The Promise and Problematics of Legal Ethics from the Lawyer’s Point of View

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In his rich meditation on the ethical condition of the contemporary American bar,1 Daniel Markovits couples a philosophic argument about legal ethics with a theory about long-term cultural trends and their effect on the profession. The argument is basically diagnostic. It does not address “whether the present regime of legal ethics – the law governing lawyers as it stands – is justified,” “what ethical principles should ideally govern the professional conduct of lawyers,”2 or how lawyers should act in concrete situations. Instead, it takes the “present regime” as a “given” and offers an account of what it must be like – “not psychologically but ethically” – to practice under it.3 The account purports to explain a “commonly observed crisis” in today’s legal profession that may be linked to “other crises of moral justification . . . in the modern world.”4 The explanation on offer is that cultural trends have made it increasingly difficult for “modern adversary lawyers”5 to justify their practices to themselves by embracing traditional role-based ideals and descriptions of their work.

Professor Markovits also claims that normative scholarship in legal ethics has been largely “inadequate to the moral problems that face

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2. Id. at 210.
3. Id.
4. Id. at 211. Markovits cites evidence that the “crisis” is commonly remarked, but not that any crisis that actually exists reflects ethical rather than psychological stresses. See id. at 211 n.1 (citing studies that detect high levels of job-dissatisfaction and depression among lawyers – and not just litigators – as well as perceptions that practice has changed for the worse, but also citing a rigorous study of the Chicago bar that reaches contrary conclusions).
5. The few concrete lawyering situations that Markovits mentions involve litigation, but he often seems to use the term “modern adversary lawyers” to describe lawyers more generally. And his expansive definition of an adversary legal system as one in which lawyers represent “particular clients rather than justice writ large” and do so with “warm zeal,” id. at 212, seems as applicable to lawyer-negotiators as it is to litigators.
practicing lawyers" because it fails to attend to the lawyer's own point of view. He hopes that his emphasis on the lawyer's viewpoint can clarify those problems and serve as a first step toward solving them, though he does not explain how.

This Essay is a critique of Markovits's argument by an academic lawyer with no formal training in moral philosophy but a sustained interest in what moral philosophy can (and cannot) contribute to normative legal ethics, which I conceive as a practical body of thought generated chiefly within the profession for the purpose of guiding and evaluating lawyers' conduct. Part I highlights the features of the argument that figure in my subsequent analysis. Part II takes up several aspects of the argument that I find problematic, including the account of the history of the American bar that anchors Markovits's conclusion that cultural forces are making role-based self-justification unavailable to lawyers. Part III begins with a summary of Markovits's imaginative and sympathetic articulation of the "distinctively lawyerly virtues" of loyalty and statesmanship that may have helped lawyers over the years to justify their practices to themselves and thus to preserve their integrity in the face of criticism based on "ordinary morality." Part III then situates those virtues within an ongoing normative debate in legal ethics by considering their "goodness of fit" with the new models of the lawyer's role that Professors Norman Spaulding and Bradley Wendell have recently developed.

I. KEY FEATURES OF THE ARGUMENT

A. The distinction between first- and third-personal morality

For Professor Markovits, the ethically salient fact about American lawyers is that they practice in an adversary legal system, which entails zealously "represent[ing] particular clients rather than justice writ large" and "manipulat[ing]" facts and law to benefit their clients. Unlike legislators, who are charged "to fairly balance the interests and claims of all persons," and unlike judges, who are charged "to discern a true account of the facts of a case and to apply the law dispassionately to these facts," adversary lawyers "are often required to do" things for clients that would

6. Id. at 211.
7. Id. at 212.
11. Markovits, supra note 1, at 212.
be immoral if done by “ordinary people in ordinary circumstances.”\textsuperscript{12} Criticizing and defending that conduct has been “the central preoccupation of academic work on legal ethics,”\textsuperscript{13} but Markovits claims that both sides have failed to see that the criticism involves two distinct charges.\textsuperscript{14}

The first charge is that lawyers, by privileging client interests over others, violate the principle of impartiality, which is central in ordinary moral assessment.\textsuperscript{15} Lawyers pursue and are duty-bound to pursue outcomes that their clients favor but that may be unfair to others,\textsuperscript{16} as when a trial lawyer helps a client avoid liability by invoking the statute of limitations yet believes that her client committed the alleged wrong and has a moral duty to redress it.\textsuperscript{17} This charge would not become moot even if the adversary system’s demands became somewhat less ruthless.\textsuperscript{18}

The second charge accuses lawyers not of partiality or “generic unfairness,” but of “particular vices with familiar names.”\textsuperscript{19} It asserts that their duty of zealous representation often requires lawyers to “present versions of the facts that they do not themselves believe,”\textsuperscript{20} to “make colorable legal arguments that they reject,” to press “facially valid claims” for their clients in order to delay a lawsuit or otherwise gain a strategic

\textsuperscript{12} Id. This characterization is meant to “focus on” litigators, but it is far from clear that Markovits considers it inapplicable to other lawyers. Although he states that lawyers acting as negotiators or as legal compliance advisors “will generally be less one-sided,” he quickly adds that such distinctions should not be overstated. Id. at 212 n.3. Moreover, the criticisms of lawyers with which Markovits is chiefly concerned – namely, that their role requires them to lie, cheat, and abuse others – have not been aimed at litigators alone.

\textsuperscript{13} Id. at 212 & n.4 (citing examples). This has indeed been a preoccupation since 1975 or so, but in Ralph Nader’s heyday (circa 1960 to 1975), legal ethics scholars mostly focused on the distribution of legal services and on “agency” problems in client-lawyer relations, such as shoddy service, neglect, and fee abuse. See Ted Schneyer, Teaching Legal Ethics to Yuppies, THE BAR EXAMINER, Feb. 1988, at 4 (noting changing fashions in ethics teaching and scholarship).

\textsuperscript{14} Markovits, supra note 1, at 213.

\textsuperscript{15} Id.

\textsuperscript{16} Markovits claims that lawyers are not only forbidden by the rules of legal ethics to act on grounds of moral conscience in ways that undermine a client’s case, but are forbidden as well to withdraw from representation on such grounds. Id. at 216 n.17 & 219 n.28. This is incorrect. See MODEL RULES OF PROF’L CONDUCT R. 1.16(b)(4) (2003) (permitting withdrawal in, pending litigation, motions to withdraw when a client insists on “action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement” – even if withdrawal would adversely affect the client’s interests) [hereinafter MODEL RULES]. Lawyers may also limit the scope of some engagements by excluding actions that they consider “repugnant or imprudent.” Id. at R. 1.2(c) & cmt. ¶ 7.

\textsuperscript{17} Markovits, supra note 1, at 215. Lawyers are also open to the charge that they violate the impartiality principle when they reject clients who cannot pay their fees. But Markovits thinks lawyers do this “because of their greed and not because of their roles.” Id. at 214 n.8. Since greed is not distinctive to lawyers, he finds this uninteresting as a matter of legal ethics. Id. It should be noted, however, that ethics rules exhort lawyers to perform some pro bono work. See MODEL RULES, supra note 16, at R. 6.1. Lawyers who fail to do such work are arguably deviating from their professional role.

\textsuperscript{18} Markovits, supra note 1, at 216-17.

\textsuperscript{19} Id. at 218.

\textsuperscript{20} This assertion calls for qualification. Lawyers may not knowingly offer false evidence to a tribunal, MODEL RULES, supra note 16, R. 3.3(a)(3), and, except when representing criminal defendants, may refuse to offer evidence they reasonably believe to be false. Id. at R.3.3 cmt. ¶ 9.
advantage, and to impeach opposition witnesses in order to undermine "even testimony they believe to be truthful." Markovits takes this to mean that lawyers are obliged by their role to act in "ordinarily immoral," "vicious" ways – namely, to "lie," "cheat," and "abuse others." What does the second charge add to the first? On one view, which Markovits calls the "dependence thesis," the charge that lawyers lie, cheat, and abuse simply elaborates on the general charge of unjustified partiality. Markovits rejects this thesis, arguing that the vices lawyers are accused of "cannot be reduced to forms of impermissible partiality" and that the two charges play themselves out in "different moral registers, tuned to two distinct moral points of view." The charge that lawyers are impermissibly partial rests on "third-personal" moral ideals that construe one's duties to others on the premise that all lives are equally important. To answer that charge, lawyers must convince the world at large that favoring client interests ultimately "respects or promotes everyone's interests" because lawyers are part of a division of legal labor that is designed to protect everyone's rights. Charges that lawyers commit the ordinary vices of lying, cheating, and abusing play in a "first-personal moral register," which directs a person to formulate and live up to appropriate ideals for herself. To answer these charges, lawyers must convince themselves that their work reflects "virtues that belong to a form of life" one might reasonably aspire to make her own, not vices that ordinarily good people avoid. On this view, even if lawyers are third-personally justified in adopting practices that favor their clients, they must still construct a first-personal account that casts their practices "as part of a life they can endorse." The third-personal argument that the lawyer's ostensibly vicious role in a division of labor is impartially justified as a necessary evil cannot succeed from the lawyer's point of view, because she will not want to "think of herself as evil at all."
To refute the dependency thesis, Markovits has us imagine that Jim (presumably an American abroad) is confronted by a dictator who has captured twenty political prisoners and who offers Jim a stark choice: "[E]ither Jim must kill one of the prisoners or the dictator will kill all twenty." The moral principle that one should never kill innocents is one of Jim’s most deeply held ideals. Even if third-personal impartial morality would justify killing one innocent in order to save nineteen, Jim "may have a good first-personal ethical reason" not to do so, because – although more innocents will die as a result – Jim will not be complicit in any killing. Markovits concedes that, given the numbers involved, Jim may reasonably decide to betray his ideal and kill a prisoner, but not that the moral relevance of this betrayal would be erased for Jim by the third-personal justification that convinced him on balance to kill. Concern for his own integrity could give Jim "a reason to pursue his first-personal aim of not killing innocents" even if this is not third-personally best.

Conceivably, however, someone else in Jim’s shoes could kill an innocent yet remain true to her first-personal ideals. To illustrate this possibility, Markovits contrasts Jim’s case with Jane’s. Jane leads a movement to overthrow the dictator, and her ideals are better adapted to the ruthless ethical climate that exists in the dictator’s realm.

not as means. id. at 223 n.30. By contrast, the older Aristotelian tradition approaches ethical justification from the moral agent’s own point of view, holding that one should strive to live according to "his own suitable life plan" and to achieve "his own admirable ends." Id. at 223. Kantians and utilitarians may believe that ethics is purely third-personal, while Markovits appears to believe that third-personal assessment is an "add-on" to first-personal ethics and that third- and first-personal assessment can lead to contradictory conclusions about the justifiability of conduct. But he takes no firm position as to whether, when, or to what degree third-personal assessment should credit the fact that an actor has a first-personal justification for his action. If his emphasis on first-personal assessment is ever to serve as a step toward solving certain moral problems that lawyers face, as he hopes, see text accompanying note 7 supra, these issues may need attention. We often think that people of integrity are more likely than others to behave in third-personally-justified ways. But, as David Luban wisely points out, if one’s integrity depends merely on keeping one’s actions and ideals in line, its power to promote third-personally-justified conduct will depend on the substance of those ideals, some of which may only be rationalizations of third-personally unjustified conduct for the sake of avoiding cognitive dissonance. David Luban, Integrity: Its Causes and Cures, 72 FORDHAM L. REV. 279, 298-301 (2003). "[T]he quest for integrity," Luban writes, "can drive us to the high road or the low road, without any landmarks to alert us about which path we have chosen." Id. at 304 (emphasis in original).

30. Markovits, supra note 1, at 226.
31. Id. at 227.
32. Id. at 228. Markovits adds that a moral agent’s integrity depends on “his understanding his ethical ideals as more than merely rules-of-thumb or interim conclusions in a third-person impartial ethical argument.” Id. at 257 n.91. Indeed, he considers it “uncertain whether a person whose attachment to his own ends hangs by only the thin thread of circumstance can properly be said to have adopted . . . any ends as his own at all.” Id. at 270 n.102. But even if one’s ideals cannot be up for constant reassessment, qualifying an ideal in light of a rare and unanticipated dilemma hardly transforms it into a mere rule-of-thumb. And a moral agent in Jim’s shoes who embraces from the outset the more nuanced ideal that one should not kill innocents unless doing so will save more innocents, and who responds to the dictator’s proposal by killing an innocent, will not have had to reassess his ideal at all.
33. Id. at 230.
34. Id. at 259.
she despises killing innocents, her circumstances do not permit her to embrace Jim's ideal. Instead, her ideal is to overthrow the dictator by virtually any means necessary in order to secure her people's freedom:

Accordingly, when Jane accepts the dictator's offer and kills [an innocent prisoner], she can develop an account of her actions that makes them consistent with her first-personal . . . ideals and that does not require her to see herself as abandoning her own ideals in favor of the dictator's simply because third-personal impartial morality requires it. Although she is, regrettably, killing an innocent, Jane is also pursuing political liberation with the courage and self-command she admires . . . ; and she can therefore recast the dead innocent as a casualty of a guerrilla war to which she is committed, and recast her part in the killing as a battlefield decision that displays the steely virtues of effective command. Although killing the [innocent] represents a defeat for Jane because, against her ultimate purposes, another innocent has been killed, the killing does not represent a betrayal of Jane's first-personal ideals, and her integrity remains intact.35

In contrasting Jim's case with Jane's, Markovits means to emphasize the cultural differences that commend the never-kill-innocents ideal to him but commend the ideal of pursuing political liberation through revolutionary means to her.36

B. The failure of legal ethics scholarship to focus on problems of first-personal morality

Markovits asserts that legal ethics scholars have focused solely on the third-personal problem of lawyer partiality and have treated the "lawyerly vices [as] nothing more than special (perhaps particularly egregious) cases of this partiality."37 For example, defenders of the present regime rely on the third-personal claim that conduct of which lawyers themselves might disapprove if it occurred outside of law practice does not breach the impartiality principle, because the adversary system that encourages or requires that conduct reflects a desirable division of labor for securing

35. id. (emphasis in original).
36. See id. (stating that "Jim's failure at squaring the demands of third- and first-personal ethical justification may be tied to the fact that the circumstances of the dictator's offer were entirely foreign to him, and Jane's success may be tied to the fact that the offer found her in familiar circumstances").
37. id. at 261. This has certainly been a dominant theme, but not all legal ethics scholars focus solely on issues of public policy or third-personal morality. See, e.g., Spaulding, supra note 9, at 59 nn. 161-63 (citing authorities); Serena Stier, Legal Ethics: The Integrity Thesis, 52 OHIO ST. L.J. 551 (1991) (arguing that modern lawyers can abide by the rules of legal ethics, properly construed, without jeopardizing their moral integrity). Markovits does note that scholars have explored the psychological costs that adversary lawyering imposes on lawyers, but he views psychological and integrity costs as distinct. Markovits, supra note 1, at 261 n.94. Notwithstanding Aristotle's view that human flourishing requires fidelity to one's ethical ideals, Markovits apparently sees no necessary connection between one's integrity and one's psychological well-being.
justice for all.\textsuperscript{38}

(Here Markovits himself takes a third-personal detour. Though less than confident that everyone's rights can be adequately protected by a system in which "lawyers care exclusively about their clients,"\textsuperscript{39} Markovits does not reject this third-personal claim. Indeed, he suggests that the adversary system can be impartially justified, at least if our "(largely) unreconstructed" system can be moderated so that lawyers commit the lawyerly vices "less freely and less brutally."\textsuperscript{40} He also thinks that the adversary system will endure in some recognizable form in any event, so not all lawyering that ordinary morality would consider vicious can be eliminated.)\textsuperscript{41}

As for critics of the present regime, Markovits notes that, with rare exceptions, they pursue incremental reforms to make our legal system better at impartially protecting everyone's rights but remain committed to the adversary system itself, without worrying whether the system requires lawyers to engage in vicious conduct that is inconsistent with their personal ideals.\textsuperscript{42} (Returning briefly to the third-personal realm, Markovits seems to welcome this effort to work from within. Rejecting adversarial lawyering out of hand, he writes, would carry the disturbing implication that all lawyers should "sit in judgment over their clients" and, like judges, determine "how legal disputes should be resolved.")\textsuperscript{43}

\textsuperscript{38} Id. at 262. Similarly, the partiality that parents show toward their children may be justified in terms of a division of labor in the societal enterprise of child rearing.

\textsuperscript{39} Id. If it is tendentious to describe adversary lawyers as commonly lying, cheating, and abusing others, as Markovits concedes, see supra note 22, it seems no less so to describe the adversary system as one in which lawyers "care exclusively about their clients." For one thing, litigators have important duties running to the tribunal itself. See, e.g., FED. R. CIV. PRO. R. 11 (barring the filing of frivolous motions); MODEL RULES, supra note 16, at R. 3.3(a)(2), (3) (imposing duties to reveal legal authority adverse to a position asserted on a client's behalf and not to offer false evidence). Markovits may view such rules as mere constraints and not as evidence that litigators really "care" about non-client interests. But there is evidence that litigators in some fields care deeply about certain third parties, not about their clients alone, and are encouraged to do so by professional norms. For example, many litigators who represent spouses in custody disputes consider themselves "obligated to consider the best interests of children." American Academy of Matrimonial Lawyers, The Bounds of Advocacy, 9 J. AM. ACAD. MATRIMONIAL LAW 1, 3 (1992). And conduct intended to discharge this obligation, whatever its status in the past, does not constitute role deviance today. The nonbinding standards promulgated by a leading association of matrimonial lawyers sanction the approach. Id. at 6-39.

\textsuperscript{40} Markovits, supra note 1, at 265. Oddly, while Markovits calls our adversary system "largely unreconstructed," he acknowledges in practically the same breath that a movement to lessen its excesses has already produced "substantial reforms." Id. at 264. Perhaps we should entertain the possibility that more litigators are resorting to vicious practices even though reforms are redefining the litigator's role in significantly less vicious ways. In that case, the motivation to behave viciously may increasingly stem from forces, such as unprecedented competitive pressures and client aggressiveness, that are external to the lawyer's legally and professionally defined role.

\textsuperscript{41} Id. at 265.

\textsuperscript{42} Id. at 264. Markovits excepts William Simon, to whom he attributes the view that adversary lawyering can never be squared with impartiality because it inevitably implicates lawyers in injustice. Id. at 261 n.94.

\textsuperscript{43} Id. at 264 (emphasis in original). This statement is difficult to evaluate because it does not specify the adjudication system that would replace our adversary system. Surely, trial lawyers in civil law countries, where litigation is conducted in an inquisitorial rather than an adversary system, do not
Assuming that some recognizable version of the adversary system can be impartially justified and that, in any event, adversarial lawyering with its attendant vices will endure, Markovits sets out to redress the scholarly preoccupation with third-personal morality by considering what legal ethics looks like "from the point of view of the lawyer whom the adversary system requires to embody these vices." He considers this a necessary corrective because charges that lawyers lie, cheat, and abuse do not become moot for lawyers just because the system in which they commit these vices can be justified in the third person. Ordinary morality, to which off-duty lawyers presumably subscribe, enjoins people to be honest, to play fair, and to treat others kindly. Yet lying, cheating, and abusing others on the job appear to betray those ordinary virtues, just as Jim, if he chose on third-personal grounds to accede to the dictator’s pressure to kill an innocent, would betray his personal ideal. Consequently, the lawyer who views the adversary system excuse as "the last word in legal ethics" yet takes ordinary moral values as her own ideals even on the job must see herself "not as an independent moral agent" but rather as a "draftee in a scheme not of her own making"; and, like Jim, she will suffer a blow to her integrity. Nonetheless, Markovits argues, lawyers over the years have found it possible to engage in "ordinarily vicious" conduct yet preserve their integrity. The question is how they have done so and whether that method is still available.

C. Role-based ethics as a source of first-personal justification

The premise of a role-based justification for conduct is that the actor whose conduct is in question must be seen as a role occupant, not simply as a person. Markovits correctly observes that when lawyers offer role-based justifications for their conduct, their critics are skeptical because they expect third-personal defenses that appeal to ordinary moral principles. But he thinks that role-based justifications are "best

function, or see themselves, as judges.

44. Id.

45. Id. at 266.

46. Id. It seems to me that anyone who engages in a practice that is steeped in tradition, as lawyers do, participates in "a scheme not of her own making." But how greatly the norms of her practice clash with her personal ideals, and how great the perceived sacrifice, will vary considerably. Although Markovits considers it crucial to recognize that concerns about the adversary lawyer’s integrity do not become moot even if adversary lawyering is third-personally justified, he speculates that the distinction between the first- and third-personal points of view may not matter to a critic such as William Simon, "who believes that adversary lawyering cannot in any event be third-personally justified." Id. at 261 n.94.

47. For example, Professor Deborah Rhode accuses lawyers of evading moral responsibility by "depend[ing] on a retreat into role that denies the need for reflection." DEBORAH RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 17 (2000) [hereinafter RHODE]. If lawyers are to be more effectively enlisted in the pursuit of justice, Rhode argues, they will have to "satisfy commonly accepted ethical principles, not just the standards set forth in bar ethical codes." Id. at 18.
interpret[ed]" as first-personal arguments designed not to convince policy makers or the world at large, but to insulate the lawyer's integrity from charges that her actions, judged by ordinary moral principles, are vicious.48

When role-based justifications succeed on the first-personal level, they do so by relying on "role-based redescriptions" of conduct that provide an independent evaluative scheme to compete with "ordinary" moral evaluation in the role occupant's mind.49 Under favorable conditions, they can protect the integrity of a role occupant whose conduct would otherwise strike him as immoral. Markovits suggests, for instance, that prizefighters preserve their integrity by seeing themselves as boxing, rather than as assaulting opponents.50 In like fashion, lawyers might replace ideals that people (including off-duty lawyers) ordinarily hold with specifically lawyerly ideals, and then recast their conduct accordingly.51

48. Markovits, supra note 1, at 268. Role-based arguments have certainly played a vital role in professional self-justification, but I do not think all such arguments are "best interpreted" as first-personal in the sense of being addressed or persuasive to lawyers alone. Lawyers often address such arguments to policymakers or the general public. See, e.g., JAMES S. KUNEN, HOW CAN YOU DEFEND THOSE PEOPLE?: THE MAKING OF A CRIMINAL LAWYER (1985). In my experience, those audiences can sometimes be convinced by role-based responses to "ordinary" moral criticism. Take lay reactions to a lawyer who learns in confidence from her client that the client has begun to use her services to defraud a third party and who decides not to disclose the information to protect the client. Some nonlawyers might well conclude that the lawyer's silence cheats or abuses the victim. But data suggest that others would find the silence acceptable on the role-based ground that lawyers must keep such information confidential so that clients will not be discouraged from sharing it with them in order to obtain good legal advice (which could include advice to abandon a fraudulent scheme). See Fred C. Zacharias, Rethinking Confidentiality, 74 IOWA L. REV. 351, 395 (1989) (providing survey data). Of course, neither those who reject nor those who accept this role-based response may view the matter from the standpoint of a neutral observer. The former may adopt the victim's perspective, but the latter may take a client's perspective. See Theodore I. Koskoff, Introduction to The American Lawyer's Code of Conduct (Roscoe Pound-American Trial Lawyers Foundation, Public Discussion Draft 1980) reprinted in TRIAL, Aug. 1980, at 44, 46-47 (reporting that nonlawyers serving on a bar committee assigned to draft a legal ethics code were "shocked by the concept that a lawyer would reveal a client's secrets except in the most extreme circumstances,” and that one nonlawyer asserted that “[w]hen I need a lawyer, I need him to be my lawyer... and if he isn't going to be my lawyer, I don't need him”)(emphasis in quotation). In other words, “ordinary people” may think they are being impartial when they ponder such issues, but do not necessarily succeed in placing themselves behind a Rawlsian "veil of ignorance.” Markovits may wish to consider how often "ordinary" and Rawlsian or "critical" third-personal assessments diverge and what implications the answer might have for his argument.

49. Markovits, supra note 1, at 271. Philosophers dispute whether role-based arguments are moral arguments. Compare ARTHUR ISAK APPLBAUM, ETHICS FOR ADVERSARIES; THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE 10-11, 14 (1999) (arguing that role-based evaluation "short circuits" moral evaluation by redescribing conduct in practice-defined terms and that adversarial practices can only be justified on grounds that are acceptable to those whom they disadvantage), and Richard Wasserman, Lawyers as Professionals: Some Moral Issues, 5 HUMAN RIGHTS 1, 12 (1975) (contrasting role-based justification with justification from "the moral point of view"), with ALASDAIR MACINTYRE, AFTER VIRTUE 169-209 (1981) (arguing that rational moral evaluation must place actors in some role, but noting that the function of many roles is contested and that even roles whose function is clear may not commend a clear course of action in specific situations), and Alasdair MacIntyre, What Has Ethics to Learn from Medical Ethics?, 2 PHILO. EXCHANGE 37, 46 (1978) (arguing that "no one is ever an abstract moral agent" and that "moral agency is embodied in roles such as that of the physician, the patient or the nurse," which are "mutually interdefined in terms of relationship").

50. Markovits, supra note 1, at 276.
51. Id., at 277.

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One of Markovits’s examples is the lawyer who makes legal arguments that she herself rejects and who sees herself as advocating, not lying.52

D. Preserving one’s integrity through role-based redescription requires cultural support that is no longer available

The key lawyerly virtues in the role-based ethic that Markovits believes lawyers found helpful in preserving their integrity in the past are 

loyalty

and

statesmanship.

Markovits insists that these virtues, to be discussed in

Part III of this Essay, “are not merely make-shift principles one might dismiss as a cheap philosophical trick. Instead they reflect deep and venerable values, which reveal the lawyer’s role to involve a high calling.”53 But, after recalling that Jane could regard killing an innocent as first-personally justified only because virtues tied to ideals of “ruthless but effective command” were culturally familiar to her,54 Markovits argues that the modern lawyer’s cultural milieu cannot support role-based first-personal ideals and that this may account for the “commonly observed crisis” in the profession.55

Markovits claims that a role can only supply convincing first-personal ideals, virtues, and redescrptions if its occupants are not “shaken by the fact that others reject these ethical concepts.”56 Effective roles must be “authoritatively insular” rather than “cosmopolitan”: their occupants “must not think of themselves as members of a role-independent ethical culture, as coming under a duty to satisfy the ethical opinions of the world at large.”57 Markovits puts the cleric’s, soldier’s, and merchant’s roles among those that were played in the past by members of authoritatively insulated sub-cultures. The insularity of these roles was preserved through barriers to entry and through self-regulation. Role occupants strictly controlled who could assume the role by requiring long apprenticeships

52. Id. at 270. For reasons given in the text accompanying notes 103-105, infra, I doubt that “ordinary people” would regard this conduct as lying in any event.

53. Id. at 283. “Reveal,” one wonders, to whom? One might suppose that, if these values are role-based, only lawyers could appreciate them and conclude that theirs is a “high calling.” See id. at 274 (stating that “role-based redescription appeals to values and ideals only role-inhabitants recognize”). But Markovits is not clear on this point. Though he is not a practitioner, his own statement expresses such an appreciation. He also notes that even those who do not occupy roles have sometimes “recognized and respected the roles’ distinctive status [in the realm of] first-personal ethics.” Id. at 289. If he means that nonlawyers as well as lawyers can recognize that the lawyer’s role third-personally justifies some acts that would be vicious in other contexts, then one wonders how sharply he thinks ordinary morality diverges from role-based ethics. Cf. RHODE, supra note 46, at 71 (claiming that it is itself a commonly accepted ethical principle that ethical obligations “depend on context”). More likely, Markovits means that nonlawyers have sometimes recognized that lawyers believe in good faith (even if mistakenly) that their “vicious” acts are role-justified.

54. Markovits, supra, note 1, at 285.

55. Id. at 287-91. One wonders how Markovits, living in the same cultural milieu as modern adversary lawyers, can muster the admiration he expresses, see text accompanying note 53 supra, for a role-based ethic that he insists is no longer available to lawyers as a source of first-personal ideals.

56. Id. at 288.

57. Id.
that developed dispositions to conform to the role. They also collectively shaped and enforced their own role norms, and asserted jurisdiction over intramural disputes.58

Markovits assumes that the lawyer’s role remained authoritatively insular in the United States until well into the nineteenth century,59 but argues that the role no longer provides convincing ideals and redescriptions because its insularity has been lost.60 His evidence for the loss is three-fold. First, lawyers have lost control over bar admissions and membership, as evidenced by the Supreme Court’s modern treatment of the license to practice law not as a privilege but as a right that may not be withheld or withdrawn without due process of law.61 Second, lawyers are no longer trained through apprenticeships; they now study law at universities, where professors pledge allegiance “to general academic standards of truth rather than to specifically lawyerly ethical ideals.”62 Third and “most importantly, the nature, source and status of the ethical principles governing lawyers’ professional conduct have all changed dramatically,” although their content “has not changed very much.”63

Markovits tries to document this “most important” change by tracing the evolution of ABA-formulated ethics codes during the twentieth century. He characterizes this evolution as follows: the Canons of Professional Ethics (1908) presented general ideals of legal ethics as “‘fraternal admonitions’” expressing the views of “‘right thinking lawyers’”;64 the Code of Professional Responsibility (1970) included “specific, legally binding disciplinary rules”; and the Model Rules of Professional Conduct (1983) consist of “legally cognizable rules drafted by a quasi-legislative process involving non-lawyers.”65

These developments, Markovits argues, have left lawyers powerless to draw first-personal ethical ideals “from within the legal profession.”66 Consequently, modern adversary lawyers must now subordinate their ordinary first-personal ideals of honesty, fair play, and kindness to a legally structured role in which they find themselves lying, cheating, and abusing others. The role-based ethic that once shielded lawyers from the

58. Id.
59. Id. at 289.
60. Id. For similar observations about the evolution and present state of the professions generally, see E.A. Krause, DEATH OF THE GUILDS: PROFESSIONS, STATES, AND THE ADVANCE OF CAPITALISM, 1930 TO THE PRESENT (1996) (likening modern developments in the professions to the collapse of medieval guilds in Europe).
61. Markovits, supra note 1, at 289-90.
62. Id. at 290.
63. Id.
64. Id. (quoting Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 YALE L.J. 1239, 1249-50 (1991)).
65. Markovits, supra note 1, at 290. Markovits also notes, correctly, that federal courts and agencies have become more active participants in the regulation of lawyers. Id. at 290 n.149.
66. Id. at 291.
slings and arrows of ordinary morality may still be remembered, but our cosmopolitan culture makes it unconvincing even to them.\textsuperscript{67}

To underscore the bleak, even tragic, implications of this, Markovits identifies two campaigns that have been launched in recent years to restore the American lawyer’s integrity, and argues that neither can succeed. The bar’s campaign to restore the “professionalism” of yesteryear\textsuperscript{68} fails to recognize the weight of the cultural forces that are dismantling many formerly insular social roles in favor of “impartial cosmopolitan forms of social organization and governance.”\textsuperscript{69} And the forward-looking campaign led by academics such as David Luban and William Simon “to cast a new role for lawyers that is more in line with modernity’s egalitarian ideals . . . fails to credit the [enduring] importance of the virtues associated with the traditional lawyer’s role.”\textsuperscript{70}

The forward-looking campaign aims to supplant the lawyer’s supposed role obligation zealously to pursue lawful client ends through all lawfully available means (without regard for the justness or worthiness of those ends and means). It encourages lawyers instead to be “moral activists”\textsuperscript{71} or to pursue their own visions of substantive justice in selecting and representing clients.\textsuperscript{72} Markovits thinks that lawyers who approach their work this way will “manipulate laws and legal institutions” in pursuit of their own “justice-based” ends\textsuperscript{73} and, rather like Jane, will “adopt brutal means” whenever necessary to achieve those ends.\textsuperscript{74} This reconstructed ethic (or role) might shore up the lawyer’s sense of integrity by aligning her (newly redescribed) “activism” or “pursuit of justice” with her first-

\textsuperscript{67} Id.
\textsuperscript{68} See, e.g., ABA COMMISSION ON PROFESSIONALISM, “... IN THE SPIRIT OF PUBLIC SERVICE”: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986) [hereinafter ABA COMMISSION].
\textsuperscript{69} Markovits, supra note 1, at 293. Unfortunately, Markovits does not elaborate on this rather cryptic formulation.
\textsuperscript{70} Id. at 294.
\textsuperscript{71} David Luban proposes that lawyers conduct themselves as “moral activists.” The activist aims to share with her client responsibility for the ends she is promoting in her representation; she also cares more about the means used than the bare fact that they are legal. . . . [She] will challenge her client if the representation seems to her morally unworthy; she may cajole or negotiate with the client to change the ends or means; she may find herself compelled to initiate action that the client will view as betrayal; and she will not fear to quit.

\textsuperscript{72} See Markovits, supra note 1, at 294 n.156 (attributing this position to William Simon). According to Simon, lawyers should have discretion not to assist clients in pursuing legally permissible courses of action or asserting potentially enforceable claims unless doing so “would further justice,” a concept Simon equates with substantive legal ideals. William H. Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083, 1084-84 (1988). They should also have discretion to assist clients by disregarding formally valid legal rules that violate fundamental legal values, including rules that withhold minimal welfare support from substantively deserving but technically ineligible applicants. Id. at 1115-16.
\textsuperscript{73} Markovits, supra note 1, at 294.
\textsuperscript{74} Id. at 295.
personal ideals. But, veering once more into the third-personal realm, Markovits claims that its wide acceptance within the bar would have serious costs for the legal order, because the lawyer’s traditional role is a vital response to the need to regulate the “perpetual conflicts between rival impulses and ideals” that arise in all societies.\textsuperscript{75} Lawyers bent on furthering their moral vision or notions of substantive justice cannot “preside” over the resolution of these conflicts because such lawyers make themselves parties to the conflicts.\textsuperscript{76} Markovits infers that our society will continue to entrust its stability to lawyers who conform to some recognizable version of their traditional role.\textsuperscript{77}

Markovits concludes that the “commonly observed crisis” in the legal profession is “justified” and “should be deep.”\textsuperscript{78} This is a richly suggestive conclusion but not quite the empirically-grounded “diagnosis of the modern adversary lawyer’s ethical condition”\textsuperscript{79} I had expected. As he frankly admits, it is one thing to say that a putative crisis is justified, quite another to prove both that it is real and that it stems from a loss of faith in traditional role-based ideals, virtues, and redescriptions.\textsuperscript{80} Focusing as he does on what it is like, ethically rather than psychologically,\textsuperscript{81} to practice law today, Markovits cannot prove the existence, source, or magnitude of the putative crisis by citing evidence that lawyers are unhappy with their careers or drink too much.\textsuperscript{82} And he makes no effort to specify the “truth conditions” for determining whether or not a purely ethical crisis exists, which would probably be a fool’s errand in any event. One either finds his argument intuitively appealing, or one does not. I think there is something to it, but less than meets the eye.

\section*{II. SOME PROBLEMATICS OF MARKOVITS’S ARGUMENT}

Although his argument certainly has some appeal,\textsuperscript{83} Markovits relies on

\textsuperscript{75} Id. at 283 (quoting STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE 189 (1989)). Such conflicts are unlikely to subside in Western democracies, whose hallmark is ethical pluralism. Indeed, philosopher John Rawls predicted some years ago that in these polities the diversity of moral and political values “may increase.” John Rawls, The Idea of an Overlapping Consensus, 7 OXFORD J. LEGAL STUD. 1, 4 (1987).

\textsuperscript{76} Markovits, supra note 1, at 283. I share this assessment, but question whether the obvious dangers of a bar whose members all approached their work this way would materialize if only a modest percentage of the bar did so.

\textsuperscript{77} Id. at 283-84. Cf. Paul R. Tremblay, Moral Activism Manqué, 44 S. TEXAS L. REV. 127, 155-58, 179 (2002) (observing that the campaign to encourage lawyers to approach their work as “moral activists” has so far been a failure and attributing the failure to the fact that practicing lawyers find the world morally and factually more ambiguous than do scholars waging the campaign).

\textsuperscript{78} Markovits, supra note 1, at 297.

\textsuperscript{79} Id. at 226.

\textsuperscript{80} Id. Markovits recognizes that lawyers have more prosaic reasons to be dissatisfied with their work — e.g., long hours, job insecurity, and intense competition for clients. Id.

\textsuperscript{81} Id. at 210.

\textsuperscript{82} Id. at 211 n.1.

\textsuperscript{83} It also has interesting parallels in Alasdair MacIntyre’s argument that moral discourse in the
several claims and a methodological choice that I believe are open to challenge or at least call for clarification. Part II will question his treatment of the adversary system as the key determinant of the lawyer’s role, the robustness of his claim that the lawyer’s role obligations require conduct that ordinary morality regards as lying and cheating, his decision to treat the “present regime” of lawyering norms as a “given,” and the historical account of the American bar that anchors his conclusion that a role-based ethic can no longer preserve the lawyer’s integrity.

**A. Does the adversary system deserve the emphasis Markovits gives it?**

It is true that the United States has an adversary legal system in which the lawyer’s role usually calls for partisanship, loyalty, and zeal.\(^84\) It is also true that these expectations differ markedly from the impartial roles we assign to judges and, less clearly perhaps, to legislators with particular constituencies. Yet the lawyer’s role is neither as distinctive nor as uniform as these contrasts imply, and this in turn suggests that the adversary system has influenced the role less than Markovits supposes.

For one thing, his expansive definition of an adversary legal system as one in which lawyers “represent clients rather than justice writ large” is idiosyncratic. If one instead views the adversary system purely as one method of adjudication and recognizes that most American lawyers litigate rarely, if at all, then lawyers’ practices and the rules that underwrite them cannot simply be chalked up to that system’s functional needs.\(^85\) They may owe as much or more to the lawyer’s status as agent or representative. Since all agents must take instructions from and be loyal to their principals, they routinely exalt their principals’ interests over others’.\(^86\) This includes the many agents, lawyers or not, who negotiate

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\(^{84}\) Modern world is in a catastrophic state because we have lost the unifying frameworks that coherent moral discourse requires and are left with fragments from earlier discourses which no longer make sense because they have been wrested out of the specific contexts in which they once had meaning. See Jean Porter, *Tradition in the Recent Work of Alasdair Maclntyre*, in *ALASDAIR MCINTYRE* 38, 39-40 (Mark Murphy ed. 2003) (discussing Maclntyre’s position).

\(^{85}\) In some bar circles, however, the traditional lawyer’s concept of “warm zeal” has taken on a pejorative connotation. For example, the terms “zeal” and “zealous” were recently excised completely from the *Arizona Rules of Professional Conduct* in favor of the notion that lawyers should behave “honorably.” The rationale for the change was that “some lawyers had misinterpreted the term ‘zealous’ to be a justification for rudeness, belligerence, and otherwise unprofessional conduct that disparages the profession.” Lynda C. Shely, *The New Rules of Professional Conduct: An Overview*, *AZ. ATT’Y*, Oct. 2003, at 28-29. One might suppose that this change evidences a collective loss of faith among lawyers in role-based ethics, but I would interpret it instead as an effort to discourage practices that are not called for by the adversary lawyer’s role, rightly understood, and indeed that deviate from that role.

\(^{86}\) Cf. Luban, supra note 71, at 57-58 (suggesting that adversarial lawyering may be structured more by the lawyer-client relationship than by the structure of adjudication). The implications of this point for Markovits’s argument are obscured by his failure to clarify the range of lawyers he has in mind. At times, he seems concerned with litigators alone, but he repeatedly calls his subjects “modern adversary lawyers” and he implies elsewhere that his argument is generalizable to a broader segment of the bar or even to the entire legal profession. See supra notes 4, 5, and 12.

\(^{86}\) See Wendel, supra note 10, at 423-24 (pointing out that lawyers, no less than other agents, are
business deals. The duties associated with their role make them partisans, of course, but may also promote some conduct that ordinary morality would consider lying or cheating. Yet those duties are obviously not designed with the adversary system in mind.87

To see how this might qualify Markovits’s argument, consider a lawyer and a lay agent who are each negotiating on a client’s behalf to purchase property. Each client has authorized his representative to accept the best price below $100,000 that she can get, each seller asks if she has authority to accept a $98,000 offer, and each agent flatly says “no.” The legal ethics rule that bars false statements of material fact to a third party in negotiations permits this answer88 and the general legal principles that govern negotiating agents presumably do so, as well. If ordinary morality views the answer as a lie, and the lawyer is culturally foreclosed from finding “negotiating on behalf of a client” to be a convincing role-based redescription of her response, then on Markovits’s analysis the lawyer’s integrity would presumably suffer a blow. But the lay agent’s integrity would be no less assaulted. Given Markovits’s view that the legal profession’s crisis “reflects,” and is “intricately involved in, other crises of moral justification . . . in the modern world,”89 one wonders whether he thinks that all negotiating agents are in the same, demoralizing boat.

On the other hand, insofar as our traditional adversary system does press American litigators to engage in ordinarily vicious conduct, one wonders whether Markovits thinks that the ethical condition of litigators operating in European and Latin American inquisitorial systems is substantially different. There is some evidence that he does think so,90 but there is no clear basis for such a distinction. According to Geoffrey Hazard, civilian lawyers have “responsibilities much the same as those contemplated in American law, and compared with American lawyers, . . . are just as partisan if not more so. It is simply that in civil litigation in the civil law regimes, the advocates must use techniques of lower visibility.”91

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87. By contrast, ethics rules that explicitly govern the legal advocate’s role are surely designed with adversary proceedings in mind. It is worth noting, however, that even professional norms that could encourage litigators to engage in “vicious” conduct in settlement negotiations (as well as in court) may sometimes serve as a useful countervailing force to the time pressures, economic pressures, and divided loyalties that can tempt litigators to provide shoddy, conflicted, or indifferent representation that puts their own clients at an unfair disadvantage and perhaps “cheats” them to boot. See Ted Schneyer, Moral Philosophy’s Standard Misconception of Legal Ethics, 1984 Wis. L. Rev. 1529, 1545.


89. Markovits, supra note 1, at 211.

90. See id. at 295-96 n.162 (distinguishing inquisitorial from adversary procedures). But cf. id. at 212 n.3 (stating that “[e]ven the most mildly adversary lawyer remains fundamentally different from the judge”).

91. Geoffrey C. Hazard, Jr., Is There an American “Legal Profession”? 54 STAN. L. REV. 1463, 1465 (2002). But see Catherine Rogers, Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration, 23 MICH. J. INT’L L. 341, 357-73 (2002) (arguing that civil and common law systems impose very different ethical obligations on litigators but that the differences are
As for the uniformity of the American lawyer’s role, Markovits notes that “negotiators or legal compliance advisers” tend to be “less one-sided or aggressive” than litigators, thereby recognizing that American lawyers play some roles that differ significantly from the advocate’s role in litigation. 92 But he never addresses the extent to which lawyers playing these non-litigation roles may also be exposed to charges of viciousness, although he does suggest that even these lawyers “will be influenced by what they think they can achieve by resorting to litigation or the threat of litigation.” 93 It is therefore worth noting that the legal obligations associated with some non-litigation roles 94 are relatively unlikely to expose them to charges of undue partisanship, let alone charges of viciousness.

For example, transactional lawyers are sometimes called upon to prepare third-party opinions that evaluate a client’s legal circumstances for the benefit of others. The lawyer **qua** evaluator is expected to approach her task in the objective spirit of a judge. 95 Lawyers serving as “intermediaries” help multiple clients with potentially conflicting interests to work out the terms of a new business venture. The lawyer **qua** intermediary is **forbidden** to act as a partisan for one co-client at the expense of another. 96 And lawyers serving as counselors are encouraged to apprise their clients of “relevant moral and ethical considerations,” 97 which often reflect a concern for third-party or societal interests. 98

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92. Markovits, supra note 1, at 212 n.3.
93. Id.
94. Although Markovits is interested in what it is like to practice law under “the present regime,” id. at 210, he cites very little authority, other than the Model Rules, as indicative of that regime. For purpose of this essay, I shall follow suit.
95. See Model Rules, supra note 16, at R. 2.3. It would be naive to suppose that lawyers always do approach the evaluator’s role disinterestedly, just as it would be naive to suppose that CPAs always conduct audits disinterestedly, but the point is that legal and professional norms recognize that they should.
96. See Model Rules of Prof’l Conduct Rule 2.2 & cmt. ¶ 8 (2001). The ABA dropped this rule from the Model Rules in 2002, not because the intermediary’s role was viewed as unwholesome, but because the relationship between that rule and others governing conflicts of interest was murky and because “it was no longer considered necessary to establish the propriety of common representation through a separate Rule.” Stephen Gillers & Roy D. Simon, Regulation of Lawyers: Statutes and Standards 194 (2004) (quoting an explanation from a report of the ABA Ethics 2000 Commission for the deletion).
98. Of course, the Model Rules may encourage lawyers to raise these considerations for the client’s sake rather than for the sake of third-party or societal interests. One famous bar leader’s position on what the counselor’s role calls for is similarly ambiguous. Elihu Root, who counseled big business clients in early twentieth-century New York City, is often associated with the view that a counselor’s job is not to tell a client what it may not do, but simply to tell the client how it can lawfully do what it wants, without referring to moral considerations. But his most famous statement on the counselor’s role is quite different: “About half the practice of a decent lawyer,” he claimed, “consists in telling would-be clients that they are damned fools and should stop.” See James Willard Hurst, The Growth of American Law: The Lawmakers 345 (1950).
B. To what extent does the lawyer's role promote conduct that is ordinarily viewed as lying or cheating?

As noted earlier, Markovits illustrates the distinction between role-based and "ordinary" morality on which his argument rests by citing the example of prize fighters, who, in the face of the criticism that they "assault" their opponents, supposedly protect their integrity by relying on a role-based redescription of their work as "boxing," a sport that features the ideals of courage, athletic grace, and fair play. But, contrary to his intention, this example suggests how fuzzy both the dictates of "ordinary morality" and the line between ordinary and role-based morality can be. Boxing is a consensual activity. If "ordinary people," including boxing fans and detractors alike, view assault as "hitting others without their consent," as seems likely, they have no reason to view boxers as assailants. And boxers have no corresponding need to resort to role-based redescription of their work in order to sleep at night.

Similar complexities arise when we examine two litigation practices that Markovits thinks ordinary moral evaluation would construe as lying and cheating, respectively. He claims that presenting to a tribunal a non-frivolous legal argument that the advocate herself "rejects" or does not "believe" (meaning, I presume, an argument she would reject if she were the judge) is a practice that ordinarily good people would consider lying. Such arguments are certainly partisan, but does ordinary moral

99. Markovits recognizes that "some ordinary moral ideas" have been absorbed into the lawyer's role-based ethic, but believes that the two moral views remain distinct enough to make his position meaningful. Markovits, supra note 1, at 272 n.105.

100. Id. at 275.

101. Some normative legal ethics scholarship relies on dubious assertions about ordinary morality to justify or criticize professional conduct. For example, Deborah Rhode argues that commonly accepted ethical principles would permit a lawyer to assist a client in applying for welfare benefits even when it is "obvious from [the] client's circumstances" that the client has undisclosed income that makes her "technically ineligible." Rhode, supra note 46, at 77. Conceding that such assistance would be "indefensible in other contexts," she claims that it is justified in the welfare case on the "conventional" principle that "[a]n impoverished mother struggling to escape welfare stands on different ethical footing than a wealthy executive attempting to escape taxes." Id. at 79. As I have pointed out elsewhere, the problem with this "principle" is that even though political conservatives could embrace it no less than liberals, their understanding, contrary to Rhode's, would be that the executive had the firmer footing! Schneyer, Reforming Law Practice, supra note 8, at 1847. See also Monroe H. Freedman, How Lawyers Act in the Interest of Justice, 70 FORDHAM L. REV. 1717, 1726 (2002) (suggesting how Rush Limbaugh might react to Rhode's argument).

102. Concededly, my criticism of Markovits's boxing example loses its force insofar as the ordinary moral charge against prizefighters is that engaging in physical violence is vicious even when consensual. At one point Markovits refers to the "ordinary" charge as "assault"; at another point, as engaging in "physical violence." Markovits, supra note 1, at 276.

103. To be sure, "ordinary moral evaluation" might well lead to the conclusion that other lawyering practices, though lawful, do constitute lying, cheating, or abuse. My point here is simply that ordinary morality may not regard lawyers' role-sanctioned practices as lying or cheating as often as Markovits supposes, in which case the ethical condition of today's lawyers may not be as grave as he supposes—even if lawyers now find role-based redescriptions less convincing than they once did.

104. Markovits, supra note 1, at 229, 264. In a penetrating essay, Professor Jack Sammons recently argued that not making an argument on behalf of a client "because it is not an argument that would move the lawyer were he or she the judge" should be regarded within the community of lawyers
assessment lead to the conclusion that they are lies? In common parlance, lies are statements that are intended to convey a false impression or that are at least known by the speaker not to correspond to the true state of affairs. If all a lawyer vouches for in making a non-frivolous legal argument is that it is worthy of the court’s consideration, and if judges understand this, I fail to see why laymen would consider the argument a lie, unless they mistakenly supposed that the lawyer was vouching for more. But if that were the unhappy case, then even in our cosmopolitan culture, I doubt that the lawyer who presents such arguments would experience a loss of integrity. And if that is not the case, the lawyer, like the prize fighter, would need no role-based redescription to fall back on.

Markovits also claims (1) that litigators are spurred by their role to “pursue claims for their clients which, while facially valid, are in fact pressed to gain a strategic advantage or even to distract or delay the course of a lawsuit” and (2) that such conduct is not only partisan but the ordinary vice of cheating as well. Again, I disagree. First of all, much of the strategic maneuvering that Markovits presumably has in mind, though perhaps common, is more likely to constitute role deviance than conformity. Rules of procedure bar the filing of pleadings or motions “for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” The Model Rules forbid lawyers to delay cases in order to frustrate “an opposing party’s attempt to obtain rightful redress or repose,” and posit that clients have “no legitimate interest” in “realizing financial or other benefit from otherwise improper delay.” And lawyers who file otherwise valid claims to obtain results for a client that are beyond the purposes contemplated for the judicial process may be liable in tort for abuse of process.

as cheating, because it violates the expectations of judges, lawyers, and presumably clients that lawyers will play the advocate’s role in litigation. Jack L. Sammons, “Cheater!": The Central Moral Admonition of Legal Ethics, Games, Luxury Attitudes, Internal Perspective, and Justice, 39 IDAHO L. REV. 273, 273-74 (2003) [hereinafter Sammons]. Sammons adds, however, that conduct that is consistent with the expectations governing a practice at a given time but will erode the quality of the practice over time might also count as cheating. Id. at 284.

105. On the other hand, if the lawyer knowingly presented a frivolous argument in violation of the rules and expectations that put such arguments beyond the pale, then lawyers and nonlawyers alike could fairly regard him as lying, because he would be tacitly and falsely representing that the argument was worthy of consideration and not beyond the pale.

106. Markovits, supra note 1, at 218. See also id. at 265 (describing adversary lawyers as “exploit[ing] unfair strategic advantages”).

107. FED. R. CIV. PRO. R. 11(b)(1). See also MODEL RULES, supra note 16, at R. 4.4 (barring the use of “means that have no substantial purpose other than to embarrass, delay, or burden a third person”).

108. Id., at R. 3.2 cmt.

109. See, e.g., Rohda v. Franklin Life Ins. Co., 689 F. Supp. 1034 (D. Colo. 1988) (holding that using discovery in a civil case to obtain information that would benefit the client in a criminal case arising out of the same events is abuse of process); Wilson v. Hayes, 464 N.W.2d 250 (Iowa 1990) (recognizing that use of judicial process to coerce defendant to do something for which the process was not intended can support a claim for abuse of process).

https://digitalcommons.law.yale.edu/yjlh/vol16/iss1/2
This, of course, is not to say that every resort to "hardball" tactics in litigation constitutes unlawful role deviance. But insofar as such tactics are lawful and common, I think ordinary morality would regard them as partisan but not as cheating. When people speak of someone cheating at cards, on an exam, on his taxes, or on his spouse, the common thread is that in each case the actor seeks an unfair advantage by violating rules or expectations that are constitutive of the activity or practice he is engaged in.\textsuperscript{110} If Markovits thinks cheating is commonly understood in a different way, an explanation is in order.

C. What if Markovits had not taken the "present regime" as a "given"?

In developing his account of legal ethics from the lawyer's point of view, Markovits confines himself to exploring what it is like to practice law "under the system of ethical rules that we now have."\textsuperscript{111} As he correctly notes, this task calls for interpreting the law rather than trying to influence its course.\textsuperscript{112} Still, by confining himself to identifying or interpreting current rules, he misses some evidence that seems highly relevant to his argument, namely, the tenor of the extensive debates that have occurred within the bar in recent years concerning both the lawyer's proper role and the implications of that role for the norms that should govern law practice. This evidence is relevant because many lawyers have participated in those debates, including the protracted ABA debate that occurred during the six-year process in which the Model Rules were first formulated.\textsuperscript{113} Their motives for participating in the bar's ethical discourse have been mixed, of course,\textsuperscript{114} but my impression is that lawyers often view their participation as part and parcel of what it means to be a lawyer\textsuperscript{115} and still resonate to the traditional idea that "[a]rticulation of the

\textsuperscript{110} For an account of why cheating is, and should be, so understood, see Sammons, \textit{supra} note 104, at 280-91.

\textsuperscript{111} Markovits, \textit{supra} note 1, at 211.

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} \textit{See} Theodore Schneyer, \textit{Professionalism as Politics: The Making of a Modern Legal Ethics Code, in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION} 95, 95 (Robert Nelson, David Trubek & Rayman Solomon eds., 1992) (claiming, on the basis of archival research, that the ABA's six-year process for producing the \textit{Model Rules of Professional Conduct} was "the most sustained and democratic debate about professional ethics in the history of the American bar") [hereinafter Schneyer, \textit{Professionalism as Politics}]

\textsuperscript{114} \textit{See id.} at 132-35 (noting the concern expressed in the \textit{Model Rules} process not to design new ethical rules that could serve as a basis for judicial expansion of lawyers' civil liabilities).

\textsuperscript{115} Alasdair MacIntyre has argued that longstanding communities (presumably including the legal profession) have open-ended, dynamic traditions and derive their unity not from stasis but from ongoing internal debate about goods that are contested within their tradition itself. Porter, \textit{supra} note 81, at 42 (explicating MacIntyre's treatment of traditions in \textit{After Virtue}). Philosopher Vincent Luizzi also observes that the \textit{practice} of legal ethics involves an ongoing process in which lawyers debate how best to conceive of their role and tie rules of conduct to that conception. Moreover, he claims that the openness of the legal ethics process to role reevaluation makes the process an attractive model for the formulation of ethical principles in other domains. \textit{VINCENT LUIZZI, A CASE FOR LEGAL ETHICS: LEGAL ETHICS AS A SOURCE FOR A UNIVERSAL ETHIC} (1993). Markovits, by contrast, argues that
professional ethic is what makes a profession a moral enterprise.”

Three of Markovits’s claims suggest why he may not have considered it useful to look in this direction, namely, his claims that the content of the ethics rules governing American lawyers “has not changed very much” for a century, that lawyers can no longer draw first-personal ethical ideals from “within the legal profession,” and that current ethics rules are simply “legally cognizable rules drafted by a quasi-legislative process involving non-lawyers.” No one who takes these positions is likely to think that the modern bar debates that produce ethics rules, or the voluminous ethics opinions that interpret them, or other bar discourse on the lawyer’s role can be mined for high-grade insights into how lawyers think and talk about professional ethics. Yet, these sources do yield up insights into lawyers’ views on “ordinary morality,” role-based ethics, and the relationship between the two.

For example, the central document in the ABA’s “professionalism” campaign asserts that whenever a litigator’s duty as an officer of the court conflicts with her duty to her client, the latter must give way. This seems not to have been a mere bow to external criticism based on ordinary morality, but an expression of professional concern that clients are increasingly pressing lawyers to use “scorched earth” tactics and thereby abandon their proper role. Similarly, my research on the ABA’s Model Rules process found that lawyers continue to debate ethical issues in role-based terms but have nonetheless become responsive to the criticism that lawyers too often justify sharp practices outside of litigation by reference to the traditional litigator’s duties. As a result, the Model Rules now expressly distinguish the advocate’s role from other legitimate roles, whose duties are presumably less likely to expose lawyers to charges that they lie, cheat, or abuse third parties.

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lawyers have lost the ability to draw role-based ideals from within the profession because the profession has been transformed from a traditional institution in which authority rests on “the sanctity of age-old rules” into a bureaucratic institution in which the authority of rules depends on their “expedieny” or “value-rationality.” Markovits, supra note 1, at 291.


117. Markovits, supra note 1, at 290. This seems to me to imply, mistakenly, that the content of ethics rules has neither changed nor been hotly debated for many decades.

118. Id. at 291.

119. Id. at 290.


121. ABA COMMISSION, supra note 68, at 28-30.

122. Id. at 30.

123. See Schneyer, Professionalism as Politics, supra note 113, at 137-38 (discussing the evolution of specialized standards for lawyers serving as counselors, evaluators, and intermediaries). See also MODEL RULES, supra note 15, at R. 2.4 & cmt. (recognizing the lawyer’s role as “third-party neutral” and addressing some of the issues that confront lawyers who serve in that role).
Although lawyers today may be more likely than they once were to judge their own practices by "ordinary" moral standards, recent bar debates also suggest that tensions between those standards and role-based norms are not, or at least not simply, a source of demoralization. Arguably, those tensions are being put to productive use, spawning integrity-preserving reforms that bring the two into better alignment without apparent harm to the adversary system. After vigorous debate, for example, the ALI and the ABA have recognized a "humanitarian" exception to the lawyer's duty of confidentiality. This exception permits lawyers to disclose otherwise confidential information whenever disclosure is reasonably necessary to "prevent death or substantial bodily harm."124 One might suppose that this exception is a grudging response to public sentiment, but the moral entrepreneur who sponsored it was Monroe Freedman, one of the bar's staunchest defenders of litigators' traditional role obligations.125 Contrary to Markovits's reading,126 the ABA has also adopted Model Rules provisions that permit a lawyer, as earlier rules did not, to withdraw from representation when a client insists on taking action that the lawyer considers "repugnant," and, in some cases, to limit the scope of an engagement to exclude actions that the lawyer finds "repugnant or imprudent."127

Moreover, many lawyers and judges have supported reforms to mitigate the excesses that now plague not only the adversary process, but litigators themselves. Those excesses are due in part to the fact that many trial lawyers no longer practice in a single locality with a stable community of lawyers who can effectively govern their relations with one another on the "what-goes-around-comes-around" principle. Instead, they often find themselves in a prisoner's dilemma in which each side fears that things will go badly if it is not the first to defect from a tacit agreement to be civil and cooperative. Lawyers are trying to ease the problem collectively by finding and supporting new ways to discourage sharp tactics. For example, some litigators, though not all, have supported procedural reforms that require the parties, without a discovery request, to turn important information over to the other side soon after a suit is filed.128 This reform is designed to discourage the delaying tactics that Markovits thinks ordinary morality would view as cheating, not simply as undue partisanship. Similarly, groups of divorce attorneys in many cities now

124. Id., at R. 16.6 (b)(1); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 66(1) (adopting the same rule for the American Law Institute, whose members are lawyers, judges, and law professors). The exception applies even if the harm to be prevented would not be caused by a criminal act or related to the matter on which the lawyer represents the client whose information is disclosed.


126. See supra note 16.

127. See id.

style themselves as "collaborative lawyers" who help spouses resolve disputes without adversary proceedings.129 The lawyers keep their clients focused on negotiation by entering into a mutual withdrawal agreement that disqualifies both lawyers from further involvement in the matter if either party opts to proceed to litigation.130

All of this suggests that even if lawyers are increasingly sensitive to charges that they commit the "ordinary vices" of lying, cheating, and abuse, the consequence may not be demoralization, but something more constructive—the motivation to consider reforms that can help to preserve their integrity without disserving the goals of the adversary system. Had Markovits examined recent changes in ethical and procedural rules, lawyer-initiated changes in practice, and the lively tenor of ethical discourse within the bar, his conclusions about the ethical condition of today's profession might have been more sanguine.

D. Has the American bar lost the insularity that arguably enables lawyers to derive first-personal ethical ideals from within the profession?

Finally, the scant history that Markovits offers in order to show that the profession has lost the "authoritative insularity" that once enabled lawyers to gird themselves with role-based, integrity-preserving ideals, virtues, and redescriptions is open to serious challenge.

As noted earlier, Markovits's historical account begins by assuming that the profession remained authoritatively insular until well into the nineteenth century131 and it supports that assumption by citing Tocqueville's remark that American lawyers of his day "displayed the tastes and habits of the aristocracy."132 But if those lawyers acted on aristocratic values, or on the "gentlemanly ethic" and "civic republicanism" that are often attributed to them,133 one might better assume that their ethical ideals were class-generated, not generated by internal professional reflection on the nature and requirements of the lawyer's role. According to Professor Tom Shaffer, the rare statements of professional norms for law practice that existed before 1850 "could not and did not come from the profession itself" (as they did later), "because

129. See John Lande, Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering, 64 OHIO ST. L.J. 1315 (2003). The movement has swiftly grown and is recognized by professional leaders as a major innovation in dispute resolution practice. Id. at 1325.

130. Id. at 1324-25. A topical issue in the field is whether withdrawal agreements unethically restrict the scope of representation and deprive clients of control over their dispute. Id. at 1328-29.

131. Markovits, supra note 1, at 289.

132. Id. at 289 n.144.


https://digitalcommons.law.yale.edu/yjlh/vol16/iss1/2
the bar had no [institutional] voice with which to speak.\textsuperscript{134}

Next, Markovits fast-forwards to the twentieth century, disregarding the period from Andrew Jackson's presidency until modern bar associations began to spring up after 1870, a period that Roscoe Pound famously labeled "The Era of Decadence."\textsuperscript{135} During that period, "the tide of... democracy carried before it almost all previously existing standards" for bar admission.\textsuperscript{136} Under the Indiana Constitution of 1851, for example, "[e]very person of good moral character, being a voter, [was] entitled to admission to practice law in all courts of justice."\textsuperscript{137}

If Pound's Era of Decadence were the end of the story, one would have to concede that the bar had lost any vestige of authoritative insularity by the mid-nineteenth century. But Markovits's account is further skewed by his failure to recognize the ensuing period of re-professionalization. That period, beginning in the late nineteenth century, featured the imposition of new bar-initiated barriers to entry into the profession and the flowering of increasingly active bar associations, including the ABA and, after 1920, the "unified" (i.e., mandatory membership) bars that were created in most states.\textsuperscript{138} The institutionalization of the bar continues today with the rapid growth of specialty associations,\textsuperscript{139} some of which make it part of their mission to formulate ambitious, non-binding ethical guidelines for practice in their fields.\textsuperscript{140}

The post-1870 bar associations were conceived in large part as corporate bodies that spoke not only for lawyers but to them, by developing ethics codes, establishing ethics committees to interpret them in advisory opinions, and enforcing them in disciplinary proceedings.\textsuperscript{141}

\textsuperscript{134} Shaffer, supra note 125, at 101. By contrast, although entry into the English bar was highly restricted by class, English barristers of the time were organized in the Inns of Court. See Krause, supra note 60, at 100-02.

\textsuperscript{135} Roscoe Pound, The Lawyer from Antiquity to Modern Times 223-42 (1953).

\textsuperscript{136} Hurst, supra note 98, at 250.

\textsuperscript{137} Id. (quoting the Indiana constitution).


\textsuperscript{139} See Judith Kilpatrick, Specialty Lawyer Associations: Their Role in the Socialization Process, 33 Gonz. L. Rev. 501, 508 (1997-98) (estimating that there are now more than 1,000 specialty bars in the United States and asserting that the number is growing rapidly). One might regard the proliferation of specialty bars as a mark of professional fragmentation that will only diminish the bar's ability to generate convincing role-based ideals. On the other hand, specialty bars are apt to enjoy greater internal cohesion than today's general-purpose bar associations and may therefore be better positioned to generate practice ideals that lawyers in their fields can embrace. See Robert W. Gordon & William H. Simon, The Redemption of Professionalism?, in Lawyers' Ideals/Lawyers' Practices, supra note 113, at 230, 243, 247 (making this point); Murray L. Schwartz, The Death and Regeneration of Ethics, 1980 Am. B. Found. Research J. 953, 954 (predicting a flowering of aspirational norms addressed to "different groupings" of lawyers).


\textsuperscript{141} See, e.g., Julius Henry Cohen, The Law: Business or Profession? 158 (rev. ed.1924) (discussing and quoting the views of Felix Adler, a philosopher and founder of the Ethical Culture Society, that ethical problems in the professions must be solved by those who "live with" them, that a
Even as French sociologist Emile Durkheim was arguing that each profession needed its own associations to debate ethical issues, adopt professional norms, and see to their enforcement, American bar leaders were implementing those ideas.

Moreover, the twentieth-century developments that Markovits cites to document the profession’s loss of authoritative insularity require considerable qualification. For example, the Supreme Court’s modern treatment of the license to practice law as a right that may not be withheld without due process represented a trivial loss of professional authority; contrary to the situation in England, control over bar admissions and disbarment has never in our history been ceded completely to the profession.

What about Markovits’s “most important” evidence of the profession’s loss of authoritative insularity over the course of the twentieth century—i.e., the evolution of the ABA’s ethics codes from the 1908 Canons of Professional Ethics, which presented general ideals of legal ethics as “fraternal admonitions” expressing the views of “right thinking lawyers,” to the current Model Rules, which consist of “legally cognizable rules drafted by a quasi-legislative process involving non-lawyers”? One problem with this evidence is that Markovits never explains why widespread adoption since 1970 of ABA ethics rules as positive law implies that lawyers can no longer derive role-based ideals and redescriptions from within the profession. He cites Robert Gordon’s accurate statement that “internalized norms” of legal ethics have become “legalized” as corroborating his position, but I fail to see why the legalization of internalized norms means that norms are no longer internalized. Surely, the fact that positive law makes murder a crime does nothing to shake our confidence that murder is morally wrong.

In addition, Markovits’s descriptions of the Canons and the Model Rules require qualification. While the Canons certainly had a hortatory ring, ABA leaders who supported their adoption hoped they would become positive law so that all lawyers would be subject to professional discipline for violating them. As for lay involvement in formulating the Model Rules, it would be inaccurate to say that such involvement would be absolutely unprecedented. For example, in 1922, President's Address, 33 ABA Rep. 341, 356 (1908).
Rules, the Kutak Commission that drafted the Rules included only two non-lawyers and their role was negligible; one died soon after being appointed and the other had no visible impact except to keep briefly alive a proposal, later rejected, requiring all fee agreements to be in writing. 150

Finally, Markovits correctly observes that federal courts and agencies have become more active players in the overall mix of lawyer regulation. 151 State courts have also become more active regulators through disqualification rulings, fee-award decisions, sanctions for procedural violations, rulings on claims of ineffective assistance of counsel, and legal malpractice decisions. Again, however, the implications of these developments for the bar’s capacity to articulate professional ideals and norms that lawyers can and do embrace are unclear. While bar-generated norms are sometimes trumped by legal standards from other sources, 152 the overlap remains great because the bar’s norms have considerable influence on the standards that courts apply in these settings, 153 as well as on the practice rules that federal agencies issue to govern the lawyers (and lay representatives) who appear before them. 154 Even when agencies consider standards that depart from bar-generated ethics rules, bar groups such as the ABA Tax Law Section often provide influential input that limits the discrepancies. 155

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150. Schneyer, Professionalism as Politics, supra note 113, at 108. A few comments were submitted, however, by consumer advocates and government agencies, and the Kutak Commission took an interest in press coverage of the project, though members of the much larger House of Delegates that finally adopted the Rules did not. See id. at 109-11, 131-32.

151. A notable recent example is the promulgation of SEC rules to implement § 307 of the Sarbanes-Oxley Act of 2002. See 17 C.F.R. § 205.1-7. The rules govern securities lawyers representing public corporations in SEC-related matters and may be in some tension with the ethics rules in force in a security lawyer’s licensing state. See Letter from SEC General Counsel to the President and President-Elect of the Washington State Bar Association (July 23, 2003) (on file with the author) (expressing concern about the bar’s tentative intention to institute disciplinary proceedings against any Washington lawyers who violate the confidentiality provisions of the state rules of professional conduct in complying with new SEC rules that permit disclosure).


154. For a partial list of federal agencies that have required lawyers or representatives who appear before them on behalf of clients to comply with ABA ethics rules, see Ernest F. Lodge III, Government Civil Investigations and the Ethical Ban on Communicating with Represented Parties, 67 IND. L.J. 549, 624 n.356 (1992).

I will not pretend that anything in this subpart proves that the American legal profession today enjoys the kind of authoritative insularity that Markovits considers essential if lawyers are to draw their first-personal ideals, virtues, and redescriptions from within the bar. My point is simply that the scant historical evidence he adduces falls well short of proving the contrary and that the conditions necessary to support authoritative insularity remain far from clear.

III. SITUATING MARKOVITS'S ACCOUNT OF THE "LAWYERLY VIRTUES" WITHIN A THIRD-PERSONAL DEBATE AMONG LEGAL ETHICS SCHOLARS

One of the finest features of Legal Ethics from the Lawyer's Point of View is its imaginative and sympathetic account of the “distinctively lawyerly virtues” (or conceptions) of loyalty and statesmanship.156 These virtues are central to the role-based ethic that Markovits believes once had the power to protect the adversary lawyer's integrity against charges based on the ordinary vices of lying, cheating, and abusing others.157 Markovits uses his account for the limited purpose of establishing the first-personal importance of role-based ethics. Although he claims that the lawyerly virtues of loyalty and statesmanship “reflect deep and venerable values” that “reveal the lawyer's role to involve a high calling,”158 he never explicitly defends them in third-personal terms, i.e., as socially desirable dispositions for lawyers to possess. Indeed, he suggests that the lawyerly virtues (and role-based ethics in general) are irrelevant in the third-personal domain because they can appeal “only to people who have already accepted the role” that is associated with those virtues and, thus, beg the question of whether the role itself is third-personally justified.159

Part III of this Essay will suggest, however, that role-based virtue ethics, as exemplified by Markovits's account of lawyerly loyalty and statesmanship, is relevant to third-personal debate, partly for the practical reason that judges and other policymakers who formulate the rules and principles that govern law practice do tend to share with lawyers a meaningful though fluid conception of the lawyer's role.160 After

Section's influence in the early 1980s on the content of Treasury Department rules governing the rendition of legal opinions concerning the prospect for realizing tax benefits by investing in tax shelters, and the ABA Business Law Section's influence on federal banking agency guidelines for the preparation of legal opinions in the wake of the S&L crisis in the early 1990's. Professor Markovits disagrees with me on the significance of this point, arguing that the key development in recent years is the agencies' more direct involvement in regulating the lawyers who practice before them, not their deference to bar views in doing so. Markovits, supra note 1, at 290 n.149.

156. Id. at 277.
157. Id. at 284.
158. Id. at 283. See also id. at 299 (asserting that his account of the lawyerly virtues presents a “substantively attractive version of a distinctively lawyerly role ethic,” albeit an ethic that is no longer culturally available to lawyers) (emphasis in original).
159. Id. at 283-84.
160. For a philosophic defense of the use of role conceptions and virtue ethics in the third-
summarizing Markovits’s account of the lawyerly virtues, Part III proceeds to situate the account in a current third-personal debate among legal ethics scholars. I shall argue that the attractiveness of the virtues as Markovits presents them implicitly indicts the “forward-looking campaign,” led by Luban and Simon, to encourage lawyers to practice with the central aim of furthering their own visions of morality or substantive justice. And I shall suggest by way of contrast that the dispositions associated with those virtues fit far more comfortably with the normative models of the lawyer’s role that Norman Spaulding and Brad Wendel have recently developed. Those models differ from one another in important ways and deserve closer attention than I can give them here, but both authors are explicitly critical of Luban and Simon’s positions for reasons much like the ones Markovits’s cites in predicting that the “forward-looking campaign” will fail to gain broad acceptance.

A. The “Lawyerly Virtues” of Loyalty and Statesmanship

Markovits fleshes out the distinctively lawyerly virtues of loyalty and statesmanship with an analogy to John Keats’s ideas about “the nature of poetic sensibility,” especially Keats’s concept of “negative capability.”161 As the poet serves his subject by effacing himself, maintaining no identity of his own, and functioning merely as a medium filling some other body such as the Sea,162 Markovits suggests, so the lawyer’s loyalty serves her clients by disposing her to efface herself, maintain no voice of her own, and allow her clients to speak through her.163 This is a distinctively lawyerly form of loyalty in two respects. People are ordinarily loyal to one another for the sake of mutual advantage, but the lawyerly virtue of loyalty calls for “an unusually selfless empathy.”164 And while ordinarily good people try when presented with disagreements to consider all points of view before making up their minds, the loyal lawyer “adopts the first-personal moral ambition to take her client’s part,” to see things through her client’s eyes, and to change positions as her client requires.165

The lawyerly virtue of statesmanship, Markovits suggests, provides a service to society that parallels the poet’s contribution to human understanding. As the poet contents himself with doubts, uncertainties, and half-knowledge in order to arrive at otherwise unavailable insights, so the lawyer’s capacity to sustain “all sides of an argument” and to content herself with “persuasion rather than proof” makes possible a procedural justice to which the “over-impassioned flame of substantive right leaves us

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161. Markovits, supra note 1, at 278.
162. Id.
163. Id.
164. Id
165. Id. at 279.
insensible.” And just as poetic uncertainty accommodates inconsistent beliefs, so lawyerly uncertainty helps to accommodate inconsistent interests, to construct compatible possibilities where others only see contradictory certainties, and to redirect attention from deep conflicts toward shallower matters. These are knacks that every society requires, but especially one whose hallmark is ethical pluralism.

Thus, the distinctive virtues of loyalty and statesmanship enable a lawyer to speak from her clients’ many points of view and not just on her own behalf. Under the right cultural conditions, the lawyer can embrace these role-based virtues, redescribe her practices accordingly, and thereby reject at least some charges that she lies, cheats, and abuses others. It is not the case that a lawyer imbued with these virtues will consider the very idea that lawyers can lie, cheat, or abuse to be a solecism; rather, her self-effacement and uncertainty will lead her to define those vices more narrowly than people commonly do. With respect to lying, for example, she will remain capable of recognizing both what it means to suborn perjury and the fact that perjury diserves the judicial process. But she will regard presenting “an argument she does not believe” as advocacy rather than lying, because her role is to articulate what might be true rather than to determine what is true. As for cheating, she will recognize that unlawfully inflating an opposing party’s litigation costs is wrong because it violates legitimate expectations and closes rather than opens up the litigation process. But she will not regard the pursuit of a lawful yet substantively unfair outcome as cheating, because her role is not to decide which party should prevail. And she will not consider it abusive to attack adverse witnesses aggressively because her role is to expose weakness in all positions.

Markovits does not deny that lawyers incur costs by cultivating these distinctive virtues or dispositions: a loyal commitment to take the client’s part rather than her own means that the lawyer must often be insincere, and a lawyer’s statesmanship – her capacity to argue all sides and her allegiance to procedures rather than outcomes – can leave her unsuited for moral leadership. But he claims that the successful cultivation of the lawyer’s role-based virtues can perform a worthwhile service for the lawyer by instilling confidence that her practices embody her own first-personal ideals.

166. Id.
167. Id.
168. Id. at 280. Because Markovits describes the lawyerly virtue of statesmanship as providing a service to society, it would be a mistake to think that the role-based ethic that he articulates is concerned solely with furthering client interests.
169. Id. at 280-81.
170. Id. at 281.
171. Id. at 282.
If, as I believe, lawyers can still cultivate these virtues, might their cultivation be worthwhile as well from a societal or third-personal standpoint? I suspect that some readers will scoff at the idea and reject out of hand Markovits’s insistence that the virtues “are not merely make-shift principles [that] one might dismiss as a cheap philosophical trick” but instead “reflect deep and venerable values, which reveal the lawyer’s role to involve a high calling.” When litigators plead ignorance of the fact that a client knowingly gave false testimony or invented frivolous claims, for example, such readers are likely to conclude that those pleas are indeed tricks – i.e., pretexts designed to explain away conduct that is motivated by ends that are entirely external to law practice, such as self-interest in earning fees, gaining professional advancement, or simply winning. Because cynicism of this kind might fuel unfortunate reforms, I believe Markovits has made a contribution to third-personal legal ethics by effectively articulating an honorable role-based explanation for at least some lawyers’ pleas of ignorance.

B. Situating Markovits’s Role-Based Ethic in an Ongoing Third-Personal Debate

The deeper third-personal significance of Markovits’s account of the lawyerly virtues comes to light when the account is viewed in the context of a normative debate that now appears to be shaping up between legal ethics scholars. On one side are those, notably Luban and Simon, who for some time have been waging the “forward-looking campaign” to encourage lawyers to practice as “moral activists” or to pursue their own visions of substantive justice. On the other side, I place Norman Spaulding and Brad Wendel, who have recently criticized Luban’s and Simon’s positions in the course of offering their own models of the lawyer’s proper role and exploring the implications of their models for the principles that should govern lawyer conduct.

172. Id. at 283.
173. See, e.g., Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 Stan. L. Rev. 589, 618-20 (1985) (chastising lawyers for regularly invoking an “epistemological demur”) to resist legal and moral accountability for their participation in conduct later found to be fraudulent; claiming that litigators are often better positioned than the court to resolve disputed issues; and arguing that lawyers’ pleas of ignorance imply a definition of knowledge more appropriate to the rigors of scientific debate than to conventional legal discourse.
174. Cf. Spaulding, supra note 9, at 2 (arguing that “we must be willing to suspend the conviction . . . that client-centered lawyering is the same as self-centered lawyering – that lawyers who have perverted the service norm for their own interests are ideal typical for any client-centered conception of the [lawyer’s] role”).
176. See Spaulding, supra note 9; Wendel, supra note 10. Markovits claims that our modern, cosmopolitan culture is not only hostile to the lawyer’s traditional role-based ethic as he defines it, but is more broadly “skeptical of social roles wherever they appear,” at least when those roles are in tension with ordinary, role-independent moral principles. Markovits, supra note 1, at 293. In my view, however, the very fact that legal ethics scholars such as Spaulding and Wendel, who are trained as
To grasp the crux of the debate, one must understand that Simon and Luban developed their positions in opposition to what they regard as the "standard" or "dominant" conception of legal ethics, a conception based on the principles of Neutrality and Partisanship. (Neutrality encourages lawyers to act without regard to the moral worthiness of a client’s objectives; Partisanship exhorts them to pursue client objectives up to the limits of the law.) Simon holds that the adversary lawyer’s traditional duty to represent her client zealously regardless of the justness of the client’s cause is pernicious because the duty inevitably implicates lawyers in injustice; Luban argues that lawyers should practice as “moral activists” – sharing responsibility with her client for the ends being promoted, caring more about the means used than the mere fact that they are legal, challenging the client if the representation seems morally unworthy, sometimes initiating action that the client will regard as betrayal, and withdrawing if that proves morally necessary.

Markovits does not respond to these third-personal positions head-on. Instead, he simply predicts that our polity will reject an ethic for lawyers that rests on such positions. Yet his reasons for this prediction could easily be restated as reasons to hope that that ethic will be rejected. He predicts rejection because the positions imply that lawyers should “sit in judgment over their clients” and decide how legal disputes “should be resolved” because lawyers who approach their work as moral activists or crusaders for their own visions of substantive justice would be willing to “manipulate laws and legal institutions in pursuit of [those] ends” and to “adopt brutal means” whenever necessary to achieve them, because such lawyers would make themselves parties to the perpetual conflicts that arise in society and therefore could not be trusted to “preside” over their resolution, and because the forward-looking campaign “fails to credit the importance of the virtues associated with the traditional lawyer’s

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lawyers, continue to generate models of the lawyer’s role that are not grounded in ordinary, role-independent morality casts some doubt on the validity of his broader claim.

177. See Ted Schneyer, Moral Philosophy’s Standard Misconception of Legal Ethics, 1984 WIS. L. REV. 1529, 1534. I have argued elsewhere (a) that the so-called “standard conception of legal ethics” is only one of several conceptions of the lawyer’s role that over time have vied for dominance and (b) that, unlike many sciences, normative legal ethics has no paradigm. Id. at 1567-69.

178. See note 72 & accompanying text supra.

179. See supra note 71. Luban and Simon seem to expect that lawyers who style themselves, respectively, as moral activists or crusaders for substantive legal ideals will act in furtherance of progressive political values. But the political diversity of the American bar, which mirrors the ethical pluralism of American society, makes it impossible to predict whether a profession committed to moral activism and the pursuit of substantive justice would tend to promote progressive or conservative values. See Ted Schneyer, Some Sympathy for the Hired Gun, 41 J. LEGAL ED. 11, 20 (1991) [hereinafter Schneyer, Some Sympathy].

180. Markovits, supra note 1, at 264 (emphasis in original).

181. Id. at 294.

182. Id. at 295.

183. Id.
role." 184

If this is not an explicit indictment of the third-personal merits of Simon and Luban's positions, it is certainly an implicit one, based at least in part on Markovits's respect for the lawyerly virtues of loyalty and statesmanship. Moreover, it is strikingly similar to the third-personal objections to those positions that Spaulding and Wendel explicitly raise.

Spaulding's Reinterpreting Professional Identity claims that the project of explicating professional ethics has been dominated for some time by scholars who are "fundamentally hostile to the concept of client-centered representation and convinced that it is to blame for professional misconduct and malaise." 185 Spaulding accepts the view that the role that prevailing ethics rules endorse envisions a lawyer who will diligently represent a client irrespective of any "personal, moral, or ideological affinity between them." 186 But, far from joining the critical bandwagon, he defends that service ideal against the forces that he thinks are increasingly pushing lawyers toward unduly "thick identification" with clients. Those forces of course include increased competition and specialization that limits lawyers to a particular clientele. But Spaulding argues that they also include the very thinking that Simon, Luban, and others have employed in attacking the client-centered service tradition.

Those attacks claim that encouraging the lawyer to select and zealously represent clients whose interests and lawful objectives do not necessarily square with her own vision of substantive justice or moral worth has spawned both lawyer malaise and professional misconduct that harms third-party and societal interests. 187 Spaulding counters that the cure Simon and Luban propose is essentially to turn the lawyer's role into "an object of self realization for the lawyer" 188 and that exhorting lawyers to "choose clients and shape their work according to a principle of moral identification" 189 is a prescription for greater professional failure. 190 In

184. Id. at 294 (emphasis added). Taken together, these reasons evince a concern that lawyers who only represent clients to whose objectives the lawyers are personally and passionately committed are more likely than lawyers who adhere to the Neutrality principle or to the role-based ethic that Markovits describes to use vicious tactics and flout norms of procedural justice. I share that concern. See Ted Schneyer, Some Sympathy, supra note 179, at 20 (noting that lawyers who use excessive tactics often believe passionately in their clients' cause). Moreover, I have argued that American lawyers, far from embracing the Neutrality principle, often identify closely with their clients and their clients' causes. Id. at 14-15.

185. Spaulding, supra note 9, at 1.

186. Id. at 6.

187. Id. at 38-39.

188. Id. at 7 (emphasis in original). I join Spaulding in rejecting this cure. But just as Spaulding insists that Simon and Luban unfairly criticize lawyers for using the principles of Neutrality and Partisanship as mere pretexts for lawyers self-interested conduct, see supra note 174, so calling their cure a proposal to turn the lawyer's role into "an object of self realization for the lawyer" rather than a misguided effort to contribute to social welfare may be unfair.

189. Id. at 39.

190. Id. (stating that "increased autonomy for lawyers to choose clients and shape their work according to a principle of moral identification may actually exacerbate professional misconduct").
other words, compared to the “thick identification” with client causes that Simon and Luban endorse, the “thin identification” with clients that the principles of Neutrality and Partisanship endorse (and, in my opinion, the “lawyerly virtues” encourage) provides more assurance that the legal profession will make a positive contribution in a society whose hallmark is ethical pluralism. 191

Wendel’s Civil Disobedience presents a normative model, the “authority conception,” that regards legal ethics as properly the concern of political rather than moral philosophy. 192 The model derives its normative force not from a commitment to client autonomy per se, but “from the reasons that confer legitimacy upon legal directives,” 193 chiefly, the capacity of law to “enable collective social action despite ethical pluralism.” 194 The model imposes substantial public responsibilities on lawyers, charging them as quasi-officials to ensure that legal institutions can resolve disputes despite the persistent conflicts that ethical pluralism fuels. 195 And it recognizes that if the law is to provide a final settlement of such disputes, it must be identifiable without reference to socially contested moral criteria. Accordingly, “lawyers are duty bound not to frustrate the achievement of law by reintroducing contested moral values into the domain of law . . . as the basis for an ethically motivated decision to act or not act on behalf of a client.” 196 Thus, the “authority conception” vindicates the principle of Neutrality. “If,” Wendel writes, “the lawyer says to the client, in effect, ‘You have a legal entitlement to X, but I refuse to assist you in obtaining that entitlement for moral reasons,’ the lawyer is simply reinscribing in the attorney-client relationship the very moral disagreement the law was intended to preempt.” 197

191. Id. at 38-39, 53, 76-81. As Spaulding notes, the Model Rules honor the Neutrality principle not by requiring lawyers to accept all (paying) clients who seek their services, as English barristers are expected to do, but by proclaiming that “representing a client does not constitute approval of the client’s views or activities.” Id. at 21, quoting MODEL RULES, supra note 16, R.1.2 cmt. ¶ 5.
193. Id.
194. Id. at 364-65.
195. Id. at 381. Wendel calls lawyers “quasi-political actors” who “act in the name of society” by channeling normative disagreements into “an authoritative process of resolution.” Id. at 384. The term “quasi-political actors” is similar in meaning to “officers of the court,” but Wendel eschews the latter term because it has been used so variously and vacuously in the past. Id. at 384 n.90. Cf. Schneyer, Some Sympathy, supra note 179, at 15 (suggesting that lawyers who select engagements on the basis of the Neutrality principle may be animated by a vision of the lawyer as “officer of the court,” and defending that practice as follows: “just as their office requires judges to hear all cases and apply the law equally to all parties, morally attractive or not, so the lawyer’s office may be said to entail a willingness to serve all comers” because “equal protection of the laws implies equal protection by lawyers no less than by judges”).
196. Wendel, supra note 10, at 366.
197. Id. at 382. However, the authority conception does not wholly embrace the principle of Partisanship. The conception implies that the lawyer should not refuse on moral grounds to invoke procedural rights in order to obtain lawful client objectives, but it enjoin the lawyer not to engage in “loophole lawyering” to achieve those objectives. Id. at 395. Loopholes, according to Wendel, are
In this respect, the authority conception is substantially at odds with Luban’s moral activist model and Simon’s substantive justice model, neither of which shows much regard for the fact that a client’s aims are permissible under the law. In Wendel’s view, Luban treats the client’s substantive and procedural rights as irrelevant to a lawyer’s work unless invoking and protecting those rights is also morally justifiable by the lawyer’s lights,\textsuperscript{198} while Simon thinks that “apparent legal entitlements are not really part of the law unless they track moral principles.”\textsuperscript{199} From a client’s point of view, Wendel asserts, these positions make legal rights meaningless. In exalting the lawyer’s moral agency over the client’s legal rights, they give no normative weight to the lawyer’s legal duty, as an agent, to carry out the lawful instructions of her principal.\textsuperscript{200}

It is presumptuous of me to draft Markovits into a third-personal debate for which he has not enlisted, especially when one of his theses is that legal ethics scholars have focused too much on third-personal issues and neglected first-personal ones. My excuse is simply that this important debate may be furthered by pointing out that Markovits’s sympathetic treatment of the lawyerly virtues of loyalty and statesmanship is strikingly aligned with Spaulding’s and Wendel’s criticisms of Luban’s and Simon’s positions. Of course, if Markovits is correct in his assessment that lawyers are now culturally foreclosed from embracing an ethic that is not grounded on “ordinary morality,” then the profession may be no more likely to rally around Spaulding’s or Wendel’s position than it is to embrace Luban’s or Simon’s.

**CONCLUSION**

Professor Markovits has clearly enriched legal ethics scholarship by giving novel and imaginative attention to the problems of first-personal justification that contemporary lawyers may face when their role obligations appear to conflict with “ordinary morality.” My reservations about his diagnosis of the “commonly observed crisis” in the legal profession notwithstanding, I look forward to his further thoughts on how lawyers might be protected from whatever threats to their integrity those conflicts pose. I also hope he will more explicitly present and defend the third-personal positions that I believe are implicit in *Legal Ethics from the Lawyer’s Point of View*. In my opinion, however, an effective foray into

\begin{footnotesize}
\textsuperscript{198} Id. at 372.
\textsuperscript{199} Id. at 373.
\textsuperscript{200} Id.
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these realms will require more attention than this article displays to the details of professional history, the complexities of the law of lawyering, the vagaries of “ordinary morality,” and the structural pressures and constraints that lawyers face. As things stand, the article may tell us more about current trends in academic moral philosophy than it tells us about the practice of legal ethics.