David Luban, Review of Daniel Markovits, A Modern Legal Ethics: Adversary Advocacy in a Democratic Age

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A Modern Legal Ethics:
Adversary Advocacy in a Democratic Age
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In his ambitious, original, and theoretically elegant book, Daniel Markovits defends the traditional lawyer's role as a one-sided partisan advocate who favors client interests regardless of the justice of the cause or the tactics. He unfolds the argument in dialectical fashion: he begins by setting out the moral critique of the advocate’s role in an unusually strong form, then argues that from an alternative point of view the critique disappears altogether because the lawyerly vices may be redescribed as a virtue distinctive to the lawyer's role, which he calls “fidelity.” Then in a final dialectical twist Markovits speculates that the conditions under which his “happy conclusion” (79, 103) follows no longer exist in modern society. That is because impartial cosmopolitan morality has displaced the insular role moralities and self-regulating guilds that once supported a lawyer’s capacity to redescribe lawyerly vices as virtues.

Markovits argues that the basic structure of adversary advocacy necessarily compels lawyers to lie and cheat. Although ethics rules can mitigate lying and cheating by prohibiting its most egregious forms, no possible set of “metes and bounds” on advocacy (Markovits's term for ethics regulations) can eliminate the lawyerly vices without abolishing adversariness altogether. Client loyalty and
control require lawyers to make arguments they don’t believe (lying) and to promote outcomes they recognize to be substantively unjust (cheating).

Reformers in both the academy and the bar want to push legal ethics norms into closer alignment with ordinary morality. Markovits believes their agenda has prevailed in recent years (105), but he finds debates over the metes and bounds of advocacy unsatisfying, because as long as lawyers remain liars and cheaters, fine-tuning the norms cannot offer lawyers a morally attractive ideal that they can pursue with integrity. In any event, Markovits finds normative ethics unphilosophical: “The task of philosophical ethics is ... primarily to elaborate what is rather than to command what should be” (19).

However, labeling even minor dissonances “lying” and “cheating” and declaring them “lawyerly vices” inaccurately describes what is. It begs the question of whether ordinary morality tolerates low-level forms of lying and cheating in adversarial situations. Must a parent arguing against his child’s expulsion from middle school exhibit “a general, affirmative commitment to truthfulness” (48), as Markovits supposes when he labels advocates who deviate from that commitment liars (39-40, 48)? May the parent, instead, argue that the expulsion is unfair even if he fears that it isn’t? At a job interview, may a candidate assert more confidence in her own abilities than she really has? May she answer illegal questions (for example, about her child-bearing plans) evasively because she really wants the job? If behaviors like these make people liars and cheaters, it isn’t obvious that ordinary morality invariably condemns liars and cheaters.
This is important if you think the problem of lawyers’ role morality arises from dissonance between role morality and ordinary morality. If the metes and bounds of advocacy prohibit egregious lying, and permit only departures from truthfulness equivalent to these examples, the lawyer’s role morality is not as vicious as the words “liar” and “cheater” suggest.

Actually, Markovits’s own theory is more normative than he recognizes. His defense of advocacy condemns “forms of lying that help clients to misrepresent rather than to express themselves and forms of cheating that close off rather than open up the judicial process” (95). The latter principle would forbid widely used tactics such as strategic delay to exhaust an adversary’s resources, discovery abuse, or filing a counterclaim to intimidate an adversary into dropping a lawsuit. More generally, Markovits would require rules of ethics that make adjudication more efficient, accurate, and fair (193); and he argues against partisanship that “is too aggressive and succeeds at subverting the legal process into a one-sided tool of his client’s will” (202). It turns out to be harder to avoid normative ethics than Markovits supposes.

II

Markovits notes that lawyers often defend themselves against charges of immorality by the “adversary system excuse” (ASE): the adversary system requires one-sided partisanship, and the adversary system can be justified by impartial moral reasons, such as the (doubtful) claims that it is the optimal system for finding truth or defending rights. Critics of the ASE (such as myself—I coined the phrase “adversary system excuse” in an eponymous 1983 essay rejecting it) are likewise
ethical impartialists: they object that pursuing client interests against all others cannot be reconciled with the moral equality of persons. Markovits observes that even if the ASE succeeds (as he apparently thinks it does), it can at most show that the advocate's vocation is a necessary evil, not a moral good. He wishes to show the latter, and to do so he launches a general attack against the "hegemony" of impartial morality (in either its third-person utilitarian form or its second-person Kantian form) over first-person moral ideals. It is via first-person morality and the demands of personal integrity, rather than the ASE, that Markovits hopes to defend adversary advocacy.

III

Markovits argues that advocates can maintain personal integrity through allegiance to one defining virtue, fidelity—by which he means not fidelity to law, but fidelity to the client's story, grasped empathetically and advocated without interposing the lawyer's own values or beliefs. Markovits borrows Keats's concept of "negative capability," according to which the poet's art lies in suppressing her own viewpoint to permit the subject of the poem to shine forth. Fidelity and negative capability go together, and require the lawyer to suppress her own conscience to tell her client's story. Viewed from the standpoint of fidelity, the lawyer is the client's mouthpiece, not a liar, and the client's champion, not a cheater (165). Under these redescriptions, a lawyer can rightly regard advocacy as a positive virtue, rather than a necessary evil.

Markovits argues that lawyers' fidelity and negative capability allow clients to participate in the adjudicatory system, and participation is essential to
legitimating adjudication. That is because participation transforms the nature of
disputes so that even the loser to whom substantive injustice is done can accept the
result of adjudication. Participating in adjudication transforms disputes in three
ways: by translating private grievances into more general terms, by moderating
unreasonable demands and expectations, and "by transforming brute demands into
assertions of right, which depend on reason and therefore...implicitly recognize the
conditions of their own failure" (188-89).

Markovits then argues as follows: (i) Societies require some mechanism like
adjudication to transform disputes so they can be resolved. (ii) That mechanism
must be legitimized, and indeed “Justice is secondary to legitimacy in political life”
(202n.). (iii) Client participation legitimates adjudication. (iv) Clients participate
through their lawyers. (v) But clients can accept this form of participation only if
they can trust their lawyers to be faithful and loyal partisans (197).

This is a controversial argument: anyone who agrees with Rawls that justice
is the first virtue of social institutions will reject step (ii) and deny the conclusion.
Moreover, contrary to Markovits’s stated aim (178), this argument offers an entirely
impartialist and in fact instrumental defense of adversary advocacy. Lawyers’
fidelity and loyalty are valuable because less faithful lawyers could not reconcile
clients to unhappy legal outcomes. Even if the argument succeeds, it is hard to see
how Markovits has provided more than another version of the ASE. There is
nothing first-personal about the argument, and a lawyer who says to herself "I may
be doing injustice, but at least I am legitimating adjudication" has accepted advocacy
as a lesser evil.
Markovits believes that he has gone beyond the ASE because the virtues of fidelity and negative capability have “general appeal” (209) on their own. However, the concept of negative capability does not transfer smoothly from the realm of poetry to that of action. Negative capability of a high order allows Shakespeare to portray characters like Richard III and Shylock sympathetically, shorn of moralizing. But it is one thing for Shakespeare to suppress moral judgment when he portrays the characters; it would be quite another if in real life he lawyered successfully for the disinheriance of the princes or the enforcement of Shylock’s contract with Antonio. Negative capability serves poetic truth; in the world of action, suppressing conscience and advocating for wrong cannot so easily be defended by redescribing it as negative capability. That is an evasion.

IV

Following Bernard Williams, Markovits gives central importance to the lawyer’s own integrity; and his chief difference from other legal ethics theorists is that he substitutes the question “how can a lawyer preserve her integrity?” for the question “what should a lawyer do?” Throughout the book he takes what Hart calls an external point of view on morality (reminiscent of Nietzsche and Williams). He asks how moral principles serve to integrate the self, rather than taking them seriously from an internal point of view as candidate right answers to moral questions.

Markovits develops a version of Williams’s familiar argument that placing impartial morality in a hegemonic position over first-personal moral ideals makes integrity impossible and undermines the conditions under which an ethical life is
thinkable. Markovits believes that Williams erred by casting this as a psychological argument about the cost of abandoning our ground projects. Markovits recasts first-personal moral ambitions as a condition of agency for creatures with bounded rationality and bounded willpower. Because we are boundedly rational, it is sometimes more reasonable not to revisit commitments already made; and because we have an exhaustible reservoir of willpower, it is sometimes more reasonable not to revisit courses of action already commenced. Markovits applies these ideas specifically to morality: it is sometimes more reasonable not to permit impartial moral reasons to encroach on first-personal moral intentions and ambitions already formed and already in motion.

Not only is it sometimes unreasonable to reconsider a decision or revise an intention, it can even be unreasonable to revise intentions already formed after we have reconsidered them and found them mistaken, because doing so depletes our reservoir of willpower (147-48). And, Markovits adds, in such cases it is unreasonable for others to criticize us for failure to reconsider or to revise intentions.

These claims are too strong to be right. Consider a non-moral case. After prolonged deliberation, Cecil decides to invest $50,000 in a speculative start-up business. Losing $50,000 will not destroy him, but he is not wealthy, and it represents most of Cecil’s life savings. His friend Cecilia phones him and urgently tells him that she has learned damaging information about the investment. On Markovits’s view, the following conclusions follow: (a) it may be reasonable for Cecil to hang up on Cecilia without hearing what she has to say; (b) hearing what
she has to say and agreeing that it is damaging information, it may nevertheless be reasonable for Cecil not to pull the plug on the investment; and (c) it is unreasonable for anyone else to criticize Cecil for either (a) or (b) (144, 147-48). It also seems to follow—from (c)—that (d) it is unreasonable for Cecil to criticize himself for going ahead with the investment, and therefore (e) given a similar choice, it is reasonable for Cecil to do it again. This is no longer bounded rationality; this is boundless irrationality.

For similar reasons, Markovits’s account of the relation between first-person and impartial morality does not merely break the “hegemony” of impartial morality, but comes close to eliminating impartial morality. On his view, it may be reasonable for an agent not to reconsider a course of action undertaken because of her own first-person moral views, even in light of a strong impartial argument that the course of action is morally impermissible; this holds even if the victim explicitly calls the infraction to the agent’s attention (309 n. 47). And it is unreasonable for anyone to criticize the agent for declining to reconsider or to change course if she does reconsider, provided that she is acting on her first-person values (147-48). But condemning an act as morally impermissible is criticism; it follows, then, that outsiders are estopped from condemning the act. If so, impartial morality appears to have been exiled not only from the space of first-person deliberation (except when by coincidence the agent’s first-person moral ambitions track impartial morality), but also from the space of second- and third-person judgment. Markovits does not believe this: he accepts that “first-person ambitions (including...their departures from impartial morality) may be judged by others”
and he insists that first-personal values are a complement, not a substitute, for impartial morality (10, 169). But he does not explain how these conclusions are consistent with his arguments about the architecture of morality, based on bounded rationality and bounded willpower.

Markovits may respond that he has argued only that it is sometimes reasonable not to reconsider a course of action, not that sticking to your guns is always reasonable. But the “sometimes reasonable” position no longer sustains his argument for the priority of first-personal values. An impartialist will rightly insist that if reconsidering a course of action is ever reasonable, it will surely be so when the course of action is vulnerable to an impartial moral objection that someone explicitly calls to the actor’s attention. “Inertial” persistence in prior plans makes sense only when the plans are morally good or even neutral. Thus, Markovits cannot maintain an in-between position: either personal integrity trumps impartial morality or it does not. If it does, his position exiles impartial morality. If it does not, then his observation that bounded rationality and willpower require some commitments to stand unquestioned excludes commitments that violate impartial morality.

V

In the final section of the book Markovits argues that lawyers are “tragic villains,” because even though he has shown that it is “conceptually possible” (213) for a lawyer to live with integrity, modernity makes it practically impossible. Modernity believes in equality and cosmopolitanism, so role moralities like the lawyer’s can no longer be “authoritatively insular” (225). Today’s lawyers have
become “anxiously cosmopolitan” (229). Today outsiders regulate the bar; its social homogeneity has eroded; and lawyers specialize, identifying with particular types of clients or causes they always represent, which threatens to confuse negative capability with positive commitment to their side. (Startlingly, Markovits criticizes public interest lawyers as “the apotheosis of this narrow form of legal practice” (220)). Although Markovits denies that he is romanticizing the past (244), it is hard to read chapter 9 as anything other than nostalgia for the clubbiness and unaccountability of the late 19th century bar. For example, he repeatedly describes the bar “capitulating” (237, 239, 241) to external regulation.

Near the end of the book, Markovits comes close to suggesting that what is true for lawyers is true for “modernity quite generally” (249), so that, across the board, first-personal justification and integrity are no longer attainable although they once were. It is hard to take this conclusion entirely seriously. The realization that roles cannot be “authoritatively insular” is as ancient as Antigone, and cosmopolitanism goes back to the Stoics; conversely, living with integrity hardly seems like a vanished possibility in modernity.