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# MISUNDERSTANDING LAWYERS' ETHICS

*Monroe H. Freedman\**  
*Abbe Smith\*\**

A MODERN LEGAL ETHICS: ADVERSARY ETHICS IN A DEMOCRATIC AGE. By Daniel Markovits. New Jersey: Princeton University Press. 2008. Pp. xii, 361. \$29.95.

The title of Daniel Markovits's book, *A Modern Legal Ethics*,<sup>1</sup> gives the impression that it is a comprehensive treatise on contemporary lawyers' ethics.<sup>2</sup> The contents of the book, however, are both more limited and more expansive than the title suggests. Markovits's treatment of lawyers' ethics concerns itself with what he conceives to be the pervasive guilty conscience of practicing lawyers over their "professional viciousness" (p. 36), and how lawyers can achieve a guilt-free professional identity "worthy of . . . commitment" (p. 2). Markovits's goal in the book is to "articulat[e] a powerful and distinctively lawyerly virtue" (p. 2), one that will provide "ethical vindication of [lawyers'] professional lives" (p. 5). Markovits believes that, in so doing, he will also offer "insights beyond legal ethics, concerning the generally fractured state of modern moral life" (p. 6).

Notwithstanding the efforts of a serious young scholar, Markovits's book falls short. Our focus in this review will be on his discussion of the ethics of adversary advocacy, which is the subtitle and predominant part of the book.

Markovits is concerned with how a lawyer's professional life can be ethically satisfying (p. 1). He contends that lawyers' lives are not "well-lived," because they feel guilty.<sup>3</sup> The source of that guilt, according to Markovits, is that lawyers are compelled to lie and cheat, routinely and viciously (p. 9).

Markovits begins his analysis with the adversary system, which combines partisan representation with impartial adjudication (pp. 4, 6–8). He notes that the lawyer's role in an adversary system is client-centered—lawyers are required to be loyal to the clients they serve. That loyalty obliges the lawyer to accept what the client wishes to achieve in the representation and to use lawful and ethical means for achieving client interests,

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1. Daniel Markovits is a Professor of Law, Yale Law School.
2. Cf. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* (1986) (a comprehensive legal ethics treatise).
3. *E.g.*, pp. 9, 107.

in particular by maintaining the client's position against any present or potential adversary (pp. 15–16, 35).

This simplified, formalistic description of the lawyer's role is fine as far as it goes. From there, however, Markovits relies on erroneous and unsupported assumptions regarding the nature of law practice and the mental and emotional state of lawyers. The nature of the lawyers' role, he asserts, requires that they violate what everyone, including lawyers themselves, consider moral conduct. His chief evidence of immorality, however, is a peculiar definition of lying and cheating.<sup>4</sup> Because of this lying and cheating, and the guilt suffered as a result, it is not possible for a lawyer to have self-respect (pp. 1, 111).

Markovits contends further that the "adversary system excuse"—that is, the lawyer's critical role in an adversary system—cannot salve this inevitable and pervasive sense of guilt.<sup>5</sup> He says that focusing on the lawyer's adversarial role may excuse such conduct, but it does not deny its "viciousness" (pp. 106–07). Thus, lawyers remain in a state of moral self-hatred.

On this meager and misleading foundation, Markovits argues that lawyers need to "redescribe" their role in terms of a distinctive and new morality, one that is consistent with the requirements of ordinary morality (p. 150). He achieves this by redefining terms so that lawyers can now call virtuous what was previously vicious. Thus, loyalty is recast as "fidelity," and lying and cheating as "nonjudgmental self-effacement" and "giving voice" to those who cannot express themselves (pp. 95–96).

Finally, Markovits argues that these redefinitions will help justify the adjudicatory process by giving participants a reason to accept it as politically legitimate.<sup>6</sup> In short, Markovits constructs a guilt-ridden lawyer out of an idiosyncratic notion of lying and cheating and then purports to save her by recasting her role as that of a self-effacing spokesperson in an adversary system now declared to be legitimate.

Sadly, even after Markovits's makeover, the lawyer remains doomed. According to Markovits, a lawyer can benefit, subjectively, from a redefined role only when the legal community is isolated from the moral judgment of the rest of society. In today's world, however, that kind of insularity is impossible. Thus, lawyers will always be subject to the moral judgment of the general community, which condemns them as liars and cheaters. In the end, the most Markovits can say for lawyers is that they are "*tragic* villains" (p. 246; emphasis in original).

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4. *E.g.*, pp. 9, 36, 111. We disagree with Markovits's notion of lawyers' lying and cheating. See *infra* notes 19–24 and accompanying text.

5. Pp. 103–08. We disagree with Markovits's description and assessment of the adversary system. See *infra* notes 32–36 and accompanying text.

6. Pp. 188–93. There is nothing original in these descriptive words and phrases or in the idea of legitimization in the eyes of the participants. See *infra* notes 51–59 and accompanying text.

Markovits was trained in philosophy before attending law school,<sup>7</sup> and, as one commentator has said, his work “may tell us more about current trends in academic moral philosophy than it tells us about the practice of legal ethics.”<sup>8</sup> A significant part of Markovits’s analysis invokes Kantian moral theory, though not always persuasively.<sup>9</sup> Most importantly for our purposes, Markovits “simply and systematically ignores the human condition[, which] is what law and law practice address.”<sup>10</sup>

As Professor Geoffrey Hazard notes, Markovits, like several of his colleagues at Yale and elsewhere, purveys the idea that the practice of law, “as defined by its function, its traditions, and its ethical norms . . . [i]s ethically suspect, perhaps evil.”<sup>11</sup> We agree with Hazard that this view is not just incorrect, but “demoralizing,” especially to law students.<sup>12</sup>

The academics to whom Hazard refers are ignorant of, or choose to ignore, the realities of law practice, and, particularly, of lawyer-client relationships. As former Chief Judge of the D.C. Circuit Harry T. Edwards observes in an earlier volume of this journal, there is a growing disjunction between legal education and the legal profession.<sup>13</sup> Edwards points to

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7. Markovits obtained his Ph.D. in philosophy from Oxford in 1999, and his J.D. from Yale the next year. Daniel Markovits Biography, <http://www.law.yale.edu/faculty/DMarkovits.htm> (last visited Aug. 11, 2009). We will not be discussing, except indirectly, Markovits’s references to Kant and other philosophers. It seems to us a needless distraction in a discussion of his views on law practice, his notion about the guilt suffered by lawyers over their professional viciousness, and his prescription for coping with that guilt. Readers interested in critical commentary on the philosophical references in the book should read the articles cited *infra* notes 23–25.

8. Ted Schneyer, *The Promise and the Problematics of Legal Ethics from the Lawyer’s Point of View*, 16 YALE J.L. & HUMAN. 45, 78 (2004) (reviewing Daniel Markovits, *Legal Ethics from the Lawyer’s Point of View*, 15 YALE J.L. & HUMAN. 209 (2004)).

9. See Alec Walen, *Criticizing the Obligatory Acts of Lawyers: A Response to Markovits’s Legal Ethics from the Lawyer’s Point of View*, 16 YALE J.L. & HUMAN. 1, 2, 13 n.30 (2004) (writing that, in an earlier version of his book, Markovits “exaggerates and misdiagnoses the problem” he addresses, and calling Markovits’s analysis both “philosophical nonsense” and “actual[] nonsense”). Walen is a professor of philosophy who has a Harvard law degree. He is currently a Research Scholar at the Institute for Philosophy and Public Policy and the School of Public Policy at the University of Maryland. Alec Walen Biography, <http://www.publicpolicy.umd.edu/facstaff/faculty/Walen.htm> (last visited Sept. 25, 2009).

10. Geoffrey C. Hazard, Jr., *Humanity and the Law*, 16 YALE J.L. & HUMAN. 79, 79 (2004) (critiquing Markovits, *supra* note 8, at 209).

11. *Id.*; see also ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) (offering his view of ethical problems associated with modern-day lawyering); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 853–54 (1985) (observing that American judges are often chosen for reasons that have little to do with professional competence). Hazard, who currently teaches at the University of California at Hastings School of Law, previously taught at Yale.

12. Hazard, *supra* note 10, at 79. We emphasize law students because no lawyer would take seriously the author’s description of the evils of law practice or of lawyers’ guilty consciences. But students who are assigned the book might be misled into thinking that it is an accurate reflection of what their professional lives will be like.

13. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191 (1993) [hereinafter Edwards, *Postscript*]; Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) [hereinafter Edwards]; see also Harry T. Edwards, *Another Postscript to “The Growing*

“significant contingents of ‘impractical’ scholars . . . who produce[] abstract scholarship that has little relevance to . . . issues” that are of interest to judges and practicing lawyers.<sup>14</sup> Although Edwards made these observations some years ago, things have not gotten better. Indeed, legal scholarship seems increasingly inscrutable and obscure.<sup>15</sup>

Of course, we understand that legal theory is essential to law practice.<sup>16</sup> What we object to is impractical theory—exalted as momentous or even meaningful—that is unrelated to the real concerns of practicing lawyers and judges.

Markovits’s project is premised upon the assumption that lawyers are burdened by guilt because they are compelled to routinely lie and cheat as part of their professional responsibilities.<sup>17</sup> In his view, this compulsory “viciousness” puts ethical burdens on lawyers who, “for good reason wish to conceive of themselves . . . as *not vicious at all*” (p. 107; emphasis in original). But Markovits’s “evidence” that lawyers are burdened by guilt over their professional viciousness is a Catch 22. He argues that the fact that lawyers deny that they routinely lie and cheat is proof of the sense of guilt that dominates their lives (p. 107).

It is not clear where Markovits got the notion that practicing lawyers spend their lives agonizing over (or denying) their viciousness. Certainly,

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*Disjunction Between Legal Education and the Legal Profession*”, 69 WASH. L. REV. 561 (1994) (asserting a similar proposition to that in the *Michigan Law Review* articles).

14. Edwards, *supra* note 13, at 35.

15. David Hricik & Victoria S. Salzmann, *Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 SUFFOLK U. L. REV. 761, 766 (2005). Often authors include much more information than is necessary:

Even a casual reader of an American law review will notice that law review articles are packed with multiple asides and superfluous references to other disciplines. The eclecticism of legal academia is, indeed, one of its greatest strengths, and to a certain extent the impulse towards overinclusion is just a by-product of looking at legal concepts from multiple perspectives. Nevertheless, much of the scholarship in present-day law review footnotes moves beyond eclectic to outright babbling.

Benjamin Barton, *The Emperor of Ocean Park: The Quintessence of Legal Academia*, 92 CAL. L. REV. 585, 597 (2004) (reviewing STEPHEN L. CARTER, *THE EMPEROR OF OCEAN PARK* (2002)). We do not mean to criticize all references in legal analysis to nonlegal sources, a practice that goes back to the Brandeis brief. In fact, Freedman was the first legal scholar to introduce the work of behavioral psychologists regarding memory, in analyzing interviewing and coaching witnesses. See MONROE H. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* 64–69 (1975) [hereinafter FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM*]. Also, we were the first to use behavioral scientists’ studies in analyzing the importance of confidentiality in gathering sensitive information. MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* 138–39 (3d ed. 2004).

16. As Freedman previously noted:

One of the fascinating things about the study and practice of law is that theory and practice are inseparable. Jurisprudence is essentially theory—the study of the philosophy of law. But jurisprudence can determine practical results in profound ways. . . . *For the practicing lawyer, there is nothing more practical than theory.*

MONROE FREEDMAN, *CONTRACTS: AN INTRODUCTION TO LAW AND LAWYERING* 214, 217 (2009) (italics and bold-face in the original).

17. P. 39 (“I am claiming that lawyers are *professionally obligated* to lie and to cheat, and not just that they will in practice tend to do so.”) (emphasis in original).

that is not our experience. Nor is it the experience of hundreds of practicing lawyers with whom Freedman has worked during more than half a century as an associate, partner, supervisor, co-counsel, or consultant, or is it the experience of the numerous public defenders, legal aid lawyers, and clinical law faculty, fellows, and students with whom Smith has worked for the past quarter century.<sup>18</sup> For us and for the countless others we have known, the practice of law has been an exhilarating, gratifying, and essentially moral profession of serving others and of maintaining the ideals of our constitutional democracy.<sup>19</sup>

We know of no study that documents widespread lawyer unhappiness due to the ethics of law practice. On the other hand, we are well aware of unhappiness—even some agonizing—among associates at large law firms.<sup>20</sup> But the agonizing we have observed and read about has been over the unreasonable demands on their time, which has significantly interfered with family life. In addition, any concerns over lying and cheating has not related to third parties, but rather to the inflation of billable hours to clients<sup>21</sup>—a serious matter, but not what Markovits is concerned about. Indeed, he

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18. It is impossible to list all the happy lawyers we know who faithfully serve their clients day in and day out, and for whom it is a privilege to do so. For a tiny sample, we offer Ralph Cathcart, a civil practitioner in New York; Paul Conway, a career public defender in Philadelphia; W. Tucker Carrington, a criminal defense lawyer and clinical teacher who runs the Mississippi Innocence Project; Lawrence Fox, a corporate lawyer in Philadelphia; Eric Freedman, a constitutional law professor in New York and principal coordinator and resource for death penalty and Guantanamo litigation; Joel Hirschhorn, a criminal defense lawyer in Miami; Marsha Levick, cofounder and deputy director of the Juvenile Law Center in Philadelphia; Judith Levin, a civil rights and criminal defense lawyer in New York; William Montross, a capital defense lawyer at the Southern Center for Human Rights in Atlanta; Michelle Roberts, a civil and criminal lawyer in Washington, D.C.; Hubert Schlosberg, a civil practitioner in Washington, D.C.; Ilene Seidman, a career civil poverty lawyer and clinical teacher in Boston; David Singleton, the founder and director of the Ohio Justice and Policy Center in Cincinnati; Clive Stafford Smith, the founder and director of Reprieve, a London-based human rights organization; Robin Steinberg, the founder and director of the Bronx Defenders in New York; Ralph Temple, a civil practitioner in Ashland, Oregon; and Chuck Watson, a criminal defense lawyer in Bozeman, Montana.

19. See, e.g., FREEDMAN & SMITH, *supra* note 15, at chs. 2–3; ABBE SMITH, *CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER'S STORY* (2008) [hereinafter SMITH, *CASE OF A LIFETIME*]; Monroe H. Freedman, *Legal Ethics from a Jewish Perspective*, 27 TEX. TECH L. REV. 1131 (1996); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (2000); Abbe Smith, *Defending the Unpopular Down-Under*, 30 MELB. U. L. REV. 495 (2006); Abbe Smith, *For Tom Joad and Tom Robinson: The Moral Obligation to Defend the Poor*, 1997 ANN. SURV. AM. L. 869 (1997); Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of a Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1 (1993) [hereinafter Smith, *Rosie O'Neill*]; Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443 (1999); Abbe Smith, *The Difference in Criminal Defense and the Difference it Makes*, 11 WASH. U. J.L. & POL'Y 83 (2003); Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203 (2004).

20. See, e.g., DOUGLAS LITOWITZ, *THE DESTRUCTION OF YOUNG LAWYERS: BEYOND ONE L* (2006); William D. Henderson & David Zaring, *Young Associates in Trouble*, 105 MICH. L. REV. 1087 (2007) (reviewing NICK LAIRD, *UTTERLY MONKEY* (2005), and KERMIT ROOSEVELT, *IN THE SHADOW OF THE LAW* (2005)).

21. See Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171 (2005).

specifically declines to talk about the “economic structure of the legal profession.”<sup>22</sup>

We are not even certain that lawyers are so unhappy—at least in comparison to other professionals or working people generally.<sup>23</sup> Nonetheless, Markovits tries to demonstrate that lawyers unhappily and routinely lie and cheat by referring to various activities that are common in law practice and that most practicing lawyers consider perfectly ethical. He offers, as an important example, lawyers “lying” in negotiations. However, in doing so, he misstates the Comment to the *Model Rules of Professional Conduct*, which, he says, “expressly contemplates that lawyers may lie about what their clients will accept to settle a case,”<sup>24</sup> and he cites a case in which he says, incorrectly, that a court declined to discipline a lawyer for “puffing” in negotiations.<sup>25</sup>

The Comment to Model Rule 4.1 does say that some misstatements of fact are acceptable as “conventions,” that is, as expected and accepted norms of behavior within a group. For example, in the case of lawyers in negotiations, the kind of statement or convention that is referred to is the use of language that is clearly understood by the participants to mean something other than the literal meaning of the words that are used. Thus, if Lawyer D says that his client is willing to pay \$100,000 and not a penny more, Lawyer P is not expected to take the statement literally and does not do so. Rather, she understands Lawyer D to mean that the defendant would like to keep the settlement as close to \$100,000 as possible, but that Lawyer D intends that figure to be the beginning, not the end, of the negotiations. Accordingly, when Lawyer P responds that her client is determined to go to trial unless the settlement is at least \$180,000, both lawyers understand that the ultimate settlement will probably be approximately \$140,000, give or take \$5,000 or \$10,000. To call either lawyer’s posturing a lie, much less “vicious,” is simply silly.

Similarly, Markovits criticizes lawyers’ legal arguments as “lies” when they try to persuade courts to rule in ways they privately think are incorrect (p. 53). He says that unlike judges and juries who dispassionately apply the

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22. P. 2 n\*. Markovits addresses this question in a footnote only. In the same note, he writes that “insofar as it is immoral for lawyers to sell their services to the highest bidders, this wrong is incidental . . . to the lawyer’s professional role.” *Id.* Another agonizing matter Markovits fails to recognize is the plight of the public defender who is given too little time and too few resources to give adequate representation to his or her clients, but who nevertheless gives the false appearance of effective representation. See Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911 (2005).

23. See John P. Heinz et al., *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735 (1999) (finding that lawyers are not unhappier than other professionals).

24. P. 55 (citing MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. 1 (2003)).

25. *Id.* (citing *Roberts v. Sears, Roebuck & Co.*, 573 F.2d 976 (7th Cir. 1978)). The case involves negotiations between two lawyers on behalf of their clients. One lawyer was accused by the other party of having committed fraud. There is no reference in the opinion to “puffing,” no reference to a request for disciplinary action by anyone on any basis, and no reference to whether the court either imposed or declined to impose discipline on the lawyer.

law to facts in an effort to determine a "true account of the facts of a case," adversary advocates "aggressively . . . manipulate both the facts and the law to suit their clients' purposes" and "promote [false] beliefs in others" (p. 3).

We should note first that in our own practice, we have often argued for a result that we would have adopted as a judge. This is partly the result of our choice of practice area and clients and partly the result of sound tactics.

But even if we do not "privately believe" in a particular case theory or argument, few judges expect advocates to be stating a personal view of the facts or law. They understand that we are engaged in *advocacy*. Both lawyer and judge understand that the lawyer is saying, in effect, "Your Honor, this is the way you can render an objectively sound and reasonable judgment that favors my client." That is a service to the court (which is free to adopt the argument or not) as well as to the client. To call this kind of advocacy a lie, much less *vicious*, is, again, silly.

Half a century ago, legal philosopher Lon Fuller analogized a lawyer's argument in court to a baseball catcher "riding with the pitch" and "pulling" a pitch into the strike zone.<sup>26</sup> As is true of Markovits's fancied lying and cheating by lawyers, it is fatuous to think of catchers as lying and cheating when they pull pitches, or base runners as being dishonest when they "steal" bases, or pitchers as deceitful when they throw a change-up. These are all tactics that are analogous to lawyers' conduct that is "permitted by the law and the Disciplinary Rules"<sup>27</sup> and that are expected, accepted, and respected by those engaged in the particular undertaking.

Clearly, therefore, the context of one's actions is critical. Inevitably, like other impractical scholars before him, Markovits identifies the source of what he sees as lawyers' pervasive immorality in role differentiation, specifically in the lawyers' role in our adversary system.<sup>28</sup> As he explains, adversary lawyers "commonly do, and indeed are often required to do, things in their professional capacities, which, if done by ordinary people in ordinary circumstances, would be straightforwardly immoral."<sup>29</sup> Thus, Markovits repeatedly criticizes what has come to be called "the adversary

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26. See Richard Armour, *The Ethics of Subterfuge*, SPORTS ILLUSTRATED, Oct. 26, 1959 (reporting class discussion at Harvard Law School led by Professor Fuller that analyzed the ethics of various forms of sports subterfuge), available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1134168/3/index.htm>; *All Yours, Professors*, SPORTS ILLUSTRATED, Nov. 9, 1959 (including dialogue between Professors Lon Fuller and Yale Kamisar regarding the merits of Fuller's views on sports subterfuge), available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1134123/1/index.htm>.

27. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101 (1980); see also Monroe H. Freedman, *Henry Lord Brougham, Written by Himself*, 19 GEO. J. LEGAL ETHICS 1213, 1213 n.6 (2006) (noting ethical restrictions on a lawyer's zealous representation of a client).

28. See generally Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980) (arguing that lawyers should not attempt to separate their professional moral judgments from their personal moral judgments); Richard Wasserstrom, *Lawyers As Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975) (analyzing two pervasive moral criticisms of lawyers).

29. Pp. 1–2. Markovits correctly notes that adversary lawyering is not restricted to advocates in courtrooms, but is the function of all lawyers who serve clients and must anticipate the potential for adversarial challenge to their work product. Pp. 15–16; see also FREEDMAN & SMITH, *supra* note 15, at 72.

system excuse” (pp. 6–9, 103–08, 156–58). As is typical of such critics, however, Markovits fails to do justice to that “excuse,” or to what we prefer to call the moral justification of the lawyer’s role in our constitutionalized adversary system.<sup>30</sup>

Markovits has almost nothing positive to say about the adversary system or those who believe in it. He offers a cramped and nearly incoherent description of the argument in favor of adversarial advocacy:

[A]ggressively partisan lawyers play an essential part in an impartially justified division of moral labor. Although lawyers may appear impermissibly to favor their clients over others, a broader view reveals that competition among partisan advocates concerned primarily, and indeed almost exclusively, for their clients produces, on balance, the best justice for all.<sup>31</sup>

He adds that defenders of the adversary system are “simplistic” and out-dated thinkers who fail to see that their view of things has been “increasingly in retreat” (p. 105).

Nowhere in 253 pages of text does Markovits provide a truly positive assessment of the adversary system (pp. 6–9, 103–08, 156–58). Nor does he explain what might be meant by “the best justice for all” in the one description he provides. As a result, he fails to give his readers anything approaching a fair presentation of the adversary system, which is the essential context of the lawyer’s role in the United States.

We count ourselves among the defenders of the adversary system—what Markovits correctly calls the “traditionalists.”<sup>32</sup> Our own book on legal ethics, *Understanding Lawyers Ethics*,<sup>33</sup> presents a systematic position on lawyers’ ethics rooted in the Bill of Rights and in the autonomy and dignity of the individual, and reflecting the traditional client-centered view of the lawyer’s role in an adversary system.<sup>34</sup>

In our book, we explain that the adversary system has been constitutionalized in this country by a panoply of fundamental rights that were incorporated into the First, Fourth, Fifth, Sixth, Seventh, and Fourteenth

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30. See FREEDMAN & SMITH, *supra* note 15, at chs. 1–2. The “adversary system excuse” is used pejoratively by Markovits. The phrase was first coined by Professor Luban, who does not share Markovits’s wholesale criticism of adversarial advocacy. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 50–66 (1988); David Luban, *The Adversary System Excuse, in THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS* 83, 83–122 (David Luban ed., 1983).

31. Pp. 6–7. Perhaps this is a postmodern version of Alan Dershowitz’s famous description of the adversary system producing a sort of “rough justice.” ALAN M. DERSHOWITZ, *THE BEST DEFENSE* xviii (1982).

32. Markovits uses Freedman to represent the traditionalists. P. 8 (citing MONROE H. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* (1975)). We refer to ourselves as “traditionalists.” FREEDMAN & SMITH, *supra* note 15, at vii.

33. FREEDMAN & SMITH, *supra* note 15. The fourth edition of this book is due to come out in 2010.

34. *Id.* at vii. Markovits does not cite this book or its earlier editions going back to 1990. However, he does cite an article that Freedman wrote forty-four years ago and a book he wrote thirty-five years ago. Pp. 258 n.32, 264 n.64, 266 n.10 (citing Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966)); pp. 257 n.14, 266 n.10, 320 n.95 (citing FREEDMAN, *supra* note 32).

Amendments to the Constitution, and that have been elaborated upon by the Supreme Court throughout history.<sup>35</sup> We also explain that those constitutional values express the deeply moral ideals of individual dignity and autonomy, and serve to safeguard individual liberties against oppressive government power.<sup>36</sup>

In addition, we argue that the adversary system is the most effective means of determining the truth, particularly in cases in which facts are in dispute.<sup>37</sup> We also point out that the adversary system has historically been an effective method for peacefully resolving disputes, including those coming from serious political and racial discord.<sup>38</sup> Further, we explain that the adversary system reflects a belief in democratic decision making through the jury system, and in the importance of giving individuals control over their cases, which gives them a greater sense of having been treated fairly and helps to legitimize the system generally.<sup>39</sup>

We will not repeat these fairly lengthy discussions here. But we want to state clearly that there are compelling reasons for a principled person to choose to be a lawyer and to carry out her professional responsibilities with a sense of moral conviction and personal gratification.<sup>40</sup>

There is an additional aspect of the lawyer's relationship to her client that bears heavily on her moral responsibilities and which is ignored by Markovits and other scholars who criticize client-centered lawyering.

When a lawyer chooses to represent a client,<sup>41</sup> she necessarily becomes the client's fiduciary.<sup>42</sup> Supreme Court Justice Benjamin Cardozo explained the obligation of a fiduciary this way:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. *Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard*

35. FREEDMAN & SMITH, *supra* note 15, at 13.

36. *Id.* at 13, 15–30, 39–40.

37. *Id.* at 30–39.

38. *Id.* at 20–26; *see also infra* note 43 and accompanying text.

39. FREEDMAN & SMITH, *supra* note 15, at 39–42. Markovits's discussion of democratic theory, pp. 178–84, takes a different tack from ours. We believe that client-centered adversarial advocacy is not only consistent with democratic theory, but furthers it.

40. Markovits seems to share this point of view in his discussion of democracy, adjudication, and adversary advocacy. *See* pp. 178–208. But this discussion is tentative, vague, incomplete, and not terribly original. He concludes, "the political argument cannot, as I have emphasized from the start, sustain the justice of adversary adjudication . . . and the argument about legitimacy therefore cannot defend adversary advocacy to the satisfaction of impartial morality." P. 210.

41. The situations in which a lawyer is required to represent a client against the lawyer's wishes are extremely rare. *See* FREEDMAN & SMITH, *supra* note 15, at 72–75 (discussing "Moral Accountability in Choosing Clients"). Also, a lawyer is permitted to withdraw as long as doing so would not cause material harm to the client, and the lawyer would be required to withdraw if the lawyer's objections were so strong as to create a risk of ineffective representation. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(1) (1983).

42. Markovits mentions the word "fiduciary" only once, in a footnote reference. P. 260 n.28 (citing RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006)).

of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine *the rule of undivided loyalty* by the “disintegrating erosion” of particular exceptions.<sup>43</sup>

Thus, the lawyer assumes the responsibility to make the client’s cause her own and to carry out the client’s lawful objectives by all lawful and ethical means that are reasonably available. In this way, the lawyer honors the client’s status as a free person in a free society, respects the client’s dignity as an individual, and assists the client in exercising his or her autonomy.

Of course, a lawyer may simply decline a particular representation, and the lawyer’s power to do that is quite broad.<sup>44</sup> If a lawyer does choose to represent a client, however, the only way for the lawyer to avoid her responsibility as a fiduciary is to put the client on notice that she will limit the scope of the representation. However, that ability is properly restricted by Model Rule 1.2(c), which permits a lawyer to limit the representation, but only to an extent that is reasonable and if the client consents. This, of course, is only fair to members of the public, who properly assume that a lawyer will in fact defend and advance their interests in all aspects of the undertaking and who rely on that assumption. Moreover, as a practical matter, it is the rare client who is willing to accept less than a full commitment from a lawyer.

What this means is that the lawyer will have made a promise—expressly or impliedly given her word upon which the client can be expected to rely—that she will use all lawful and ethical means that are reasonably available to advance the client’s lawful interests in all aspects of the representation. Promises, of course, are generally recognized as among the heaviest of moral obligations. For Immanuel Kant, for example, keeping promises is a moral imperative.<sup>45</sup> It is interesting, therefore, that Markovits, along with other scholars who criticize lawyers for zealously representing their clients, ignores the moral and ethical imperative of the lawyer’s promise to the client and the client’s reliance on that promise.

Markovits, perhaps more than other critics of zealous advocacy, seems to find advocacy itself distasteful.<sup>46</sup> He says that he is interested only in what

43. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, C.J.) (citing *Wendt v. Fischer*, 154 N.E. 303 (N.Y. 1926)) (involving a businessman described as a “joint adventurer,” rather than a lawyer) (emphasis added).

44. See FREEDMAN & SMITH, *supra* note 15, at 72–75 (discussing moral accountability in choosing clients).

45. IMMANUEL KANT, *Theory of Ethics*, in KANT SELECTIONS 268, 310 (Theodore Meyer Greene ed., 1929); see also THOMAS HOBBS, *LEVIATHAN* 202 (C.B. Macpherson ed., Penguin Books 1968) (1651) (“But when a Covenant is made, then to break it is *Unjust*: And the definition of INJUSTICE, is no other than *the not Performance of Covenant*.”); JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* 27 (George Routledge and Sons Ltd. 1909) (1690) (“Justice, and keeping of contracts, is that which most men seem to agree in.”).

46. Other critics tend to focus on lawyers’ conduct at trials—for example, putting forward “false” theories, cross-examining truthful witnesses to suggest they are lying, putting on perjurious witnesses, and arguing all of the above at closing. See, e.g., Harry I. Subin, *The Criminal Lawyer’s “Different Mission”: Reflections on the “Right” to Present a False Case*, 1 GEO. J. LEGAL ETHICS

it is like “ethically . . . to practice law with an adversary advocate’s professional commitments,” and that he is not addressing the issue “emotionally or psychologically” (p. 6; footnotes omitted). However, there is more than ethics in Markovits’s central concern with lawyers’ guilty consciences over adversary advocacy. Moreover, it is a concern that is not shared by the many lawyers who have fought passionately for another person in need or in trouble, for a cause that is dear, or for a principle that is cherished.

Markovits eschews including “sensational” cases in his book as better “suited to casuistry” (p. 20). But some real life cases would have helped ground the discussion. For example, Markovits makes all sorts of assertions about criminal law practice—such as “professional detachment” is more readily abandoned in a criminal context (p. 82), and lawyers respect civil clients more than criminal ones (p. 84)—that seem to come from nowhere. Markovits might have pondered zeal in the defense of one who has been wrongfully accused or convicted in a time of numerous DNA exonerations,<sup>47</sup> or zeal in defense of Guantanamo detainees.<sup>48</sup> As one Guantanamo defense lawyer has written:

I now appreciate not only the tenuousness of our republic but also the special role that lawyers play in maintaining our constitutional system if it is to be maintained. . . . As frustrating, disappointing, and discouraging as this experience has been, I would again drop everything . . . to fight for our fundamental rights. . . . That [request] in 2005 [for defense lawyers to serve at Guantanamo] changed my life, and I hope along the way I can change the lives of others around me. Who knows, maybe next time I will be the one sending out the [request].<sup>49</sup>

Although other critics think the “adversary excuse” is most justified in a criminal context,<sup>50</sup> Markovits barely discusses criminal defense, explaining

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125 (1987). But Markovits doesn’t confine his criticism to “deceiving tribunals.” Pp. 48–54. He is equally concerned with lawyers “lying and cheating” in investigation, discovery, negotiation, drafting of legal documents, and settlement. Pp. 57–66.

47. As this review goes to print, 244 people have been exonerated by DNA evidence in the United States. Innocence Project, <http://www.innocenceproject.org/know> (last visited Oct. 16, 2009). For an account by one of the authors of her efforts to free a wrongly convicted prisoner, see SMITH, *CASE OF A LIFETIME*, *supra* note 19.

48. For two excellent books featuring first-person accounts of defending Guantanamo detainees, see JOSEPH MARGULIES, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006); CLIVE STAFFORD SMITH, *EIGHT O’CLOCK FERRY TO THE WINDWARD SIDE: SEEKING JUSTICE IN GUANTANAMO BAY* (2007). For an article about a military defense lawyer’s representation of a detainee, see Ellen Yaroshesky, *Zealous Lawyering Succeeds Against All Odds: Major Mori and the Legal Team for David Hicks at Guantanamo Bay*, 13 *ROGER WILLIAMS U. L. REV.* 469 (2008) (recounting Major Michael Dan Mori’s extraordinary—and ultimately successful—efforts to free Australian national David Hicks). Disclosure: Freedman was a consultant for Major Mori, Clive Stafford Smith, and other Guantanamo defense lawyers.

49. H. Candace Gorman, *My Experiences Representing a Guantanamo Detainee*, *LITIG.*, Spring 2009, at 10, 16.

50. See e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 58–66 (1988); David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS* (David Luban ed., 1983); DEBORAH L. RHODE, in *THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 49–80 (2000); David Luban, *Are Criminal Defenders Different?*, 91 *MICH. L. REV.* 1729, 1762–63 (1993); see also WILLIAM H. SIMON, *THE PRACTICE OF*

that “[t]he distinctiveness of the criminal context should not be overstated” (p. 84 n. \*).

Restraint in lawyering seems to be what Markovits is after; restraint and a kind of purity. Lawyers should be more *dignified*, they shouldn’t be so aggressive, and they should be absolutely convinced of the righteousness of their cause. Yet, in our experience, the very people who claim to disdain zealous lawyering seek exactly that when they or a loved one needs a lawyer.

Markovits’s professed ultimate goal is to rescue lawyers from the pervasive sense of guilt that he has conjured up. He tells his readers he truly believes in lawyers, he’s on their side, and his “sympathies lie with lawyers rather than with their detractors” (p. 5). To save them, he offers a “redefinition” of the lawyer’s role—what he calls an “integrity-preserving role-based redescription” (p. 223). This, he says, “involves the *context* in which the resort to role arises” (p. 166; emphasis in original). But this redefinition/redescription proves to be merely word-play, rather than any serious or insightful reconception of the adversary system or practice of law.<sup>51</sup>

His redefinition consists largely of replacing the word “loyalty” with “fidelity.”<sup>52</sup> We would not quarrel with this, since Freedman used the word fidelity in place of loyalty twenty-nine years ago when he drafted the American Lawyer’s Code of Conduct,<sup>53</sup> and Smith identified fidelity as the “governing virtue” for the criminal defense lawyer in an article she wrote ten years ago.<sup>54</sup> Nevertheless, it is difficult to see how this could help dissipate Markovits’s widespread lawyerly guilt.

JUSTICE: A THEORY OF LAWYERS’ ETHICS 187–94 (1998) (conceding that adversarial advocacy is justified in criminal defense in view of “excessive and discriminatory criminal punishment”).

51. A brief word about style. Markovits is given to considerable repetition and turgid language. There are too many examples to note them all. At one point, Markovits states:

The modern hegemony of impartialist moral ideas has therefore given rise to a new and distinctive form of subjugation, associated with understanding morality solely in terms of sacrificing oneself to satisfy burdensome duties owed others—as an external force in one’s life, to which one must *submit*. It has also engendered a distinctive form of alienation, associated with identifying guilt as the principal moral motive. Both difficulties are dramatically articulated in existentialist calls for making authenticity the prime virtue of action.

P. 110 (emphasis in original) (footnote omitted). At another point, Markovits states, “[I]t should be possible . . . to reorient role-insularity so that it does not compete with impartial morality but rather gives one cultural and institutional expression (among many) to the need for boundedly rational beings to engage impartial morality through the mediation of contingent and particular commitments.” P. 253.

52. Markovits illustrates this position as follows:

Perhaps surprisingly, the principle of professional detachment—the requirement that adversary advocates withdraw from their own judgments of their clients’ cases—may *itself* be recast as a characteristically lawyerly virtue, which I shall call *fidelity*. Fidelity is a complex virtue—quite different from loyalty *simpliciter* and its cognates and much more difficult to achieve.

P. 90 (emphasis in original) (footnote omitted).

53. See THE ROSCOE POUND-AM. TRIAL LAWYERS FOUND., THE AMERICAN LAWYER’S CODE OF CONDUCT 201 (Public Discussion Draft 1980) (including a chapter entitled “Fidelity to the Client’s Interests”).

54. Smith & Montross, *supra* note 19, at 515.

Markovits also offers as a role redescription the awkward phrase “negative capable commitment.”<sup>55</sup> Markovits explains this as the lawyer serving the role of mouthpiece. Thus, when a lawyer “presents an argument she does not personally believe[,] she proceeds not as liar but as mouthpiece, which is consistent with her negatively capable commitment accurately to articulate what clients claim rather than to determine what she (privately) thinks is true” (p. 165).

Again, we would not argue with this, because Freedman said much the same thirty-four years ago when he wrote, “Let us say it plainly: a lawyer is a mouthpiece in the sense that one of the lawyer’s most important functions is to speak for the client’s interest in the most persuasive way possible.”<sup>56</sup> Also, Smith has repeatedly written about lawyers providing a “voice” for their clients.<sup>57</sup> But again, it is difficult to see this as a revelation calculated to assuage Markovits’s idea of pervasive professional guilt.

Finally, Markovits says that lawyers serve a political function by legitimizing a legal process that results in the peaceful resolution of disputes.<sup>58</sup> Once again, we agree. As we have said, “[S]ociety, through the legal system, channels the grievances of people and groups into socially controlled, non-violent means of dispute resolution. We—the lawyers—play an indispensable part in that constructive social process.”<sup>59</sup> By repeating these familiar themes as if they were new insights, Markovits claims to have achieved his goal of rescuing lawyers from their own viciousness. Thus, “By embedding lawyerly fidelity (with its attendant negative capability) in a political context, this approach achieves two successes for lawyers’ ethics that have remained beyond the grasp of more traditional arguments that sound in morality and develop, in one way or another, the adversary system excuse for partisan lawyering” (p. 208).

But no. Markovits’s “positive conclusion” for the profession is not that lawyers are heroic defenders of individual liberties who serve the essential function in a constitutional democracy of maintaining individual dignity and autonomy (p. 12). His final judgment is that his argument “has the form of tragedy, and that lawyers are *tragic* villains” (p. 246; emphasis in original).

We disagree. Although the practice of law has its share of tragedy—whether due to random misfortune or pervasive injustice—it is ultimately uplifting and gratifying. We know we are not alone in this conviction. This is not the time to discourage lawyers and prospective lawyers from the zealous, client-centered practice of law. On the contrary, there has never been a

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55. P. 165. Markovits elaborates on this notion further: “[J]ust as poetic negative capability preserves the intellectual imagination and promotes accommodation among inconsistent beliefs, so lawyerly negative capability preserves the practical imagination and promotes accommodation among incompatible interests.” P. 166.

56. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM*, *supra* note 15, at 12 (emphasis in original).

57. See, e.g., Smith, *Rosie O’Neill*, *supra* note 19.

58. P. 208. However, Markovits does not refer to the essential political function of protecting individual liberties against governmental power.

59. FREEDMAN & SMITH, *supra* note 19, at 19.

greater need for lawyers willing to champion individual liberties and human rights.

What makes lawyers unhappy is not Markovits's fictitious "vicious" lawyer. What makes lawyers unhappy is books like this one.