

# Further Thoughts about *Legal Ethics from the Lawyer's Point of View*

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## INTRODUCTION

It is a pleasure to be read and a great pleasure to be argued with. Perhaps the greatest pleasure is to *answer*, especially insofar as one feels that one's critics have misunderstood or gone wrong. But although it is sometimes helpful to clarify confusions, there is always the risk that an effort to be exhaustive in this respect will become exhausting instead and that a rigorous emphasis on small differences will suppress larger and more important ones. For this reason, and also in order not to abuse the luxury of writing (at least for the moment) last, I shall resist the temptation to defend my earlier argument against every objection at every turn and instead use these pages (in the main) to emphasize the principal themes of the discussion and to articulate continuing disagreements. This approach has its drawbacks, to be sure. For example, the effort to emphasize larger themes requires me to leave many excellent smaller points unaddressed.<sup>1</sup> Moreover, I will undoubtedly fall short of my ambition to convey a fair account of the main lines of disagreement. My view of the broader terrain is itself influenced by the peculiar ground upon which I stand, and even a dispassionate treatment of the differences that these Responses illustrate will inevitably take on something of the character of a rebuttal. But even as I recognize the shortcomings of this approach – and my own shortcomings in executing it – I shall continue to emphasize the main lines of disagreement that the Responses display rather than to vindicate my own position. This effort will be most useful in propelling the discussion

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1. This will be especially true insofar as the Responses overlap and I choose one as the standard-bearer for arguments that several make. I will, in such cases, necessarily ignore interesting differences in emphasis among Responses that agree on a larger point.

forward, even if progress necessarily occurs only in fits and starts.

The account of the lawyer's ethical position that I propose in *Legal Ethics from the Lawyer's Point of View* may be broken, roughly, into three parts, and the three Responses to my argument fortuitously divide their attentions more or less evenly among them. First, I develop a set of quite general philosophical ideas about ethics, which emphasize a structural distinction between third- and first-personal ethical argument – that is, between ethical argument that emphasizes impartial concern for others and ethical argument that emphasizes a person's own projects and plans. I argue that the single-minded pursuit of third-personal impartial morality undermines the integrity of the moral personality, which I claim depends upon sustaining free-standing first-personal ethical commitments.<sup>2</sup> These ideas form the backdrop against which the “extraordinary complexity and intractability”<sup>3</sup> that I claim characterizes the modern adversary lawyer's ethical position arises. Alec Walen, however, doubts whether free-standing first-personal ethical ideals can be justified – and indeed whether they are intelligible at all – and he therefore rejects the philosophical frame into which I place my account of adversary legal ethics.<sup>4</sup>

Second, I develop a substantive characterization of the role obligations of adversary lawyers and of the tensions between these role obligations and the first-personal moral ideals of ordinary good people, and I connect this characterization to the more general ethical ideas that were my first preoccupation.<sup>5</sup> I claim that lawyers' professional obligations require them to betray the first-personal ideals and ambitions of ordinary good people, and I conclude on this basis that even if adversary advocacy is third-person impartially justified, “participating in the adversary system assaults the good adversary lawyer's integrity.”<sup>6</sup> Ted Schneyer, however, doubts whether the role obligations of lawyers and the first-personal ideals of ordinary people are in fact so different, at least when they are each properly understood, and he therefore doubts whether the threat to adversary lawyers' integrity is as pressing as I say – or, indeed, whether it arises at all.<sup>7</sup>

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2. See Daniel Markovits, *Legal Ethics from the Lawyer's Point of View*, 15 YALE J.L. & HUMAN. 209, 222-60 (2003).

3. *Id.* at 222.

4. 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 (2004) [hereinafter *Criticizing the Obligatory Acts of Lawyers*]. Ted Schneyer also doubts my account of first-personal ethics, although the center of gravity of his response to my argument lies elsewhere. See *infra* note 7 and accompanying text.

5. See Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 212-22, 261-84.

6. *Id.* at 266.

7. See Ted Schneyer, *The Promise and Problematics of Legal Ethics from the Lawyer's Point of View*, 16 YALE J.L. & HUMAN. 45 (2004) [hereinafter *Promise and Problematics*]. Walen expresses similar doubts, although the center of gravity of his response to my argument lies elsewhere. See *supra* note 4 and accompanying text.

And third, I ask how adversary lawyers' integrity might be sustained against this assault. I observe that the dominant idea in legal ethics – the adversary system defense – cannot answer the assault: the adversary system defense, which sounds in third-personal morality, casts lawyers' professional obligations as necessary evils; but lawyers' integrity must be defended in the first person, by arguments that allow lawyers to understand their professional activities as simply not being evil. And I introduce an unconventional account of the ethics of role and propose that role-based ethical ideals can in principle secure integrity against the tensions between third-personal moral imperatives and ordinary first-personal ideals that I claim plague lawyers, roughly by giving lawyers access to unconventional first-personal ideals that are consistent with the third-personal imperatives of adversary justice. However, I identify a political argument that explains why such an ethics of role is not, and cannot be, available in practice to modern adversary lawyers.<sup>8</sup> I conclude that “modernity has opened up a gap between the demands of third-personal and first-personal ethical justification, and modern lawyers have fallen in.”<sup>9</sup> Geoffrey Hazard, however, wonders whether the tensions between modern political and moral life are as stark as I have cast them, and doubts that a distinctive role mentality is in fact necessary for sustaining adversary lawyers' integrity.<sup>10</sup>

I shall address each of these three sets of questions in turn and lay out the main substantive differences that separate my views from my critics'. Finally, I shall conclude by briefly taking up a fourth difference between my Article and the several Responses to it, one which does not involve any additional substantive claims or arguments that I make but instead emphasizes the methodological theme that I announced at the beginning of *Legal Ethics from the Lawyer's Point of View* and that pervades the Article's entire analysis. This theme was to replace casuistry with reconstruction – to exchange the instinct to criticize or reform the law governing lawyers by reference to independently defended moral ideals for an effort to discern the “distinctive forms of life and action” that arise in a modern adversary legal order, in order to explain “what it is like ethically” to practice law in such a system and, in this way, identify “the values and ideals that are immanent” in the law governing lawyers as it stands.<sup>11</sup> The authors of the Responses all retain, in one form or another, the approach I have sought to abandon, and this methodological difference illuminates many of the substantive disagreements that separate us. I shall

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8. See Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 268-98.

9. *Id.* at 292.

10. See Geoffrey Hazard, *Humanity and the Law*, 16 YALE J.L. & HUMAN. 79 (2004). Schneyer expresses similar doubts, although the center of gravity of his response to my argument lies elsewhere. See *supra* note 7 and accompanying text.

11. Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 210.

conclude my remarks by connecting these substantive and methodological themes.

### 1. FIRST-PERSONAL MORALITY AND THE PROBLEM OF INTEGRITY

My account of the ethical circumstances of modern adversary lawyers is embedded in a broader philosophical view of the structure of ethics quite generally. I develop a distinction between *third-personal ethics*, which emphasizes a person's duties to others, construed in light of the impartial idea that each person's life is as important as everyone else's, and *first-personal ethics*, which emphasizes that each person nevertheless has an especially intimate connection to her own actions and ideals and therefore has distinctive reasons to live up to her own peculiar ideals and ambitions, as the author of a life that she can affirm from the inside.<sup>12</sup> I argue that these two ethical points of view are independent and free-standing: that the demands they place on an agent can conflict and that when such conflicts arise first-personal ethics should sometimes (although certainly not always) outweigh third-personal ethics in an agent's all-things-considered practical deliberations. I claim that the contrary view, which asserts the hegemony of third-personal ethical ideals, requires persons to betray their ideals and ambitions in ways that place the integrity of their moral personality under threat. I explain the complexity and intractability of the modern adversary lawyer's ethical position in the light of these general ideas: I observe that the professional obligations associated with adversary advocacy conflict with the first-personal ethical ideals that are culturally available to modern lawyers, that this conflict places lawyers' integrity under threat, and that the dominant approaches to legal ethics, which sound in a purely third-personal register, fail to answer the threat.

Walen focuses his critical attention on this general philosophical backdrop to my narrower arguments about specifically legal ethics. He rejects my view of the ethical circumstances of adversary lawyers because he denies quite generally that first-personal ethics enjoys the independent, free-standing status upon which this account depends. Walen's doubts about first-personal ethics take two forms. First, and more radically, Walen claims that the first-personal as I construct it is simply incoherent – quite literally a piece of philosophical nonsense. Second, and more moderately, Walen claims that even if first-personal commitments can be rendered coherent, the *free-standing* view of first-personal ethics that I adopt cannot in the end be justified – that first-personal ambitions must give way whenever they conflict with third-personal morality properly understood, and that even first-personal ambitions that are limited in this way (that is, by an appropriately sophisticated account of third-personal

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12. *Id.* at 222-23.

ethics) are sufficient for sustaining integrity. Walen's radical claim about incoherence rests upon a mistaken interpretation of my argument and can fairly readily be set aside. His moderate claim about the hegemony of the third person presents a serious objection to my argument, which belongs to a deep and on-going debate in moral theory, and which deserves substantial and sustained attention. I take up each of Walen's claims in turn.

#### *A. The Coherence of First-Personal Ideals*

Walen objects that my distinction between first- and third-personal ethical justification commits the "deep mistake" of assuming that morality "can be broken into two distinct domains of justification,"<sup>13</sup> and indeed that my "strategy of carving up morality into possibly competing domains of justification trades on a species of philosophical nonsense."<sup>14</sup> The problem, Walen claims, lies in my account of first-personal morality, which he says "simply does not make philosophical sense."<sup>15</sup> If these claims are right, then my account of legal ethics is not just mistaken but incoherent, so that it must be rejected out of hand.

The roots of this radical objection – according to which my account of first-personal morality is philosophical nonsense – lie not in moral philosophy or indeed in practical reason generally but rather in a set of theoretical ideas about the nature of language and, relatedly, of conceptual intelligibility. Walen adopts a series of arguments most directly associated with the later Wittgenstein<sup>16</sup> and with Donald Davidson.<sup>17</sup> These arguments develop the theme that both language and the concepts it articulates must be accessible to all persons in order to function properly as language or concepts at all. The idea of a private language, Wittgenstein would say, is incoherent, because every use of words "stands in need of a justification which everybody understands."<sup>18</sup> Alternatively, as Davidson puts the point, conceptual relativism – the idea that there can exist multiple conceptual schemes for organizing experience with "no translating from one scheme to another"<sup>19</sup> – is incoherent because "different points of view make sense . . . only if there is a common co-

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13. Walen, *Criticizing the Obligatory Acts of Lawyer*, *supra* note 4, at 3.

14. *Id.*

15. *Id.* at 5.

16. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, especially §§ 258-302.

17. See DONALD DAVIDSON, *On the Very Idea of a Conceptual Scheme*, in *INQUIRIES INTO TRUTH AND INTERPRETATION* 183-98 (1984).

18. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 261.

19. Davidson, *On the Very Idea of a Conceptual Scheme*, *supra* note 17, at 183. Davidson also makes this argument in terms of language, observing that "we may identify conceptual schemes with languages," *id.* at 185, and that "translatability into a familiar tongue [is] a criterion of languagehood." *Id.* at 186.

ordinate system on which to plot them.”<sup>20</sup>

Walen worries that my account of first-personal morality falls on the wrong side of these arguments – he worries, as he says, that I use first-personal morality “as a kind of private space for justification, dealing in reasons that may matter only to the agent, and even worse, dealing in reasons that need make sense only to the agent.”<sup>21</sup> In other words, he worries that in proposing a class of first-personal moral ideals whose hallmark is to matter to some persons but not to others, I embrace “relativism of conceptual scheme.”<sup>22</sup> Walen claims that whatever its initial appeal, such “heady talk of truths for some but not for others”<sup>23</sup> in the end renders my view incoherent.<sup>24</sup>

This objection simply misconstrues my argument, however, which proposes neither private languages, nor conceptual relativism, nor indeed any of their “heady” cognates. Walen’s suggestions to the contrary notwithstanding, I never propose that first-personal moral ideals (even when they are based on insular roles) are *unintelligible* to those who do not share them. Indeed, I take almost precisely the opposite view with respect to intelligibility. I expressly reject the crass versions of role-morality – which insist that actions taken within roles may be rendered intelligible only from within the roles (or at most from within the roles’ conceptual schemes) – that Walen accuses me of committing.<sup>25</sup> And my initial illustration of the redescriptive strategy at which Walen takes aim, in which a man’s giving an engagement ring to his wife-to-be is described differently by the engaged couple, a sociologist of marriage, and a tax collector, again emphasizes the universal and public character of conceptual intelligibility.<sup>26</sup> I observe that, as a theoretical matter, “all three descriptions might be accurate and appropriate answers to certain forms of the question ‘What is the man doing?’”<sup>27</sup> and connect the choice among these several descriptions to *practical*, not theoretical, differences

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20. *Id.* at 184.

21. Walen, *Criticizing the Obligatory Acts of Lawyers*, *supra* note 4, at 20.

22. *Id.* at 21.

23. *Id.* at 22.

24. The objection that first-personal morality falls foul of the private language argument has been made before, by Christine Korsgaard. See CHRISTINE KORSGAARD, *The Origin of Value and the Scope of Obligation*, in *THE SOURCES OF NORMATIVITY* 131, 136-39 (1996). Korsgaard’s version of the argument is more modest than Walen’s, however, in that it acknowledges that the connection it draws between first-personal moral reasons and private language is an *analogy* only, and that sustaining the analogy requires an argument, roughly, that reasons universally compel a practical response from persons to whom they are addressed in the same way in which concepts universally compel thought in persons to whom they are addressed. See *id.* at 139-45. I do not take up Korsgaard’s analogy to private language in any serious way here, but only note that the additional argument she presents expressly invokes some of the ideas about motivation that I do address below. See *infra* notes 35-36 and accompanying text.

25. See Walen, *Criticizing the Obligatory Acts of Lawyers*, *supra* note 4, at 22-23.

26. See Markovits, *Legal Ethics from the Lawyer’s Point of View*, *supra* note 2, at 273.

27. *Id.*

that relate to the *interests*, not the conceptual schemes, of the persons involved. Finally, one of the central aims of my argument is to translate lawyerly first-personal ethical ideals (of loyalty and statesmanship) into ordinary moral and political language and even to explain why it might be third-person impartially justified for lawyers to pursue these ideals.<sup>28</sup> And when I conclude that my account of lawyerly negative capability has “displayed a *substantively* attractive version of a distinctively lawyerly role ethic,”<sup>29</sup> I am obviously referring to a conceptual scheme that everyone, including non-lawyers, can share.

I do say, as Walen repeatedly points out,<sup>30</sup> that lawyers who defend their integrity by reference to idiosyncratic role-based first-personal ideals need address or persuade only themselves, but when I write in these ways I plainly mean not that these first-personal ideals need be *theoretically intelligible* only to lawyers (my own project, as I have said, seeks to make them generally intelligible) but rather that the ideals need be *practically motivating* only to lawyers. This difference – between theoretical reasons that are intelligible only to certain agents and practical reasons that motivate only certain agents – matters enormously in the present context. Only the first idea, about limited intelligibility, invokes private languages or conceptual relativism in any straightforward way, and my account of free-standing first-personal morality evidently involves only the second idea.

Moreover, Walen sometimes himself seems to recognize this important difference between theoretical and practical reason. Thus, he distinguishes early in his argument between reasons that “make sense” only to certain agents and reasons that “matter” only to certain agents and suggests that the former are more suspect than the latter,<sup>31</sup> adding that he “do[esn’t] mean to deny that people can *care* about different things.”<sup>32</sup> But having recognized this difference between theoretical and practical reason and having rehearsed arguments whose express subject is limited to theoretical intelligibility, Walen glosses over the difference, with respect

28. *Id.* at 277-84.

29. *Id.* at 299. Schneyer observes this feature of my argument and wonders how, “living in the same cultural milieu as modern adversary lawyers, [I] can muster the admiration [I] express[] . . . for a role-based ethic that [I] insist[] is no longer available to lawyers as a source of first-personal ideals.” Schneyer, *Promise and Problematics*, *supra* note 7, at n.55. I do not share Schneyer’s sense that this admiration is at odds with my overall argument. For one thing, much of my approval of the distinctively lawyerly virtues comes from third- rather than first-personal considerations, as Schneyer himself observes, *see id.* at n.53, and one of my main points is that these can come apart, including in ways that involve tragic loss. For another, there seems to me to be nothing mysterious in recognizing the first-personal attractions even of forms of life that one cannot actually adopt. It is like admiring a foreign religion or culture that one cannot possibly take for one’s own.

30. Walen, *Criticizing the Obligatory Acts of Lawyers*, *supra* note 4, at 19-20.

31. Walen accuses my argument of “dealing in reasons that may matter only to the agent, and *even worse*, dealing in reasons that need make sense only to the agent.” *Id.* at 20 (emphasis added).

32. *Id.* at 24 (emphasis in original).

to my view, in a single, unargued sentence – he claims that “it is hard to see not only why but how we should take ourselves to use concepts like justification, persuasion, and description differently when dealing with practical issues than when dealing with theoretical issues.”<sup>33</sup>

I find neither the why nor the how of this difference difficult to credit. Practical reason differs from theoretical reason in two respects which make it natural to think that hostility to first-personal reasons should not extend to the practical realm. First, because practical reason aims at action in the world, its conclusions are mutually exclusive in a way in which the conclusions of theoretical reason are not, and this makes insisting that all reasons have a general, public application much more costly in practical than in theoretical reason. In theoretical reason, people can accept many distinct conceptual schemes at once even in the face of translatability among them – as in the case of the several accounts of the engagement ring – so that insisting that all concepts must be equally available to everyone does not diminish the range of concepts that are available to anyone. In practical reason, by contrast, generally applicable reasons necessarily undermine each other, or crowd each other out, whenever they differ – the man in the example must decide, finally, whether or not to give the ring. This means that insisting that all practical reasons must apply to persons generally dramatically diminishes the range of reasons on which persons may act, as Walen admits when he says that when one person makes practical claims that another person rejects, “then [they] have a real dispute in which at least one of [them] must be wrong.”<sup>34</sup> It seems that such prescriptiveness about practical reason leaves the range of acceptable options too diminished, and indeed (as my earlier argument proposes at length) that this diminution threatens the integrity of persons whose projects and ambitions are ruled out.

And second, the connection between practical reasons and motivations that I have been emphasizing also distinguishes practical from theoretical reasons, and insofar as persons are not motivated by the same practical considerations, this explains how idiosyncratic, first-personal practical reasons might arise.<sup>35</sup> Of course, the question what variety of motivations

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33. *Id.* at 23.

34. *Id.* at 24. Walen accepts that persons may make sense of differences in their practical reasoning “by reference to other differences between [them] – e.g., different histories, different sensitivities, different talents, etc.,” which may all be fit into “a common framework for justification.” *Id.* But this proposal only shakily supports practical variety, insofar as persons shape their sensitivities and talents, and hence their histories, by reference to reasons with respect to which, on Walen’s view, there arises an almost inexorable pressure towards commonality.

35. The role of motivation in practical reason is itself a subject of considerable philosophical dispute. The position that emphasizes the importance of motivation is presented in Bernard Williams, *Internal and External Reasons*, in *MORAL LUCK* 100-13 (1981) and Bernard Williams, *Internal Reasons and the Obscurity of Blame*, in *MAKING SENSE OF HUMANITY* 35-45 (1995). There is, of course, another side to the argument.



persons may rationally have is itself complicated and contested, and certain ways of answering it support the idea that free-standing first-personal morality is impossible. One such answer, commonly associated with modern Kantians, is that there is a constitutive end to rationality (as in Korsgaard's suggestion that persons must value their own humanity<sup>36</sup>), so that persons must pursue this end, in preference over any competing ends, if they are rationally to pursue any ends at all. But as soon as it invokes any such arguments, the objection to free-standing first-personal morality loses its self-evident and clearly compelling character: it is no longer connected to immediately intuitive claims about intelligibility and translation but depends, instead, on precisely the kinds of "heady" and "exotic" doctrines Walen disparages.

Walen's radical suggestion that first-personal ethical justification is literally nonsense therefore fails to face up to important differences between theoretical and practical reason. And although the view that first-personal reasons are incoherent may perhaps be resuscitated by moderating its tone somewhat and providing supporting arguments, this reconstruction cannot sustain the sense of obviousness that is the hallmark of Walen's radical objection and that easy analogies to private language and conceptual relativism purport to underwrite. Moreover, Walen provides no suggestions as to how such supporting arguments might go, so that although the question is important, it is best reserved for another occasion.

### *B. The Weight of First-Personal Ideals*

Let me turn, therefore, to Walen's second, more moderate objection to my account of free-standing first-personal morality, which is more immediately compelling and which states, on its own terms, a substantial objection to my view. I do not, in the end, find even this moderate objection satisfying. But it seriously engages an ongoing and clearly important dispute, which my own arguments also seek to advance and which will certainly continue well beyond the present exchange.

Walen claims that even if first-personal moral ideals can be rendered coherent, they should not ever outweigh third-personal impartial morality in all-things-considered practical deliberation and, moreover, that integrity does not require them to do so. Walen proposes that the conflict I see between integrity and hegemonic third-personal morality, which underwrites my belief in the first-personal's capacity sometimes to outweigh the third, arises only because I "take[] too narrow a view" of third-personal impartial morality.<sup>37</sup> Although Walen acknowledges that

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36. See CHRISTINE KORSGAARD, *The Authority of Reflection*, in *THE SOURCES OF NORMATIVITY* 90-130 (1996).

37. Walen, *Criticizing the Obligatory Acts of Lawyers*, *supra* note 4, at 25.

the utilitarian conception of third-personal morality does indeed threaten integrity,<sup>38</sup> he insists that the Kantian conception does not. Kantianism, on Walen's view, takes as its central question "what, if anything, can we all agree that we should do, given that our motives are not merely impersonal?"<sup>39</sup> and therefore builds the problem of integrity – of the agent's relations to her own peculiar projects and plans – into the most basic structure of third-personal impartial morality.<sup>40</sup> Walen concludes, on this basis, that the Kantian construction of third-personal impartial morality leaves agents as much free play to pursue their idiosyncratic projects and plans as they could reasonably want.

I agree with Walen that the Kantian account of third-personal impartial morality represents a significant – indeed, a qualitative and not just a quantitative – advance over utilitarianism with respect to integrity and the first-personal. Utilitarianism is, as I say, "insistently and unforgivingly impersonal"<sup>41</sup> and the utilitarian assault on integrity is therefore "peculiarly immediate and crass."<sup>42</sup> In particular, utilitarianism quite generally undermines the very idea of a first-personal project. As Barbara Herman says, the utilitarian "must not only be prepared to interrupt his projects when utility calls, but he must also pursue his projects without the sense that what makes them worth pursuing is connected to the fact that they are his."<sup>43</sup> (I make the same point when I say that the utilitarian "sees himself merely as a cog in a causal machine" and "adopts new interim projects so capriciously" that "he cannot recognize which projects and ideals are, finally and properly, his own."<sup>44</sup>) The Kantian view of third-personal impartial morality, by contrast, is not quite so flagrantly and unremittingly corrosive of first-personal commitments, but only constrains the first personal, as a "limiting condition."<sup>45</sup> This difference arises, as I observe, because the Kantian allows for a much more sophisticated and flexible account of value and practical reason.<sup>46</sup> And I expressly wonder, in light of this advance, whether "third-personal impartial morality, properly reconstructed [along Kantian lines], can indeed [account for integrity], so that the move to the independent first person becomes

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38. See *id.* at 25.

39. *Id.* (quoting TOMAS NAGEL, EQUALITY AND PARTIALITY 15 (1991)).

40. Because Walen believes that integrity is consistent with absolute deference to third-personal impartial morality properly understood, he never asks (as I do) whether integrity is sufficiently important to outweigh third-personal morality when the two come into conflict. Nor would it be sensible for him to do so.

41. Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 232.

42. *Id.* at 231.

43. BARBARA HERMAN, *Integrity and Impartiality*, in THE PRACTICE OF MORAL JUDGMENT 23, 39 (1993).

44. Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 229.

45. BARBARA HERMAN, *Integrity and Impartiality*, in THE PRACTICE OF MORAL JUDGMENT 23, 39 (1993).

46. See Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 234.

unnecessary and unmotivated.”<sup>47</sup>

So although Walen claims that I “distort[] [the] Kantian project” of integrating the first-personal into the third, I in fact emphasize precisely the features of the Kantian approach that cause Walen to find it consistent with integrity. Indeed, Walen and I even take the same view of the effects that the Kantian innovation has on the ground, as it were: although I am more inclined than he is to emphasize the narrow limits of the free play that Kantianism gives to first-personal commitments, Walen accepts, in substance, precisely these limits. To be sure, Walen proposes to offer “a general argument that any plausible deontological [Kantian] theory based on rights has to embrace partiality [first-personal ideals]”<sup>48</sup> and insists that “at the very foundation of deontology [Kantianism] is the protection of partiality [the first-personal].”<sup>49</sup> But the Kantian account of the first-personal that Walen actually offers is much more cramped than these impressive claims suggest.<sup>50</sup> Thus, Walen accepts that third-personal impartial morality “may require one to sacrifice one’s [first-personal] projects if they are truly [impartially] impermissible.”<sup>51</sup> And although the tone of this remark is conditional and permissive, its substance is absolute and highly restrictive: “if” in this construction means “whenever,” as Walen recognizes when he characterizes Kantian third-personal morality as “a check that requires us to be partial *only* when [that is, insofar as] partiality is impartially acceptable.”<sup>52</sup> This is precisely the narrow and fundamentally derivative account of the first-personal according to which, as my own characterization of the Kantian position emphasizes, the first-personal arises merely out of “applications of third-personal ideals to peculiar facts about particular persons,” so that any conflict between the first- and third-person must always return “back to the [third-personal] standpoint on appeal.”<sup>53</sup>

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47. *Id.* at 233-34.

48. Walen, *Criticizing the Obligatory Acts of Lawyers*, *supra* note 4, at 27.

49. *Id.* at 28.

50. Here it is worth noting also that the account of the first-personal that I prefer is much less extravagant than Walen suggests. In particular, Walen quotes Barbara Herman’s view that Kantianism properly refuses to “honor unconditional attachments” and in this way suggests that I am proposing to give first-personal morality such an unconditional status. *See id.* at 126 (quoting BARBARA HERMAN, *Integrity and Impartiality*, in *THE PRACTICE OF MORAL JUDGMENT* 23, 39 (1993)). But insofar as calling a first-personal attachment “unconditional” suggests that the attachment can *always* outweigh any third-personal moral concerns, I expressly reject that first-personal ideals are unconditional. As I say repeatedly, when third-personal impartial concerns becomes “large enough,” then every first-personal attachment must give way. *See Markovits, Legal Ethics from the Lawyer’s Point of View*, *supra* note 2, at 228, 244. I insist only upon a much more humble claim, namely that first-personal ideals can *sometimes* outweigh third-personal morality, all-things-considered. Walen rejects even this humble claim.

51. Walen, *Criticizing the Obligatory Acts of Lawyers*, *supra* note 4, at 26.

52. *Id.* at 27 (emphasis added). As these shifting tones indicate, Walen seems sometimes to be of two minds about the scope that Kantianism allows first-personal ideals to have: he seeks to characterize it as broad even as his substantive arguments narrow it.

53. Markovits, *Legal Ethics from the Lawyer’s Point of View*, *supra* note 2, at 254. I take the

Walen and I therefore agree about the substance of the Kantian approach to the first-personal. In particular, we agree that although the Kantian view renders the idea of first-personal ideals and ambitions intelligible in a way utilitarianism does not, the Kantian view does not treat first-personal morality as free-standing or allow that it might ever outweigh third-personal morality in all-things-considered practical deliberations. There is thus a well-formed question between us, namely is a first-personal that, although real, is not free-standing and serves at the sufferance of the third-personal sufficient for sustaining the integrity of agents' moral personality? When I answer that this Kantian version of the first-personal is not sufficient for integrity, I do not so much distort the Kantian view as reject it.

I reject the Kantian view – the proposal to limit first-personal morality to such ideas as can win third-personal approval – on the basis of an extended account of the necessary conditions for sustaining an integrated moral personality.<sup>54</sup> I claim, specifically, that persons' continued practical engagement with the world as independently responsible agents, and also the continued coherence of their individual practical personalities, both depend upon abandoning the Kantian view and casting first-personal ambitions as free-standing and as capable – at least sometimes – of outweighing third-personal morality in all-things-considered practical deliberations.<sup>55</sup> I connect these ideas, moreover, to an argument that claims it is a necessary condition for sustaining persons' practical integrity that they see themselves as free-standing, self-originating sources of ideals and values to live by rather than as merely delegates or representatives of an overarching third-personal moral scheme.<sup>56</sup>

Walen, to be sure, denies that Kantians are “are asking people to treat themselves as mere representatives of some impersonal ‘kingdom of ends’” and adds that the Kantian view does not require people “to see [their commitments] as grounded in impartial reason.”<sup>57</sup> But Walen does not elaborate upon this claim in any substantive detail, and his own account of the Kantian attitude towards first-personal commitments seems, as I have observed,<sup>58</sup> to emphasize the regulative function of impartiality from which he purports to distance himself. Indeed, although the denial that Kantianism views people as mere representatives of the impersonal is essential to Walen's broader position, he seems to abandon it when he admits, in the very next sentence, that people “have to ensure that [their

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second phrase from a leading Kantian. See THOMAS NAGEL, *THE VIEW FROM NOWHERE* 202 (1986).

54. See Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 243-60.

55. See *id.* at 252-55.

56. See *id.* at 255.

57. Walen, *Criticizing the Obligatory Acts of Lawyers*, *supra* note 4, at 30.

58. See *supra* notes 51-53 and accompanying text.

commitments] pass moral muster as reflecting the kind of partiality that is impartially acceptable.”<sup>59</sup> It is hard to see how this requirement of impartial acceptability is not, in effect, a requirement that the commitments be grounded in impartial reason and therefore that people view themselves as mere delegates of impartial reason. In any event, Walen never explains the difference.

Walen’s remarks nevertheless do raise substantial and important questions about my view, and they arise at precisely the point at which it is most profitable for a Kantian to join the argument. My own approach to these issues is probably less than satisfactory: it is more rhetorical than I would like it to be and is perhaps even conclusory. Moreover, alternative accounts of the conditions of integrity do exist, including Kant’s own view that only ideals and ambitions that pass third-personal impartial muster can be freely, and hence authentically, pursued. This view accepts that integrity has the importance that I have given it and perhaps even that free-standing, self-originating first-personal ambitions are essential for integrity. But it adds that only third-personal, impartially approved ideals can be self-originating in the way that integrity requires. I do not, as I have said,<sup>60</sup> find Kant’s view appealing, because I am put off by the metaphysical account of freedom on which it seems to depend. But it undoubtedly does provide contemporary Kantians with significant resources for defending against my arguments. In particular, the connection that Kant draws between third-personal approval and authentic self-direction has the right form for answering my claim that free-standing first-personal ideals are necessary for integrity. If a modern Kantian could give these ideas a non-metaphysical development, this would significantly weaken the appeal of the position that I defend, including in my own mind.<sup>61</sup> Walen, to my mind unfortunately, never takes them up in any serious way.

Instead, Walen concludes his account of the Kantian position by defending one prominent Kantian’s view of the example, involving Jim and the innocents, whose analysis set my larger argument about integrity and the first-personal in motion. Recall that Jim was confronted by a

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59. *Id.*

60. See Markovits, *Legal Ethics from the Lawyer’s Point of View*, *supra* note 2, at 254 n.88.

61. Another possible avenue of defense for the Kantian is to argue that persons can sustain their integrity by adopting, as a first-personal ideal, the generic ambition to do what is third-personal impartially best. Something like this approach is taken by Barbara Herman, who proposes that “an attachment to impartial morality can itself be a project that gives a life meaning. It is a defining feature of Kantian morality that one basic attachment, one self-defining project, is morality itself.” BARBARA HERMAN, *Integrity and Impartiality*, in *THE PRACTICE OF MORAL JUDGMENT* 23, 38 (1993). I devote substantial energy to arguing that this generic ambition cannot support a person’s integrity. See Markovits, *Legal Ethics from the Lawyer’s Point of View*, *supra* note 2, at 244, 248-50, 253-54. But my arguments remain less satisfying than I would like here also, and this is another point at which the Kantian view may plausibly seek to reassert itself.

dictator who had captured twenty innocents and said that if Jim did not kill one innocent then he would himself kill all twenty. Jim's first-personal ideals centrally include not harming – and certainly not killing – innocents, but this is a situation in which third-personal morality seems to command that he kill. Insofar as third-personal morality requires Jim to abandon his first-personal ideals, it seems to place his integrity under threat. Walen proposes to defend the Kantian approach to Jim's dilemma, which he says Kantians can handle "in stride."<sup>62</sup> It will perhaps be useful, in completing my reply to Walen, briefly to take up his remarks in this connection, in order to explain why my criticisms of the Kantian approach to the example are indeed well-taken and thereby to emphasize that the important dispute about the first-personal and the conditions of integrity that I have identified cannot be avoided.

I expressly accept that the Kantian approach to Jim's dilemma is, once again, more subtle than the utilitarian – because Kantianism takes into account, as utilitarianism does not, the individual moral claim, addressed specifically against Jim, of the innocent whom Jim might kill.<sup>63</sup> In particular, the Kantian insists (to my mind, rightly) that Jim must individually justify his killing to this innocent. But although this innovation makes the argument more complicated, it remains the case that if the innocent consents to the killing, then Kantian third-personal impartial morality once again recommends that Jim kill. This is reflected in Korsgaard's account of the dilemma, and in particular in her proposal that the dictator's evil plans throw Jim and the innocents into a "smaller moral world within which the issue is between [Jim and the innocents],"<sup>64</sup> and her suggestion that if the innocent consents to being killed, then Jim should perceive himself as joining the innocents in a benevolent effort to battle the dictator's evil intentions.

I insist, in light of this, that the Kantian view remains inadequate to sustaining Jim's integrity. The smaller world metaphor ignores that if Jim kills (even if he kills with the innocent's consent) then he has also joined the dictator's malevolent project, which requires that he abandon his ambition not to kill innocents.<sup>65</sup> Moreover, through its emphasis on the consent of the innocent who might be killed, the Kantian approach in effect places the decision whether or not Jim should kill in the hands of this innocent's attitudes and ideals. But sustaining Jim's integrity depends

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62. Walen, *Criticizing the Obligatory Acts of Lawyers*, *supra* note 4, at 29. Walen adds that "Nothing Markovits says about the example is something that can't be said by a Kantian." *Id.* For reasons that the main text makes plain, I disagree.

63. See Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 232-36.

64. CHRISTINE KORSGAARD, *The Reasons We Can Share: An Attack on the Distinction between Agent-Relative and Agent Neutral Values*, in *CREATING THE KINGDOM OF ENDS* 275, 296 (1996).

65. See Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 239-40.

upon addressing not the innocents' points of view, but Jim's.<sup>66</sup> And although Korsgaard accepts that the third-personal case for Jim's killing may be undermined by the innocents' commitments – say, because they are pacifists and refuse to consent to Jim's killing even in the smaller world<sup>67</sup> – she ignores the question whether *Jim's* commitments (perhaps also to pacifism) might be sufficient to sustain his decision not to enter the smaller world in the first place.<sup>68</sup>

Moreover, despite Walen's claim that this reading of Korsgaard's approach to Jim's case is "uncharitabl[e],"<sup>69</sup> his own account of the Kantian view precisely confirms it. Thus, although Walen claims to "see no reason to think that [Korsgaard] would want to deny Jim reason to refuse to shoot" based on Jim's own ideals and ambitions, including that Jim is "a committed pacifist himself,"<sup>70</sup> he at once articulates precisely such a reason. As Walen says, Korsgaard (as a Kantian) "would want to say that pacifism in such a case is unreasonable – that it shows a form of self-indulgence."<sup>71</sup> And when set against his earlier insistence that Kantianism is committed to the idea that a person may pursue her first-personal ideals only insofar as this is third-personally "acceptable,"<sup>72</sup> Walen's suggestion that Jim's refusing to kill the one may be "unreasonable" or "self-indulgent" is revealed as a gentle way of saying that it is impermissible.<sup>73</sup>

Finally, Walen's positive proposal for the way in which the Kantian might approach Jim's integrity-based arguments against killing the innocent only repeats the mischaracterization associated with Korsgaard's smaller world metaphor and so confirms the inadequacy of the Kantian

66. See *id.* at 243.

67. See *id.* at 236 (citing CHRISTINE KORSGAARD, *The Reasons We Can Share: An Attack on the Distinction between Agent-Relative and Agent Neutral Values*, in *CREATING THE KINGDOM OF ENDS* 275, 296 (1996)).

68. Walen in effect admits this feature of Korsgaard's approach when he observes, rightly, that Korsgaard's account of the Jim example appears in a dispute with Thomas Nagel about the proper understanding of the constraints that Kantian morality imposes on the permissibility of maximizing outcomes. See Walen, *Criticizing the Obligatory Acts of Lawyers*, *supra* note 4, at 34. Nagel had treated these constraints as belonging to the agent subject to them – as agent-relative. See THOMAS NAGEL, *THE VIEW FROM NOWHERE* 175-85 (1986). Korsgaard sought to cast them as belonging to the persons whom they protect – as agent-neutral. See CHRISTINE KORSGAARD, *The Reasons We Can Share: An Attack on the Distinction between Agent-Relative and Agent Neutral Values*, in *CREATING THE KINGDOM OF ENDS* 275 (1996). Korsgaard proposed that these constraints cannot function to protect others, as they must, if they are agent-relative. But she argued, more strongly, that agent-relative reasons are impossible, and this has the consequence, as I observe in the main text, of undermining integrity. (Note that integrity may be possible on Nagel's view, which may not be quite so Kantian as Walen, who views the Nagel-Korsgaard dispute as intramural to Kantian morality, takes it to be.)

69. Walen, *Criticizing the Obligatory Acts of Lawyers*, *supra* note 4, at 33.

70. *Id.* at 34.

71. *Id.*

72. *Id.* at 27.

73. Walen's insistence that he "can see no reason why [Korsgaard] would say it is impermissible" for Jim to refuse to kill based on his pacifism, *id.* at 34, is thus belied by his own earlier arguments.

view. Walen proposes that Jim's killing the one innocent is best understood as a beneficent act (presumably because it saves the remaining nineteen), and that the duty of beneficence is imperfect.<sup>74</sup> Imperfect duties, for Kant, are indefinite and leave open a role for personal inclination in determining precisely how they will be fulfilled,<sup>75</sup> and Walen's suggestion is presumably intended to take advantage of this and provide the Kantian with a way of explaining the sense that Jim might properly consult his first-personal ideals and ambitions in deciding how to act. But this approach simply will not do. To begin with, it likely fails even on its own terms: although beneficence generically is an imperfect duty, the imperfectness of particular acts of beneficence is surely measured on a sliding scale, and Jim's killing, understood as a beneficent act, is surely almost perfectly obligatory.<sup>76</sup> But beyond this, and much more importantly, casting Jim's killing as a beneficent act once again ignores – almost grotesquely – Jim's point of view. Jim's killing appears beneficent only in the shadow of the dictator's evil – only in the smaller moral world that Korsgaard imagines Jim and the innocents to inhabit. But Jim is not simply subsumed in the dictator's shadow, and his first-personal ideals – in particular the ideal of not killing any innocents – will naturally refuse to characterize the killing so benignly. Preserving Jim's integrity depends upon taking these first-personal ideals seriously, but Walen's claims about Kantian beneficence, just as Korsgaard's metaphor of a smaller world, simply cast them aside.

The Kantian approach, in Walen's hands, therefore once again ignores that the problem of integrity requires addressing not the innocents' points of view, but Jim's. That is what my account of the free-standing, self-originating first-personal insists upon.

## 2. LAWYERS' ROLE-OBLIGATIONS AND ORDINARY FIRST-PERSONAL IDEALS

I develop the general view of the relation between integrity and free-standing first-personal moral ideals and ambitions in connection with a narrower account of the modern adversary lawyer's peculiar ethical circumstances. This account draws an analogy between the adversary lawyer's case and Jim's. Just as third-personal impartial morality requires Jim to kill in betrayal of his first-personal ambition not to harm innocents, so the imperatives of the lawyer's role require adversary lawyers to lie,

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74. *Id.* at 29.

75. The structure of imperfect duties is explained in ONORA NELL, *ACTING ON PRINCIPLE* 43-58 (1975).

76. It is difficult to credit Walen's claim that casting the problem as one of beneficence allows the Kantian to "recognize the weightiness of the choice, and leave the weighing to Jim." Walen, *Criticizing the Obligatory Acts of Lawyers*, *supra* note 4, at 29.



cheat, and abuse in betrayal of their first-personal ambitions to honesty, fair play, and kindness.<sup>77</sup> (Moreover, for reasons that I will elaborate upon in the pages to come, the lawyerly imperatives to lie, cheat, and abuse are not mere artifacts of the law governing lawyers as it stands, but are instead connected at a deep level to the broader character of adversary justice.) And just as Jim's betrayal threatens his integrity, so adversary lawyers' betrayals threaten theirs.

Schneyer doubts, however, that the tensions between the professional duties of adversary lawyers and the first-personal ideals of ordinary good people are as substantial as I make them out to be, and he therefore doubts whether the threat to lawyers' integrity that I observe is as pressing as I claim – indeed, whether it is real at all. Schneyer proposes to dissolve these tensions in two ways. First, he claims that I overstate the adversariness required by the law governing lawyers as it stands. And second, he claims that the first-personal ideals of ordinary good people are more flexible, and so more tolerant of lawyers' professional conduct, than I suppose. These two objections are of course mutually reinforcing, and I must answer both in order to sustain my view. Moreover, although the first doubt perhaps receives slightly more attention from Schneyer, it is worth noting that the second is likely more threatening to my argument, whose success depends, ultimately, on a certain measure of inflexibility in ordinary first-personal moral ideals. This is because I suggest that my account of the threat to lawyers' integrity “would survive even if the adversariness of legal practice were reduced far below current levels”<sup>78</sup> and, indeed, under “any account of legal ethics that is connected to a recognizably adversary conception of legal process.”<sup>79</sup> I cannot possibly make good on this claim by resorting to characterizations of adversary legal ethics as it stands.

#### *A. The Adversariness of the Lawyer's Role*

Still, although the argument must eventually address the question of ordinary first-personal morality, it will be helpful to begin with the question of the adversariness of the version of the lawyer's role that is familiar today. Schneyer thinks that I exaggerate this in two ways: first, that I overstate the adversary obligations even of lawyers who litigate in court; and second, that I mistakenly treat litigators, who are in fact the most adversary of all lawyers, as representative of the legal profession generally. I do not think that I exaggerate in either of these ways, and I will explain, in each case, what separates my views from Schneyer's.

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77. See Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 218-19.

78. *Id.* at 216-17.

79. *Id.* at 217.

Schneyer claims that I neglect provisions of the American Bar Association's Model Rules of Professional Conduct that significantly reduce the adversary demands that the law governing lawyers imposes even on litigators, and indeed that these provisions together constitute a trend away from the conception of the adversary lawyer that my argument presents.<sup>80</sup> Moreover, Schneyer's account of these provisions emphasizes that they do not just dampen adversariness generically but rather take aim (almost self-consciously) at specifically those elements of adversary litigation that threaten a litigator's integrity by placing her professional duties in conflict with her first-personal ideals.<sup>81</sup> Most notably Schneyer emphasizes Model Rule 1.16(b)(4),<sup>82</sup> which permits a lawyer to withdraw from representing a client, even when the withdrawal will materially harm the client's interests, if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."<sup>83</sup> Schneyer proposes that this provision allows even a litigator to adjust his professional conduct to his conscience and that it therefore addresses (and presumably substantially eliminates) the tension between the lawyer's professional obligations and her first-personal ideals upon which my claims about integrity depend.

However, I believe that Rule 1.16(b)(4) does not function to protect lawyers' integrity as Schneyer proposes. This is both because I read the rule narrowly (probably more narrowly than Schneyer does) and because I

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80. See Schneyer, *Promise and Problematics*, *supra* note 7, at 63-66.

81. Not all of the provisions that Schneyer considers have this character, and his argument is less persuasive when they do not.

For example, Schneyer mentions that Model Rule 4.4 forbids lawyers from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person." See ABA MODEL RULES OF PROF'L CONDUCT 4.4(a). (Schneyer also emphasizes Rule 11 of the Federal Rules of Civil Procedure in this connection, which states that lawyers may not file pleadings or motions "for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." FED. R. CIV. P. 11(b)(1) (1993)). I explain in *Legal Ethics from the Lawyer's Point of View* why I do not think this principle sufficient to eliminate the conflict between lawyers' role obligations and ordinary first-personal morality, see Markvoits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at n.25 and accompanying text, and I shall not take up the argument again here. Indeed, Schneyer admits that these principles "of course" do not entail that "every resort to 'hardball' tactics in litigation constitutes unlawful role deviance." Schneyer, *Promise and Problematics*, *supra* note 7, at 62.

In another example, Schneyer emphasizes that the ABA and ALI have recently "recognized a 'humanitarian' exception to the lawyer's duty of confidentiality" which "permits lawyers to disclose otherwise confidential information whenever disclosure is reasonably necessary to 'prevent death or substantial bodily harm.'" *Id.* at 65 (citing MODEL RULES OF PROF'L RESPONSIBILITY 1.6(b)(1) (2003) and RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 66(1) (2000)). This exception seems to me to prove the rule that I assert. The lawyer's duty of confidentiality remains intact, as a general matter, even when disclosure would prevent some lesser harm or injustice, and these cases are quite sufficient to generate the tension between the lawyer's role and first-personal morality upon which my argument about integrity depends.

Schneyer proposes other examples also, of course, but I do not regard them as either central to his argument or independently persuasive and so do not take them up here.

82. See Schneyer, *Promise and Problematics*, *supra* note 7, at 47 n.16 & 121.

83. MODEL RULES OF PROF'L CONDUCT 1.16(b)(4) (2003).

understand the conflict between the lawyer's professional role and her first-personal morality that gives rise to the problem of integrity broadly (probably more broadly than Schneyer does). Thus, I treat the strong language in Rule 1.16(b)(4) – the requirement that withdrawal be permitted only when a lawyer finds the client's conduct "repugnant" or suffers a "fundamental disagreement" with the client – as seriously limiting the cases in which the rule may be invoked to support a withdrawal. This treatment is consistent with the recent history of the rule, which involves a redrafting of an earlier version that allowed withdrawal when a client insisted upon "pursuing an objective that the lawyer considers repugnant or imprudent."<sup>84</sup> As the ABA Reporter's explanation of the changes notes, the new formulation is in one important respect less permissive than the old. The old rule, by "[a]llowing a lawyer to withdraw merely because the lawyer believes that the client's objectives or intended action is 'imprudent' permit[ted] the lawyer to threaten to withdraw in almost any dispute with the client, thus detracting from the client's ability to direct the course of the representation."<sup>85</sup> The new rule, by contrast, limits withdrawal to the narrower class of cases in which "the disagreement over objectives or means is so fundamental that the lawyer's autonomy is seriously threatened."<sup>86</sup>

This narrow view of the circumstances in which Rule 1.16(b)(4) allows withdrawal is also consistent with the practical application of its predecessor rule, both in court rulings and in ethics panel opinions.<sup>87</sup>

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84. MODEL RULES OF PROF'L CONDUCT 1.16(b)(3) (1998).

85. ABA Report to the House of Delegates, No. 401 (Feb. 2002), Model Rule 1.16, Reporter's Explanation of Changes.

86. *Id.* The new rule is also more permissive than the old, insofar as the old rule's reference to "pursuing an objective" limited the grounds of withdrawal to objections to the ends of a representation whereas the new rule's reference to "taking action" allows withdrawal "regardless of whether the action concerns the [client's] objectives or the means of achieving those objectives." *Id.*

It is therefore unclear whether this change can be marshaled, on balance, as evidence in support of the trend towards softening the adversariness of lawyers that Schneyer observes. See *supra* note 81 and accompanying text. Schneyer never connects the change to the trend expressly, but he presents the rule on the whole as part of the trend. Other commentators address the rule in terms that suggest, at least in some respects, a similar view. See, e.g., Robert Burns & Steven Lubet, *Division of Authority between Attorney and Client: The Case of the Benevolent Otolaryngologist*, 2003 ILL. L. REV. 1275, 1296 (in conjunction with recent comments to Model Rule 1.2, "the enlarged basis for withdrawal under Rule 1.16 essentially eviscerates the notion of client control, or even meaningful input, concerning the means of representation").

I believe, by contrast, that the change that narrows the grounds for withdrawal outweighs the change that widens them, and that the overall change therefore cannot be viewed on balance as part of Schneyer's trend. Moreover, I also believe, as I argue in the main text, that regardless of the direction of development, the rule as it stands does not dampen the conflict between lawyers' role obligations and first-personal morality as Schneyer supposes.

87. I have not found any authoritative interpretations of the new rule, but insofar as the new rule is in the relevant respect less permissive than the old, narrow constructions of the old rule entail narrow constructions of the new. Moreover, the old rule was little applied in practice, which is revealing in itself. It not only reinforces the sense that the withdrawals contemplated by the rule are exceptional but also suggests that lawyers understood this and rarely sought to invoke the rule. For related remarks, see Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 215.

These typically emphasize a narrow set of ideologically charged circumstances whose ethically distinctive character is culturally familiar. One common class of cases involves lawyers who oppose the death penalty and are permitted to withdraw from representing criminal defendants who propose to pursue it.<sup>88</sup> Other cases involve lawyers who seek to withdraw when their clients take steps that threaten to harm children.<sup>89</sup>

Critically, there is, as I observed in *Legal Ethics from the Lawyer's Point of View*, no suggestion in the legal materials that a lawyer may prejudicially withdraw from a case simply because she believes, on balance, that her client ought to lose.<sup>90</sup> Moreover, such cases as take up the question uniformly conclude that a lawyer may not prejudicially withdraw on this ground. A revealing example is *State v. Jones*,<sup>91</sup> in which the Supreme Court of Montana held that a lawyer's belief in his client's guilt, and his consequent belief that the client's decision to reject a plea bargain and insist upon a jury trial was repugnant, could not sustain the lawyer's withdrawal from the representation.<sup>92</sup> Indeed, the court went on to hold that the defense counsel in the case had "failed to function in any meaningful sense as the government's adversary,"<sup>93</sup> and had therefore

88. For example, the Delaware Supreme Court (citing Rule 1.16(b)(3)) has held that "[a]n attorney who is unable in good conscience to represent a client intent upon [deliberately seeking the death penalty in order to avoid other punishments], or to whom the death penalty is 'repugnant,' may seek leave to withdraw from the representation," although it added (more restrictively than the rule) that withdrawal would be permissible only "if the client's interests would not be prejudiced thereby." See *Red Dog v. State*, 625 A.2d 245, 247 (Del. 1993).

89. See, e.g., Pa. Eth. Op. 98-58, 1998 WL 988192 (Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility May 26, 1998) (lawyer representing a mentally disabled mother in a child custody case could withdraw under Rule 1.16(b)(3) in light of his belief that the state should retain custody because the mother was unfit); Ill. ISBA 90-9 (January 1991) (lawyer in an adoption proceeding may withdraw following adoptive mother's illegal payment to natural mother against the lawyer's prior warning that such payment was illegal).

Note, however, that not every familiarly fraught question has been thought to underwrite a lawyer's withdrawal under the rules. Thus, the Board of Professional Ethics of the Supreme Court of Tennessee has expressed doubts over whether a lawyer who opposed abortion on religious grounds might withdraw from an appointment to serve as counsel to a minor who sought to obtain an abortion under a Tennessee law permitting judicial bypass of parental consent. See *Tenn. Formal Op. 96-F-140* (June 13, 1996). The opinion is strikingly inarticulate and obscure, but it is nevertheless included among the annotations to the American Bar Association's Annotated Model Rules of Professional Conduct (June 2003).

90. See Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 215. The form of words that I used to express this idea referred to cases in which a "lawyer's conscience dictates that the client should lose," *id.*, and the mention of "conscience" may explain Schneyer's emphasis on a rule that focuses on intensely ideological grounds for withdrawal. I intended "conscience" to convey a very different and much more deflationary meaning, however, one related to a lawyer's conscientious judgment about the legal (and perhaps also the generic moral) merits of her case. This is the meaning, as I observe in the main text, that is most suited to sustaining the argument concerning integrity.

91. 923 P.2d 560 (Mont. 1996).

92. See *id.* at 566. I report other, similar holdings at Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 215-17.

93. 923 P.2d 560, 566 (quoting *Frazier v. United States*, 18 F.3d 778, 782 (9th Cir. 1994) (internal quotation marks and citation omitted)).

been deficient as counsel.<sup>94</sup> Finally, and revealingly, the court concluded that although in general an ineffective assistance of counsel claim requires showings of both deficiency and prejudice,<sup>95</sup> the defense counsel's conduct had produced "an actual conflict of interest" breaching "the duty of loyalty, perhaps the most basic of counsel's duties," so that the case presented "the very rare instance in which a presumption of prejudice is warranted."<sup>96</sup> This observation – that a lawyer who seeks to impose her own views of the merits of her client's case has a conflict of interest with the client – emphasizes the narrowness of Rule 1.16(b)(4) quite apart from the specific criminal context of *State v. Jones*. Although a lawyer may perhaps prejudicially withdraw from a representation when a narrow class of highly ideologically charged issues come into play, she may not prejudicially withdraw simply because she rejects the merits of her client's case.<sup>97</sup>

Of course, this narrow reading of the permissible grounds for withdrawal will not sustain my larger argument if a threat to lawyers' integrity arises only when lawyers are required to continue representations in the face of ideologically charged opposition to their clients. (In these cases, even my reading of the Model Rules permits lawyers to vindicate their ideological commitments by making prejudicial withdrawals.) But the threat to lawyers' integrity that I describe in fact arises in a much broader class of cases in which I have argued prejudicial withdrawal is not permitted – the class of cases in which lawyers come simply to reject the merits of their clients' positions, perhaps because they conclude that their clients have committed some commonplace moral wrong,<sup>98</sup> or even because, setting morals to one side, they come to take a view of the law that disfavors their clients.<sup>99</sup> This broad account of the threat to lawyer's

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94. *Id.*

95. *See id.* at 568 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

96. *See id.* (citing *Strickland v. Washington*, 466 U.S. 668, 692 (1984)).

97. This principle is consonant with the rules of professional responsibility in related areas – for example, the rules governing appointments to serve as counsel, which are discussed in Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at n.17. Note that some jurisdictions impose even narrower limits on the grounds for declining appointments. *See, e.g.,* NEW YORK CODE OF PROF'L RESPONSIBILITY EC2-29 (stating that the permissible grounds for declining appointments "do not include such factors as the repugnance of the subject matter of the proceeding, . . . the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case").

98. For example, because they conclude that their clients were in fact negligent.

99. Walen proposes that lawyers in an ideal adversary system would never, or at least rarely, represent clients whom they thought should lose, and so would not face even the threat to integrity that this case involves. *See Walen, Criticizing the Obligatory Acts of Lawyers*, *supra* note 4, at 2, 9-12. This position strikes me as both practically fanciful and theoretically unsound (although Walen is surely right to observe that clients in ordinary civil cases have no right to their lawyers, *see id.* at 9). It is practically fanciful because, quite apart from the adversary organization of legal practice, lawyers and clients are matched by mechanisms – including substantive expertise and ongoing relationships – that do not and could not possibly allow for lawyers to vet their clients based on the merits of their cases. It is theoretically unsound because it converts all lawyers into cause lawyers and so destroys

integrity is an important feature of my argument, and it is worth emphasizing again here.

I claim in *Legal Ethics from the Lawyer's Point of View* that lawyers' professional obligations require them to lie, to cheat, and to abuse – to display what I call the “lawyerly vices”<sup>100</sup> – and that lawyers must therefore abandon and indeed betray ordinary first-personal ideals in favor of honesty, fair-play, and kindness.<sup>101</sup> This tension – between lying, cheating, and abusing on the one hand and honesty, fair-play, and kindness on the other – is the source of the threat to modern adversary lawyers' integrity that my argument identifies. And this tension does not depend upon, or indeed typically involve, the highly charged conflicts between lawyers' ideological commitments and their clients' aims that seem, at least implicitly, to motivate Schneyer's suggestion that lawyers are less adversary than I suppose. Instead, the tension that places lawyers' integrity under threat characteristically arises *whenever* a lawyer concludes, even for the most ordinary reasons – for example, that a client failed to take reasonable care, or that a precedent decides a technical legal question in a disadvantageous way – that a client should not win her case. Ordinary first-personal aspirations – to honesty, fair-play, and kindness – all counsel conceding the case in such circumstances, but adversary lawyers plainly may not do so and must (as I have argued) continue to serve even those clients whom they believe should lose.<sup>102</sup> Serving such clients requires lawyers to make arguments that they do not themselves believe, to employ procedure in the service of substantively unjustified ends, and to attack and undermine deserving and truthful opponents – that is, to lie, cheat, and abuse.<sup>103</sup> The threat to adversary lawyers' integrity

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lawyerly negative capability and undermines the service that negative capability provides to pluralist politics. I make these points in greater detail in Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 293-96, and will not revisit them here.

100. See *id.* at 218-20.

101. See *id.* at 275.

102. Schneyer accepts this and admits that adversary lawyers must display “partisanship, loyalty and zeal,” Schneyer, *Promise and Problematics*, *supra* note 7, at 68, and that “these expectations differ markedly from the impartial roles we assign to legislators and judges.” *Id.* Indeed, Schneyer emphasizes this contrast between the professional duties of lawyers and ordinary first-personal morality, when he observes that a lawyer who declines to make an argument “‘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 as cheating.” See *id.* at 61 n.104 (quoting Jack Sammons, “Cheater!”: *The Central Moral Admonition of Legal Ethics, Games, Lusory Attitudes, Internal Perspective, and Justice*, 39 IDAHO L. REV. 273, 273-74 (2003)). Needless to say, refusing to make arguments that one disbelieves is not considered cheating in ordinary morality.

Note that these same considerations also underwrite a reply to Walen's suggestion, which I do not take up in any detail, that although the threat to integrity that I describe might arise in our actual adversary system, it would not arise in an ideal adversary system. See Walen, *Criticizing the Obligatory Acts of Lawyers*, *supra* note 4, at 19.

103. Lawyers may not, of course, pursue these strategies free from every constraint. I discuss some of the constraints on lawyers' advocacy in *Legal Ethics from the Lawyer's Point of View*, see Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at n.20-25 and accompanying text, and Schneyer emphasizes them also, see, e.g., Schneyer, *Promise and Problematics*, *supra* note 7,

therefore arises not because lawyers must abandon specific and intensely ideological first-personal ideals about the substance of their cases – as in the death penalty and related cases – but rather because they must abandon more general ideals that broadly counsel pursuing the good as one sees it. That is why I say in *Legal Ethics from the Lawyers' Point of View* that the first-personal charges against lawyers that give rise to the threat to lawyers' integrity "focus[] less on whose or what interests lawyers promote and more on what lawyers *do* for clients, whoever they are and whatever positions they take."<sup>104</sup>

The real issue concerning my account of the threat to the adversary lawyer's integrity is therefore not whether lawyers may defer to highly charged ideological commitments in the rare cases in which they arise but rather how lawyers might manage more ordinary conflicts between their own views of their cases and the positions that they must take on their clients' behalves. These conflicts cannot plausibly be eliminated by moderating the adversariness of our professional ethics, because they are inherent in the very idea of adversary ethics, as Schneyer himself admits.<sup>105</sup> Accordingly, if the threat that I propose faces lawyers' integrity is illusory only, then this will not be because lawyers' professional ethics are less demanding than I have supposed but rather because ordinary first-personal morality is more flexible than I have supposed.

But before I turn to this important question, I should briefly take up Schneyer's second doubt about my characterization of the professional duties of modern adversary lawyers. Schneyer worries that I focus too

at 47 n. 20.

But these constraints leave substantial room for lawyers to lie, cheat, and abuse. For example, lawyers may not knowingly make false statements of fact or law to tribunals, *see* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2003), fail to disclose adverse controlling precedents, *see* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2003), or offer false evidence, including perjured testimony. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2003). But as zealous advocates, they nevertheless may present colorable versions of the facts that they do not themselves believe and make colorable legal arguments that they reject. This is expressly recognized in the Model Rules – for example, in the Comment to Rule 3.1, which explains that although there must be a non-frivolous basis in law and fact for a lawyer's statements to a tribunal, statements need not be frivolous "even though the lawyer believes that the client's position ultimately will not prevail." MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. ¶ 2 (2003). Indeed, it is one of the banalities of legal ethics that lawyers are "required to be disingenuous," that is, "to make statements as well as argument which [they do] not believe in." Charles Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 9 (1951).

Finally, some of the constraints on zealous advocacy that the Model Rules impose should probably be interpreted as serving rather than retarding the lawyer's adversary effectiveness. Thus, the comment to Rule 3.3 that Schneyer observes allows lawyers to refuse to proffer evidence that they reasonably believe to be false (save when representing criminal defendants), *see* Schneyer, *Promise and Problematics*, *supra* note 7, at 47 n.6 (citing MODEL RULES OF PROF'L CONDUCT Rule 3.3 cmt. ¶ 9 (2003)), explains itself by observing that proffers of proof that the lawyer reasonably thinks false "may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate." MODEL RULES OF PROF'L CONDUCT Rule 3.3 cmt. ¶ 9 (2003).

104. Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 218.

105. *See supra* note 101.

narrowly on lawyers who litigate before courts – for whom the demands of adversariness and the threats to integrity are particularly strong – and neglect the much larger class of lawyers who do not litigate and for whom the problems that I describe are much less pressing. This is a very different kind of objection from the others that I have considered: it addresses not the correctness but rather the scope of my argument. Indeed, I expressly recognize in *Legal Ethics from the Lawyer's Point of View* that my argument applies most naturally to lawyers acting as litigators.<sup>106</sup> The live question is how broadly beyond the direct context of litigation my argument sweeps.

Schneyer does not offer any definitive answer to this question,<sup>107</sup> but he proposes that my “expansive definition of an adversary legal system as one in which lawyers ‘represent clients rather than justice writ large’ is idiosyncratic” and seems to prefer instead narrowly to confine the adversary legal ethics that I describe.<sup>108</sup> In particular, Schneyer observes that most American lawyers “litigate rarely,”<sup>109</sup> and he identifies several non-litigation roles for lawyers that “are relatively unlikely to expose [lawyers] to charges of undue partisanship, let alone charges of viciousness” of the sort that threaten integrity as I describe.<sup>110</sup> Schneyer mentions, in particular, that the Model Rules expressly contemplate that lawyers may “prepare third-party opinions that evaluate a client’s legal circumstances for the benefit of others,”<sup>111</sup> serve as arbitrators or other “third-party neutrals,”<sup>112</sup> and counsel clients on the moral, economic, social, and political consequences of their actions.<sup>113</sup> In all these activities, Schneyer observes, lawyers must actively avoid the partisanship that gives rise to the threats to lawyers’ integrity that I describe.

I, of course, accept that mere membership in the bar cannot possibly trigger the threats to integrity that I describe, and moreover that Schneyer has identified a series of activities that engage lawyers without threatening their integrity. (Schneyer might have added judging to his list – after all, judges are also lawyers, and I develop the threat to the adversary lawyer’s

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106. See Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 212 n.3. Schneyer recognizes that I recognize this. See Schneyer, *Promise and Problematics*, *supra* note 7, at 59.

107. He rightly points out that I do not either. See *id.* at 59-60.

108. See *id.* at 58.

109. See *id.*

110. See *id.* at 70.

111. See *id.* (discussing MODEL RULES OF PROF'L CONDUCT Rule 2.3 (2003)).

112. See *id.* at 64 & 64 n.123 (discussing MODEL RULES OF PROF'L CONDUCT Rule 2.4 (2003)).

113. See *id.* at 60 & 60 n.97-98 (discussing MODEL RULES OF PROF'L CONDUCT Rule 2.1 (2003)). Schneyer also observes that lawyers may serve as intermediaries, although the Rule expressly contemplating such service was dropped from the Model Rules in 2002 for reasons that do not suggest any doubt about the propriety of this role. See *id.* at 60 & 60 note 96 (discussing MODEL RULES OF PROF'L CONDUCT Rule 2.2 (2001)).



integrity by express contrast to the judge's role.<sup>114</sup>) But I am more inclined than Schneyer to view these non-partisan activities as arising at the periphery of the lawyer's role and to insist that although not all lawyers litigate, and although partisan professional ideals are most obviously at play in litigation, the partisanship principle nevertheless remains, as Geoffrey Hazard has said, "at the core of the profession's soul."<sup>115</sup>

Certainly it is not hard to counterbalance the non-adversary conduct that Schneyer identifies with cases of adversary conduct that arises in circumstances besides litigation: lawyers who give tax advice, for example, may advise their clients to take positions on tax returns as long as the positions have "a realistic possibility of success if litigated,"<sup>116</sup> a standard that expressly allows a lawyer to advise reporting a position "even where the lawyer believes the position probably will not prevail, there is no 'substantial authority' in support of the position, and there will be no disclosure of the position on the return."<sup>117</sup> (Strikingly, the ABA reached this conclusion in the context of an express recognition that the realities of the audit lottery make it likely that such contentious positions will never come to the Internal Revenue Service's attention.<sup>118</sup>) Moreover, some of the professional duties that lie at the foundation of lawyerly adversariness unquestionably apply even outside of litigation or its orbit. Thus, the duty to preserve client confidences applies quite generally to all forms of lawyering,<sup>119</sup> and indeed may apply more strictly outside of litigation, when it is less likely to run up against competing duties requiring candor before tribunals.<sup>120</sup> And finally, the political structure of

114. See Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 212.

115. See Geoffrey Hazard, *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1245 (1991).

116. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 85-352. This replaces an even more permissive rule allowing lawyers to advise clients to take any positions that have a "reasonable basis." See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 314 (1965). (This standard still applies in some areas of tax practice.)

117. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 85-352. A task force of the ABA Tax Section elaborated that "having a 5 percent or 10 percent likelihood of success, if litigated, should not meet the new standard. A position having a likelihood of success closely approaching one-third should meet the standard." Paul Sax, James P. Holden, Theodore Tannenwald, Jr., David Watts & Bernard Wolfman, *Report of the Special Task Force on Formal Opinion 85-352*, reprinted in 39 TAX LAW 633, 638-39 (1986).

118. See *id.* Fewer than one percent of tax returns are audited.

119. See MODEL RULES OF PROF'L CONDUCT Rule 1.6 (2003). Although the rules concerning client confidences were relaxed in 2003 to allow for disclosure in certain cases in which clients use a lawyer's services in furtherance of a crime or fraud, see MODEL RULES OF PROF'L CONDUCT Rule 1.6(b)(2) & (3), they remain strikingly strict. These rules, incidentally, permit the beginnings of an answer to Schneyer's intriguing question whether the duties that agents owe their principals under the law of agency entail that all agents face threats to their integrity analogous to those that I claim burden lawyers. See Schneyer, *Promise and Problematics*, *supra* note 7, at 58-59. That answer would observe that ordinary agents do not come under the full range of duties that apply to lawyers and, equally importantly, that ordinary agents who violate their duties do not face the full range of sanctions that apply to lawyers.

120. See MODEL RULES OF PROF'L CONDUCT Rule 3.3 & comt. ¶ 10 (2003).

the lawyer's role – the connection between lawyerly negative capability and the stable management of social conflict that I identified in *Legal Ethics from the Lawyer's Point of View*<sup>121</sup> – makes the broad scope of lawyerly adversariness unsurprising. Insofar as the negatively capable lawyerly virtues associated with adversariness (and hence the conflict between lawyerly and ordinary first-personal ambitions that triggers the threat to lawyers' integrity) serve an important political function, the scope of lawyerly adversariness will be commensurate to the importance of the function. And although I accept Schneyer's claims that adversariness does not pervade all of the lawyer's professional activities, I continue to insist that adversariness is sufficiently broad-ranging to make its ethical consequences worth studying and sufficiently characteristic of lawyers to place this study at the center of distinctively legal ethics.

### *B. The Flexibility of Ordinary First-Personal Ideals*

Schneyer's observations about lawyers therefore do not gainsay that lawyers must characteristically display a striking degree of adversariness in their professional conduct. But my larger argument about integrity involves a second claim, namely that such adversariness is at odds with ordinary first-personal morality, and the argument may therefore fail, even though I am right about lawyers, because I am wrong about ordinary first-personal morality. In particular, ordinary first-personal morality may be more tolerant or flexible than I suppose, so that the ordinary moral ideals of honesty, fair-play, and kindness to which my argument appeals do not, in fact, cast adversary lawyers as liars, cheats, and abusers. Schneyer also presses precisely this challenge to my argument, doubting "the robustness of [my] claim that the lawyer's role obligations require conduct that ordinary morality regards as lying and cheating."<sup>122</sup> Moreover, Schneyer's doubts about lawyerly adversariness and this new challenge complement each other. Even though I reject Schneyer's attempt to distance modern lawyers from the adversariness that I attribute to them, my larger argument cannot simply ignore Schneyer's caution against overstating the adversariness of the lawyer's professional role. The tensions between adversary ethics and ordinary first-personal morality that I emphasize must refer to an appropriately modest conception of adversary ethics.

Answering Schneyer's suggestion that ordinary first-personal morality can accommodate the lawyer's role-obligations requires developing a detailed account of the substance of ordinary first-personal morality, in order to display the ways in which lawyerly adversariness deviates from it. I shall not attempt any such exhaustive analysis here, nor shall I take up all

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121. See Markovits, *Legal Ethics from the Lawyer Point of View*, *supra* note 2, at 283 & 295-97. I freely admit that this connection remains for the moment less fully articulated than it might be.

122. See Schneyer, *Promise and Problematics*, *supra* note 7, at 58 & 48 n.22.

three of the vices – lying, cheating, and abusing – that I have claimed lawyers’ role obligations involve. Instead, I shall proceed more impressionistically, and I shall focus on lying. Even an informal argument can convey the deep tensions that arise in this connection between ordinary first-personal morality and the lawyer’s role, and lying is the vice to which Schneyer devotes the most attention and with respect to which Walen also presents arguments that parallel Schneyer’s. Developing the argument for the case of lying will make plain how the argument will go in the other cases, as well.

Schneyer accepts (at least for the purposes of argument) that lawyers make statements that they do not themselves believe. But he doubts that this amounts to lying, according to the standards of ordinary first-personal morality, because of the institutional context in which lawyers make these claims. Lies, for Schneyer, are “statements intended to convey a false impression.”<sup>123</sup> But Schneyer believes that lawyers who take adversary positions that they would reject if they were judge or jury have no such intent. Instead, Schneyer proposes that “all a lawyer vouches for in making a non-frivolous legal argument is that it is worthy of the court’s consideration” and Schneyer adds that “if judges understand this, I fail to see why anyone would consider the argument a lie, unless he mistakenly supposes that the lawyer was vouching for more.”<sup>124</sup> Likewise, Walen thinks it is “inaccurate to say . . . that a lawyer who tries to convince others of arguments she does not herself believe is lying.”<sup>125</sup> And Walen adds that when a lawyer makes an argument that he would reject if he were a judge, “we should not interpret his argument as a statement of what he actually believes is true, but as an attempt . . . to put the argument on one side as convincingly as possible.”<sup>126</sup> On each of these views, lawyers are insincere without lying. They are, as Walen says, “in a way, acting.”<sup>127</sup>

I reject this effort to harmonize lawyerly adversariness with the ordinary first-personal morality of lying, both because I reject the account of lawyers’ intentions that it presents and because I reject the account of the first-personal morality of lying that it supposes. (The effort, one might say, combines an academic view of lawyers with a lawyerly view of lying, and neither view is adequate to its subject.) To begin with, although lawyers clearly do not vouch for their statements as judges vouch for their opinions, Schneyer is wrong to suggest on this basis that they do not intend to deceive and therefore do not lie. (Vouching is only a means by which to lie effectively, and not an essential element of lying.) Lawyers,

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123. *Id.* at 61.

124. *Id.* at 62.

125. Walen, *Criticizing the Obligatory Acts of Lawyers*, *supra* note 4, at 13.

126. *Id.* at 14.

127. *Id.*

after all, are *zealous* advocates, which means that they intend to persuade even if mistaken, and not to persuade only if correct (and lawyers certainly do not use the adversary process merely as a means to discovering the truth themselves).<sup>128</sup>

Moreover, although there are many ways, as Walen points out, in which lawyers may overstep their roles in seeking to make a position more persuasive than it deserves to be – for example, by appealing to emotion or even prejudice<sup>129</sup> – the intent to persuade apart from truth does not itself violate but is instead required by lawyers' adversary roles. Thus, although courts of course know, as Schneyer and Walen both observe, that lawyers appear as advocates rather than sincerely,<sup>130</sup> Walen is mistaken to suppose that a lawyer might preferably, or indeed properly, preface her arguments by warning the court "not to conclude that [she] personally accept[s] the argument [she is] about to express,"<sup>131</sup> and she certainly may not generally inform the court of weaknesses in her position that the court has overlooked. That is an attitude that the adversary system – which involves a real and not just provisional division of labor between advocate and tribunal – precisely does not allow the lawyer to take.<sup>132</sup> (This is an important difference between an actually adversary proceeding and an academic discussion in which the participants take all sides in a cooperative effort to determine the truth.) The division of labor at the core of adversary procedures requires lawyers to intend to succeed even when they should fail – to intend to deceive – and this intent is not undone by the fact that lawyers do not personally vouch for the lies that they tell.<sup>133</sup>

Finally, ordinary first-personal morality firmly insists that the lawyer's

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128. The analogy between lawyers and actors that Walen marshals in lawyers' defense is therefore flawed. *See id.* Although it is true that lawyers and actors are alike in that neither personally vouches for what she says, they are different in that actors do not intend for their audience to be deceived, but only (what is very different) for the audience to suspend disbelief.

129. *See id.*

130. *See* Schneyer, *Promise and Problematics*, *supra* note 7, at 61-62; Walen, *Criticizing the Obligatory Acts of Lawyers*, *supra* note 4, at 14. Juries, of course, do not know this nearly as well as courts, and adversary lawyers undoubtedly seek to persuade juries by conveying a sense (often false) of their own conviction in favor of their clients. The argument that adversary lawyers lie should not, however, help itself to this fact, because adversary legal practice need not and should not allow lawyers to take advantage of jurors' ignorance in this way.

131. *Id.*

132. Indeed, Walen admits precisely this point when he accepts (although reluctantly) that even in an ideal adversary system, in which lawyers make no improper appeals to emotion or prejudice, lawyers are not merely judges' aids. *See id.* at 8.

133. It is perhaps tempting to say that even where adversary lawyers' narrowest intent is to deceive in the service of their clients' positions, their broader intent is to support the adversary system and that system's capacity impartially to resolve disputes – and that this intent is consistent with ordinary first-personal morality. This reply fails on two fronts, however. First, it confuses intent with motive, and as white lies make plain, even well-motivated deception counts as a lie. And second, the ambition to which the suggestion refers – to support the adversary's system's impartial dispute resolution – is just a special case of the ambition to do what is impartially best that I have argued cannot possibly sustain integrity. *See* Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 253-54.

intent to persuade even when wrong counts as lying, so that Schneyer and Walen cannot retreat to the position that although lawyers do indeed intend to deceive, only deception achieved by personal vouching may properly be called a lie. Such a narrow conception of lying – the conception that requires vouching and not the mere intent to deceive – is decidedly idiosyncratic and represents a substantial deviation from ordinary approaches to the first-personal morality of lying. The ordinary morality of lying emphasizes that whereas truthfulness allows a person's listeners to share in her view of the world, and so creates a kind of community of understanding, lies place a speaker out of community with her listeners because the combination of knowledge and ignorance that lies create makes it impossible for liar and listener to share a point of view.<sup>134</sup> This account sweeps broadly, and it surely includes intentional deception quite generally and not just deception accomplished by the means of personal vouching, because intentional deception generally renders shared understanding impossible, regardless of whether the deception is accomplished by vouching or by some other means. Indeed, the account that makes personal vouching an essential element of lying is, in effect, the narrow, lawyerly view of lying that I propose lawyers who have embraced negative capability as a distinctive role-ethic might adopt to defend against the threat to their integrity that I diagnose.<sup>135</sup> But even if this narrow conception of lying is, in appropriate circumstances, available to lawyers as an *answer* to the threat to their integrity, it cannot simply *pre-empt* this threat. The threat to lawyers' integrity arises because lawyers' professional obligations conflict with ordinary first-personal morality, including the ordinary view of lying, under which the intentional deceptions that these obligations require count as lies.

### 3. THE IMPORTANCE OF THE LAWYER'S ROLE

The first two parts of my argument in combination characterize an ethical crisis that threatens modern adversary lawyers. I claim that moral integrity is threatened when persons must abandon or betray their free-standing first-personal ideals and ambitions in the service of third-personal impartial morality. And I observe that the professional obligations of

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134. I develop these ideas at greater length in Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1422-28 (2004).

135. See Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 280. Whereas the ordinary view of lying is concerned to respect community among people who each assert their own positive points of view, the narrow, lawyerly view of lying is concerned to prevent self-assertion among negatively capable lawyers who have foresworn holding positive points of view entirely. Calling the lawyerly view of lying narrow is therefore in one way deceptive, because it suggests that lawyers adopt the same general understanding of lying as ordinary people but that they apply this understanding to a narrower set of circumstances. In fact, lies for lawyers are almost entirely different things from lies for ordinary people.

adversary lawyers require that lawyers betray ordinary first-personal ideals of honesty, fair-play, and kindness, and therefore place adversary lawyers' integrity under threat.

The third part of my argument discusses a way out of the crisis. I reinterpret the ethics of role to emphasize that role-ethics complements rather than competes with third-personal impartial morality, specifically by underwriting idiosyncratic, role-based first-personal ideals that are consistent with the demands of third-personal morality in circumstances in which ordinary first-personal ideals are not.<sup>136</sup> Role-occupants who adopt such idiosyncratic first-personal ideals can therefore conform to the requirements of third-personal impartial morality in such circumstances without placing their integrity under threat, whereas people who retain ordinary first-personal moral ideals cannot.<sup>137</sup> I suggest, in particular, that a distinctively lawyerly role-ethic that emphasizes lawyers' negative capability allows lawyers to conform to their adversary professional obligations while retaining their integrity intact.<sup>138</sup> Finally, I speculate (although I only speculate) about the conditions under which roles can support idiosyncratic first-personal ideals as they must do if they are to sustain the integrity of the persons who inhabit them.<sup>139</sup> I propose (although I only propose) that roles can serve this purpose only if they are insular rather than cosmopolitan, and I conjecture (although I only conjecture) that the lawyer's role has become steadily cosmopolitan over the previous century or so and is now too cosmopolitan to sustain the idiosyncratic first-personal ideals upon which the integrity of modern adversary lawyers depends.<sup>140</sup> I conclude by observing that this threat to the modern adversary lawyer's integrity is no accident, but that the combination of forces that generates it is instead inscribed in the genetic structure of modern morals and politics, so that there is something tragic in the modern adversary lawyer's ethical circumstances.<sup>141</sup>

Hazard doubts, however, whether anything so distinctive as a role is necessary for mediating the tensions between ordinary morality and the lawyer's professional obligations that I describe, and he therefore also doubts whether the adversary lawyer's capacity to preserve her integrity in the face of these tensions is connected to the cultural and institutional structure of her role in the ways that I describe. He claims that my analysis involves a "mistaken conflation"<sup>142</sup> of morality and positive law and proposes that the ethical tensions and threats to integrity that I discern

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136. *See id.* at 268-84.

137. *See id.* at 276.

138. *See id.* at 277-84.

139. *See id.* at 284-88.

140. *See id.* at 288-91.

141. *See id.* at 291-300.

142. *See Hazard, Humanity and the Law, supra* note 10, at 80.

may be resolved by paying proper attention to important differences between the two.<sup>143</sup> Moreover, Schneyer is also skeptical of my account of the place of the lawyer's role in the ethical circumstances of modern adversary lawyers, although he accepts my general claims about roles and integrity, so that his doubts proceed on narrower grounds than Hazard's. In particular, Schneyer doubts both that the lawyer's role was as insular in the past as I suggest and that it is as cosmopolitan now.<sup>144</sup> I briefly take up each objection to my account of the ethical functioning of the lawyer's role in turn. Because my own claims in this connection are speculative only, I shall confine my replies to these objections to making suggestions for further work.

#### A. *Lawyers' Respect for Positive Law*

Hazard emphasizes the distinction between morality and positive law. He suggests that legal norms, including presumably the norms that make up the law governing lawyers, must be understood in terms of their distinctively law-like character and, borrowing words from Kant, that these norms are in particular "objective" rather than "subjective."<sup>145</sup> Hazard presents this distinction in terms reminiscent of the jurisprudential debate between natural law and positivism,<sup>146</sup> and he is surely right to remark upon Kant's surprising affinity for positive law.<sup>147</sup> But these jurisprudential associations are not necessary for Hazard's point, which is that there can be good reasons – for example, reasons involving respect for settled expectations, or the importance of justifying laws through arguments that are publicly accessible to everyone, or even the special place of institutions in moral and political life<sup>148</sup> – for a person to obey

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143. See *id.* at 80-83. Hazard's expression of these ideas is somewhat elliptical, and my account of his views is therefore necessarily interpretive. I hope that I have his position right, and I would be glad to be corrected if I do not.

144. See Schneyer, *Promise and Problematics*, *supra* note 7, at 66-70.

145. Hazard, *Humanity and the Law*, *supra* note 10, at 83. Hazard provides an interpretation of Kant's ideas about the relationship between law and morals, which he admits are "not transparent." *Id.* at 82. I shall not take up the interpretive question about Kant. I shall also not take up Hazard's view of the place of Kant's ideas in my own argument, and in particular his suggestion that I "use Kantian philosophy to anchor a critique of legal ethics or of the lawyer's vocation." *Id.* at 83. This is not what I take myself to be doing at all – I view myself as a critic rather than an applier of Kant in this respect – but I do not think such a purely interpretive dispute worth pursuing.

146. See *id.* at 81.

147. The positivist themes in Kant's jurisprudence are developed in greater detail in Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535 (1996).

148. Perhaps the strongest version of this claim appears in Rawls's dualist view that "[t]he principles of justice for institutions must not be confused with the principles which apply to individuals and their actions in particular circumstances." JOHN RAWLS, A THEORY OF JUSTICE 54-55 (1971). But the claim does not depend upon dualism, and even a leading monist, who insists that the same principles should guide the design of institutions and individual action, can nevertheless accept that "the duties of state officials [presumably including adversary lawyers] are very different from the duties of private citizens." Liam Murphy, *Institutions and the Demands of Justice*, 27 PHIL. & PUB. AFF. 251, 254 (1998).

positive law even when it does not best reflect the moral principles that she would, writing on a clean slate, aspire to pursue. I read Hazard to propose, against the backdrop of these observations about positive law, that there is nothing surprising or mysterious in the fact that the legal principles that govern lawyers as members of the legal profession are at odds with the moral principles that lawyers would prefer to pursue as individuals and certainly that there is nothing threatening to integrity when adversary lawyers adopt the former over the latter. Instead, it is just a case of recognizing that positive law matters, so that a person may be required to act differently because law, and not just morality, applies to her.

Hazard is surely right that the existence of positive law can change how a person should, all-things-considered, behave, including by causing her to have most reason to violate moral principles that she would have most reason to follow in the absence of positive law. Moreover, the law-like character of lawyers' codes of professional ethics undoubtedly contributes to their authority in this way. But I do not see how these observations about the positive legal authority of lawyers' professional ethics contribute to sustaining adversary lawyers' integrity in the face of the tensions that I observe between lawyers' professional obligations and ordinary first-personal morality. Indeed, Hazard's remarks seem to me to appear in their best light when they are understood not as rejecting my account of the problem of lawyers' integrity or of the importance of the lawyer's role in addressing it, but rather as proposing an alternative account of the substantive content of that role.

Observations about the positive character of law cannot simply eliminate tensions between law and morality, because – as familiar discussions of civil disobedience emphasize<sup>149</sup> – the authority of positive law eventually runs out in the face of its sufficiently great immorality, so that announcing the law-like character of a rule cannot spare persons the difficult choice whether or not to obey it. Tensions may arise, moreover, between law and both third- and first-personal morality. And although historical cases involving social protest movements give the question whether to obey positive law that violates third-personal impartial morality a particular prominence in our political culture, the question whether to obey positive law that violates first-personal morality can be equally pressing. For example, although the case of resisting a law that drafts soldiers to fight in an unjust war is more familiar, a law that drafts someone fundamentally committed to gentleness to fight in a war whose justice she nevertheless acknowledges is no less troubling. Indeed, the legal recognition of conscientious objection to military service emphasizes an objector's personal opposition to war broadly rather than her political

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149. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 363-91 (1971).



belief that a particular war is unjust,<sup>150</sup> and it is therefore most naturally understood as a concession to first- rather than third-personal objections to the authority of law.

These observations do not, of course, say when or how commonly positive law comes into conflict with a person's first-personal moral commitments. This will depend on the content of both positive law and the person's first-personal moral ideals. In particular, it will depend on whether and to what extent the person adopts law-abidingness in itself as a distinctively first-personal ambition. Insofar as a person does make it her personal project to respect the law, she will find unjust or otherwise immoral laws less alien, and less costly to comply with, because compliance will seem to her an expression of at least one of her native ambitions. On the other hand, a person whose first-personal ambitions do not include any such respect for the law, and instead include a measure of iconoclasm or indeed rebellion against the law, will find laws whose substance she disapproves of more alien and more costly to comply with. Law-abidingness, as a first-personal ambition, therefore plays a critical part in mediating the relationship between law and other moral ideals.

Hazard's emphasis on the connection between the lawyer's vocation and the authority of positive law might be read, against this background, to propose that lawyers display a peculiarly strong first-personal sympathy for law-abidingness. This distinctive first-personal ambition to respect and obey the law might be thought to serve lawyers by reducing the costs they must bear when they betray other first-personal ambitions – to honesty, fair-play, and kindness – in order to conform to the ethical obligations created by the law governing lawyers. When read in this way, Hazard's comments do not so much deny the general importance that I ascribe to role-morality as offer a competitor to the particular conception of the lawyer's role that I propose. They compete with my normative account of the lawyer's role – in particular, by replacing my account of negative capability with an account of law-abidingness. And they also compete with my descriptive account of the circumstances in which the lawyer's role can sustain her integrity – in particular, by treating the increasingly legislative character of the law governing lawyers as supporting rather than threatening the lawyer's integrity, at least insofar as this development gives the lawyer's role increasing legal sanction and, moreover, increases the connection between specifically lawyerly professional ethics and law-abidingness. I am skeptical of this view on both counts: I am concerned about the pathologies of law-abidingness as a substantive value, which I worry can too easily develop into a worship of

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150. See 50 U.S.C.A. Appx § 456(j).

formal rules;<sup>151</sup> and I wonder whether a distinctive role can be sustained by such juridical, rather than cultural and sociological, forces. These questions of course cannot be resolved here.

*B. The Increasing Cosmopolitanism of the Bar*

Hazard's arguments do not undermine my account of the importance of role to lawyers in any general way but tend, rather, to confirm that a distinctively lawyerly role-ethic is integral to preserving adversary lawyers' integrity. But I may be right about the part that role – and indeed even that role-insularity – plays in the overall construction of the lawyer's ethical circumstances and still be wrong about the particular historical development and contemporary character that I ascribe to the lawyer's role. Schneyer thinks that I am wrong in precisely this way. First, he doubts whether the nineteenth century lawyer's role was as insular as I have suggested. Thus, Schneyer proposes that the aristocratic values that I ascribe to nineteenth-century lawyers might be attributed to the lawyers' class position rather than to any role insularity,<sup>152</sup> and he observes that the role-insularity that I propose existed cannot have been supported by institutions of self-governance among lawyers because there was no organized bar at the time.<sup>153</sup> Moreover, and to my mind much more importantly, Schneyer also questions whether the contemporary lawyer's role has become as cosmopolitan as I suppose. In particular, he observes that even if institutions beyond the bar have formally acquired increasing influence over legal ethics, the substantive content of the law governing lawyers remains overwhelmingly determined by lawyers themselves.<sup>154</sup> And, most important of all, Schneyer doubts whether the increasing legalization of legal ethics – which he accepts as a fact – undermines the insularity of the bar as I claim: he wonders why “the legalization of internalized norms means that the norms are no longer internalized.”<sup>155</sup>

Schneyer is quite right to call for greater sociological, and especially greater historical, evidence to support the suggestions that I make about

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151. A particularly powerful example of this concern, and a case whose substance touches on the conflict between the moral instincts and professional obligations of legal officials, is the retreat into formalism of abolitionist judges called on to enforce the fugitive slave laws before the civil war. See ROBERT COVER, *JUSTICE ACCUSED* (1975).

152. See Schneyer, *Promise and Problematics*, *supra* note 7, at 66.

153. See *id.* Schneyer adds that the nineteenth century bar did not, at least in some states, control its membership, and cites a provision in the 1851 Indiana Constitution that “[e]very person of good moral character, being a voter, is entitled to admission to practice law in all courts of justice.” See *id.* at 67. (Other states did in fact have similar guarantees in their constitutions. California, for example, adopted a provision in 1879 that guaranteed broad access to employment in the professions. See Cal. Const., art. XX § 18 (1879).) The use Schneyer makes of such provisions stands in some tension with his claims about lawyers' high class status, which suggests that whatever formal rights existed, bar membership was in fact narrowly confined to a small elite.

154. See Schneyer, *Promise and Problematics*, *supra* note 7, at 68-69.

155. *Id.* at 68.

the development and character of the lawyer's role. But I think that our disagreement, especially concerning the nature of the modern bar, is less about the facts than about the theoretical idea of the lawyer's role and, in particular, of the bar's role-insularity. Schneyer seems to approach the bar principally as an institution of administration and therefore sensibly asks about the substantive expertise and influence that it contributes to the regulation of lawyers. He correctly observes, in answer, that legal experts are often consulted and that "the bar's norms have considerable influence" on the substantive outcomes of the law-like processes that I claim (and Schneyer acknowledges) now underwrite the law governing lawyers.<sup>156</sup> But the ethics of role plays a justificatory rather than an administrative part in my larger ethical argument, and I therefore approach the bar (and the lawyer's role) as a source not of management but rather of authority. I claim (and Schneyer does not deny) that the authority that underwrites the law governing lawyers no longer belongs to the bar but now resides in the same political institutions that underwrite the authority of ordinary public law – indeed, that is what it means to say that the norms of legal ethics have been legalized.<sup>157</sup> Schneyer's remarks about the lawyer's role therefore raise the question whether, as he suggests, an administrative or managerial role can sustain the integrity of lawyers or whether, as I claim, an authoritative role is necessary instead.

I do not think that a purely administrative role – a role that merely channels and manages external legal authority – can serve the first-personal functions upon which the adversary lawyer's integrity depends. Legal authority is by nature impartial, and law imposes third-personal obligations, so that law-like norms cannot directly solve the first-personal problem of integrity that I have described. Of course, the legalization of norms does not preclude the existence of congruent first-personal norms, as Schneyer rightly observes. To begin with, legal obligations may converge with the previously existing first-personal ambitions of those whom they regulate. This is the case in much of the criminal law, including in Schneyer's example of the law against murder.<sup>158</sup> Moreover, law can sometimes encourage certain norms to be adopted in the first-person, as has plausibly happened, for example, in the case of anti-discrimination law. But when law reinforces or reforms first-personal ideals in this way, it does so because its rules, and in particular the principles that underlie these rules, express ideals that come to appeal to persons as ambitions for their own lives. And although a theory of the

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156. *Id.* at 69. Schneyer has made similar points in his past work. See Ted Schneyer, *From Self-Regulation to Bar Corporativism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639 (1994). I discuss this argument in Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 290 n.149.

157. See *id.* at 290.

158. See Schneyer, *Promise and Problematics*, *supra* note 7, at 68.

law's expressive power is a complicated thing, certain natural limits on this power are not difficult to discern. In particular, law's expressive content is connected to its third-personal character – to the impartial principles upon which its authority depends and to the universal audience that it must address. Law therefore cannot, because of its public, third-personal nature, easily express, much less generate or sustain, *idiosyncratic* first-personal ideals.

Moreover, this general limitation is evident in connection with the special case of the law governing lawyers. It is clearly no longer a justification for the legalized regime of professional ethics under which lawyers work today that this body of rules promotes a distinctively virtuous form of life for lawyers – although this would be a natural thought for lawyers who occupy an authoritatively insular role, it would today be rightly viewed by non-lawyers as rent-seeking or self-dealing. The justification that the law gives for the regime of legal ethics that it underwrites is not that this body of rules expresses and organizes a virtuous form of life, but rather that it produces the best justice overall. The legalized law governing lawyers, in other words, expresses the values of the adversary system defense – and these, as I have argued at length, precisely cannot underwrite a first-personal moral life that can sustain the integrity of adversary lawyers who must, under the terms of the defense, abandon or betray ordinary first-personal moral ideals..

The idea of role-differentiation must therefore come into play in more than a merely administrative fashion if lawyers are to develop idiosyncratic first-personal ideals that can sustain their integrity. This idea may perhaps be brought to bear inside the law – and the account of the general first-personal ambition of law-abidingness that I articulated in my discussion of Hazard may be understood as proposing this course, specifically by explaining how law might, in spite of the third-personal impartial nature of its authority, come to generate idiosyncratic first-personal ambitions simply by issuing substantively different commands to different people. Perhaps Schneyer also has something similar in mind, although he does not say so, in which case my doubts about Hazard's approach apply to Schneyer's also.

Of course, the alternative approach to preserving lawyers' integrity, which is to bring role-differentiation to bear on legal ethics from without the law though the idea of an authoritatively insular legal role, suffers its own backward-looking pathologies, as I myself have emphasized.<sup>159</sup> This is just a case in which there is no easy or fully satisfying way out for modern lawyers, which is why I end *Legal Ethics from the Lawyer's Point*

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159. See Markovits, *Legal Ethics from the Lawyer's Point of View*, *supra* note 2, at 293.

of *View* on a note of tragedy.<sup>160</sup>

### CONCLUSION

I attempt in *Legal Ethics from the Lawyer's Point of View* to develop a systematic account of what it is like, ethically, to practice law in the modern adversary system. This effort requires reconstructing a complex practical and legal institution in philosophical terms. The two parts of the larger view – the empirical account of the practice of law and the philosophical account of the nature of ethics – are equally important to the overall argument. My approach to legal ethics therefore stands in sharp contrast to both dominantly legal accounts – which emphasize pragmatic assessments of the actual practice of legal ethics – and dominantly philosophical (and often casuistic) accounts – which emphasize ethical theory and approach legal ethics with a moralizing, reformist zeal. I aim instead to take law and philosophy equally seriously – to give to legal ethics a philosophical interpretation that remains rooted in lawyers' actual practice – which is why I say that I seek to articulate “the values and ideals that are imminent in the law.”<sup>161</sup>

The argument in *Legal Ethics from the Lawyer's Point of View* is of course not purely methodological – it presents a distinctive and contestable substantive view of both ethics generally and legal ethics in particular. The Responses to which I devote these pages take issue with many aspects of my substantive view, including my commitment to free-standing first-personal morality, my conviction that the professional obligations of adversary lawyers conflict dramatically with ordinary first-personal morality, and my view of the place of an insular legal profession in managing this conflict. The Responses' criticisms of these and other of the substantive claims that my argument involves have been always serious and often telling. Even as I have tried to explain why I retain my views in the face of these objections, I have also tried to display the force of the objections and to suggest the ongoing debates that the objections should engender.

But the Responses have not grappled seriously with the methodological commitment that unites the several parts of the overall account of legal ethics presented in *Legal Ethics from the Lawyer's Point of View*. And the differences between these methodological commitments and the methodologies implicit in the Responses to my argument underlie many of the substantive disagreements that the Responses do highlight.

These differences in method explain, for example, why I view the tensions between cosmopolitan first-personal morality and the obligations

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160. See *id.* at 300.

161. *Id.* at 120.

of the adversary lawyer's role in starker terms than my critics do. Walen, who emphasizes philosophy and therefore has no interest in the empirical architecture of the first person (which is built upon practical experience), denies that this tension is conceptually intelligible. And Schneyer, who emphasizes legal practice and therefore does not try to connect particular rules of conduct to the broader conceptions of virtue and vice under which they arise, denies that ordinary and professional practices are entangled in competing images of virtue. Only an approach like mine, which emphasizes both philosophy and law, will notice the vital part that first-personal ideals play in the construction of moral personality and organize the narrow idiosyncrasies in particular rules of conduct that lawyers follow into broadly idiosyncratic lawyerly accounts of virtue and vice. The methodological differences also explain why I view the lawyer's role (and that role's insularity) as more important to the lawyer's moral life than my critics do. Hazard's philosophical (indeed, jurisprudential) account misses important ethical differences between ideals that are grounded in a cosmopolitan idea of respect for legal authority and ideals that are grounded in an insular role. And Schneyer's legal account adopts an administrative theory of role-insularity that does not match the ethical framework within which role-based arguments operate. Only a mixed approach like mine can generate a conception of role adequate to the combined philosophical and legal place that it must occupy in the larger landscape of legal ethics.

These methodological observations cannot, of course, settle any substantive disagreement in favor of my views. But insofar as the proper task for legal ethics is, as I propose, to understand philosophically the ethical practices through which the legal profession constructs itself, my methodology represents a distinct advance over the alternatives. This in itself should add credibility to the more substantive conclusions that I reach.