may overcome lawyerly distrust when parties are cooperatively doing business together. But the latent distrust can erupt quickly to drive lawyers and their clients to treat the other side as undeserving of respect. And this can seem to warrant playing dirty. For if one thinks that the other side is unscrupulous, then one will feel an especially strong moral urge to do whatever one can to ensure that the immoral party is not able to exploit the law and prosper.

A related factor is that lawyers develop a kind of blind spot. As they work with their clients, they naturally start to internalize their clients' points of view. As a result, lawyers often feel more righteous about the cases they are arguing than they rationally should. They absorb the partiality of their role in such a way that they come to feel as though they are actually being impartial when they make their case. As a result, they are likely to feel too often that they have the kind of strong moral reason to combat the other side that seems to make cheating a necessary means to a worthy end.

Another factor that undoubtedly plays a role is that people with a strong sense of ideals and integrity often have trouble with the rough combat of the adversary system. After a few years of practice, they seek to leave the law. This serves as a kind of filter, weeding out, as it were, those who are not comfortable cheating. The resulting pool of people who thrive on combating each other with any dirty play they can use makes it that much more likely that the norm of the profession will be zealous and not idealistic, at least with regard to means.

Finally, there is an ideological feedback loop. As these influences are felt, the profession will develop a kind of false ideology which says that lawyers should use any trick they can to win. This is the philosophical expression of the social pressure mentioned earlier. If lawyers believe that their goal is to win in any way they can as long as they are not severely sanctioned, then they are more likely to cheat and play dirty. And as cheating becomes (or remains) the statistical norm, it reinforces the false ideology which says that the zealous adversary system is actually morally justifiable as well.

Thus runs the race to the bottom in which the only thing holding back a lawyer's actions in the effort to win is the threat of sanction. To say it is a race to the bottom is not to imply that it was ever far from the bottom. There may have been a time when some of these pressures were less
intense and a professional ethos would have restrained playing dirty more than is the case today. Older lawyers talk as if this is the case, though one has to worry that their talk is more a reflection of the rosy tint of nostalgia than accurate historical reporting. Whether things were once better or not, the point is that there are a number of factors pushing the system strongly in the direction of zealous advocacy.

Non-ideal theory is essentially the theory of how one deals with a system in which bad people have corrupted the practices. Some of the factors mentioned here, like the lawyer’s blind spot, do not involve anyone behaving badly. But it is unscrupulous clients who provide the economic pressure for lawyers to play dirty. And it is unscrupulous lawyers who translate that pressure into the practical necessity of playing dirty back in order to prevent deserving clients from being put at an unfair disadvantage. And even the lawyer’s blind spot is concerned, though in an exaggerated way, with the need to combat those who seek more than they deserve. Thus, it is fair to say that what we have in the real-world zealous adversary system is an example of more or less intractable non-ideal theory.

B. Ethical Analysis of the Zealous Adversary System

What should we say of a good lawyer who manipulates the legal system, using rhetorical tricks and abusing strategic maneuvers, on behalf of a worthy client? Is she behaving as she should—in a morally permissible fashion, in a way that merits criticism—or as she may not? In a sense, she may well behave as she should. Given the adversary system we have, such techniques may be necessary to the pursuit of justice. If we can’t ask deserving clients to throw themselves on their swords, we can’t ask good lawyers to let bad lawyers run their deserving client through with swords. Such cheating tactics may be a necessary evil. There is an analogy in the justification for killing in war. No one thinks such killing is good in itself, but sometimes, when the war is just, soldiers who are themselves just pawns in their government’s games have to be killed, intentionally killed, to protect other innocents.

Why, then, are lawyers criticized for their unethical behavior? Why can’t they defend themselves with honor, more on a par with military honor? This may seem a particularly apt question given the way arms races change military tactics, much as the race to the bottom that I’ve described changes adversary tactics in law.

Part of the answer is that soldiers are often drafted and put under another’s command, and thus are not judged for those they kill, but for the bravery they show. But this answer won’t do for those who volunteer to

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102. See RAWLS, supra note 62, at 245-48, 351.
fight in a war. They know they are volunteering to join the effort to kill other soldiers. Yet these soldiers, at least in a just war, are often regarded as heroes, not villains. Whence the difference?

One difference may be that soldiers show real bravery. This is rarely true for lawyers. Lawyers put others at risk, but the only lawyers who really put themselves at risk are those who take a case on a contingency basis or those who defend dangerous and despised criminal defendants. But even they are hardly ever gambling with their lives and health. Thus, lawyers are lacking a key virtue that has always tended to glorify soldiers.

Another difference may be that lawyers for the “other guy” are always around us. They are the lawyers that “we” criticize. Normally, unless one’s country is under foreign occupation or repressive military rule, we only see “our” soldiers. So there is an asymmetry in affection.

And there is, I think, one other difference that matters. The ideal of war does not impose many restrictions on how soldiers can fight other soldiers. If one is fighting a just war, the objective is to win, and the restrictions on the means that one can use concern primarily what can be done to civilians. The ideal of litigation imposes more restrictions on what one should feel free to do to the other party. This difference should not be surprising. Resort to litigation indicates that goodwill has broken down but not that law has broken down. The law is still supposed to provide a better alternative than brute force. War, by contrast, occurs when law too has broken down and the only tool left to use is brute force.

Now I don’t mean to deny that soldiers can be villains in the public’s eye too. If the war is unjust, soldiers look bad, even if they are conscripts. If the war is unjustly prosecuted, without sufficient regard for civilians, soldiers look bad. The Viet Nam war seemed to involve at least the second problem, if not also the first. That is why so many people criticized the soldiers, and why so many soldiers themselves seem to have been so deeply disturbed by their own role in the war. Indeed, even in a just war fought with just means, one would expect many soldiers to feel some ethical discomfort at intentionally killing. Pacifism is not a dominant philosophy in our culture, but it’s not completely marginal either. It appeals to the perfectly understandable thought that killing another human is always morally problematic. But when the war is just and the means are just, the soldier is in a less compromised position than the adversary lawyer in a zealous adversary system. The lawyer is deviating from the ideal of her role, while a soldier is not.

Still, one might reply, if sharp tactics must be used to keep a rough balance of power, how can we say that they do not facilitate the proper functioning of law? Yes, it would be better for the proper functioning of law if both sides practiced advocacy in accordance with the ideal. But if one side is going to use cheating tactics, the other side should, as well. Otherwise, deserving parties will be put at an unfair disadvantage, and
surely the law is not better served by putting a deserving party at an unfair disadvantage.

Viewing the practice of law this way, by putting it in context, we can see that there is a stronger analogy between the soldier and the lawyer than I let on above. The soldier has to kill because the situation has become truly about as far from ideal as it can come. Both goodwill and the law have broken down, and now one has to hope that justice happens to be served by might. The soldier may not deviate from any ideal of warfare, but that’s because warfare is so far from the ideal in the first place. The zealous adversary system is also far from the ideal, but no farther. And if a lawyer uses tactics that are justifiable given that she is acting in a zealous adversary system, then she does not deviate from the relevant ideal.

In line with this last response, it is tempting to say that criticism of lawyers who use sharp practices may sometimes be misplaced. It makes sense to criticize a lawyer who serves an undeserving client with sharp practices. And it makes sense to criticize a lawyer who serves a deserving client with sharp practices that go beyond those that are necessary to prevent that deserving client from being at a disadvantage. But if a lawyer sees that he must play dirty to protect his deserving client from being put at an unfair disadvantage, he does not deserve criticism. He does not deserve criticism because it would be false to claim that he has moral reason, all things considered, to do otherwise. Criticism directed at such a lawyer is then really misdirected. It should not be taken personally by the lawyer. Rather, it should be understood simply as criticism of the general state of the adversary system—of the extent to which it deviates from the ideal.

This is not to say that criticism of good lawyers in the zealous adversary system is misplaced altogether. It still serves a useful function. It can be taken creatively as a call to avoid complacency, to do something to shake up the system to try to bring it closer to the ideal. Even if it is a Sisyphean task, there is value in those periods when there is ascent towards the ideal. And it may be the case that reform, even if it never will bring about the ideal, can raise the general level of practice some way away from the bottom towards which the race is run.

As I said, that answer is tempting, but I am not fully satisfied with it. Imagine a case in which you are a lawyer, you have a client who is a deserving plaintiff, and you are at trial cross-examining a witness for the other side. You believe this witness is telling the truth, and you believe that if he is believed, the jury will likely rule against you. This is not because the jury should rule against you. They are likely to rule against you because they will likely not be able to put his testimony in the proper context—they will give it too much weight. So you decide you need to discredit him if you are to win, as you are convinced you should. How do
you do so? You ask a series of leading questions and trap him into saying something that sounds really stupid. You make him look like a fool, despite the fact that you know he is not a fool. Now it's the end of the day, and you reflect on what you have done. You saved your client's case. But you did it with trickery. You tricked an honest witness into saying things he should not have said. Do you feel good about yourself and your actions? It is hard to see how, if you have any ethical core and any self-transparency left, you could feel completely comfortable with what you've done.

What then are we to say? You used both this witness and, in a way, the jurors simply as a means of achieving the just end. A hard-core Kantian would have to say that you behaved simply impermissibly. I myself think we should be a bit flexible on such matters. There are times, I think, when a person can be used simply as a means to achieving some important good. There are times when the harm that results is not too great, and the good achieved is substantial. You could argue that these conditions are met here. The witness may resent you for your treatment of him, but he will not, after all, be that badly hurt. And the jury may never realize what you've done. Thus, I am still inclined to say that using them that way may be morally permissible if it is truly necessary to achieve justice. That is, you may not be morally required not to do what you did. And if you must do it to serve justice, then you are arguably actually morally obliged to do it.

But even if your action is permissible and even required, there is still a strong moral reason not to do such things to people. A good person would not be comfortable acting that way. At the very least, there is always the danger that one will become calloused and insensitive to the reasons not to treat people this way. There is also the danger that one will become subject to the lawyer's blind spot and misjudge when such treatment can be justified. And perhaps most importantly, there is always something ethically disturbing in letting the ends justify the means when the means are themselves disrespectful of others. For these reasons, at least, moral criticism of the lawyer herself may serve a good end, keeping her from being morally complacent, keeping her alive to the dangers of her practice. And for these reasons as well, a good person might not last long as an adversary lawyer.