

COPYRIGHT NOTICE:

Daniel Markovits: A Modern Legal Ethics

is published by Princeton University Press and copyrighted, © 2008, by Princeton University Press. All rights reserved. No part of this book may be reproduced in any form by any electronic or mechanical means (including photocopying, recording, or information storage and retrieval) without permission in writing from the publisher, except for reading and browsing via the World Wide Web. Users are not permitted to mount this file on any network servers.

Follow links for Class Use and other Permissions. For more information send email to: permissions@press.princeton.edu

INTRODUCTION

IF THE BASIC TASK of ethics is to say how one should live,¹ then the basic task for a professional ethics is to explain how the actions, commitments, and traits of character typical of the profession in question may be integrated into a life well-lived.

For some professions—perhaps for medicine—answering this question is an essentially happy affair. The medical profession's core ethical appeal is never seriously in doubt, and so its professional ethics is primarily concerned with elaborating the values that account for this appeal and analyzing marginal cases (such as end-of-life care), where it is unclear just what conduct these values recommend. For other professions—for example, for torturers—professional ethics is an essentially unhappy affair. The torturer's professional commitments cannot, finally, be seen as anything other than a retreat from ethical life, and so his professional ethics become inevitably a masquerade, which can at most disguise the ethical failings of a basically degenerate occupation.²

There exists also a third class of professions, for which the nature of professional ethics is essentially uncertain. These professions have obvious ethical appeal but also display obvious ethical shortcomings; and although virtuous professional administration may enhance the professions' appeal and diminish the shortcomings, these will never be more than incremental changes to substantial entries on both sides of the ethical ledger. Accordingly, it is an open question, for such professions, whether a life lived within them may be a life well-lived, overall.

Law is just such a profession. On the one hand, lawyering is intimately connected to the deep and enduring ethical ideals of respect for persons that justice involves. On the other hand, the legal profession also has an ethically troubling aspect. Lawyers—at least when they function as adversary advocates—do not pursue justice itself, directly and impartially. Instead, they are charged loyally to represent particular clients, whose interests and aims may diverge from what justice requires.³ This entails that adversary advocates commonly do, and indeed are often required to do, things in their professional capacities, which, if done by ordinary people in ordinary circumstances, would be straightforwardly

immoral.⁴ These practices make it uncertain whether the life of the lawyer is, finally, worthy of commitment.*

I shall seek, in these pages, to confront the uncertainty about lawyers' ethical lives by developing a professional ethics that comes down essentially in favor of lawyers, articulating a powerful and distinctively lawyerly virtue and explaining how this virtue renders lawyers' professional commitments ethically worthwhile. At the same time, the argument raises questions about whether this lawyerly virtue is practically available to modern lawyers, so that the vindication it offers is only bitter-sweet, at least when assessed from lawyers' own points of view.

AN OVERVIEW OF THE ARGUMENT

The basic argument of the book may be simply stated, in three parts. First, lawyers' professional obligations to behave in ways that would ordinarily be immoral are not simply the results of excessive or perverse partisanship. Instead, they are deeply ingrained in the genetic structure of adversary advocacy. Uncertainty about the ethical appeal of the legal profession therefore cannot be resolved simply through incremental changes in the positive law governing lawyers. Second, while it may be that lawyers' professional obligations to act in ordinarily immoral ways are necessary parts of a moral division of labor that best serves justice overall, this is not enough to redeem their professional ethics. Division of labor arguments cannot cast lawyers' professional lives as in themselves worthy of affirmation and commitment, which is what a successful legal ethics requires. And third, an alternative approach to legal ethics, which develops an account of distinctively lawyerly virtue to complement division of labor arguments, can render lawyers' lives ethically appealing and so bring their professional ethics to a successful conclusion. But although this vindication is possible in principle, recent developments in the structure of the legal profession

*Lawyers may, of course, behave unethically in other ways also. Most notably, lawyers who select clients based simply on the clients' ability to pay fees contribute to creating an unfair distribution of legal services. This raises a host of questions concerning ethical obligations to provide legal services pro bono and, more broadly, the economic structure of the legal profession. I will not address these questions here, however, save for some brief reflections in chapter 8. Lawyers' roles cannot plausibly be said to obligate them to distribute their services on the basis of the ability to pay fees (in civil cases, at least, no one has a right to whatever lawyer he can afford). And insofar as it is immoral for lawyers to sell their services to the highest bidders, this wrong is incidental rather than essential to the lawyer's professional role (doctors behave in similar ways). An argument about the basic nature of adversary advocacy should therefore avoid relying on such contingent features of any particular adversary legal practice.

threaten to deny contemporary lawyers practical access to the ideals on which it depends.

Part I: Adversary Advocacy

The book's argument begins by describing the complexities that underwrite the uncertain prospects for lawyers' professional ethics. To this end, the first part of the book embarks on a systematic interpretive engagement with the professional obligations of adversary advocates. This engagement generates a detailed and robust account of the ordinarily immoral conduct to which lawyers are professionally committed even as, in the very same breath, it sows the seeds of a parallel conception of distinctively lawyerly virtue. In both respects, Part I sets the stage for the rest of the book.

The legal process writ large may be designed to promote accurate assessments of factual and legal claims in the service of just adjudication. But the individual lawyers who shepherd clients through the legal process do not pursue truth or justice directly. Instead, the lawyer-client relationship is governed by principles of *lawyer loyalty* and *client control* that require lawyers to repress personal impressions of what is true or fair in deference to their clients' interests and instructions. This places lawyers in an unusually complex ethical position.

Most familiarly, the ideals of lawyer loyalty and client control subject adversary advocates to professional obligations to violate otherwise applicable principles of impartiality. As Geoffrey Hazard and William Hodes declare in the leading treatise on legal ethics, "the law of lawyering imposes a clear and mandatory favoritism when a lawyer must choose between the interests of clients and non-clients."⁵

Moreover, this thin, generic idea of partisan preference operates (although now in less-acknowledged ways) through thicker and more structured professional duties to embrace forms of conduct that would ordinarily be classed as vices, with familiar names.

Unlike juries and judges, adversary lawyers should not pursue a true account of the facts of a case and promote a dispassionate application of the law to these facts. Instead, they should try aggressively to manipulate both the facts and the law to suit their clients' purposes. This requires lawyers to promote beliefs in others that they themselves (properly) reject as false. Lawyers might, for example, bluff in settlement negotiations, undermine truthful testimony, or make legal arguments that they would reject as judges. In short, lawyers must lie.

And unlike legislators, adversary lawyers should not seek to balance competing interests and claims so that all persons get what they deserve. Instead, they should strive disproportionately and at times almost

exclusively to promote their clients' interests. This requires lawyers to exploit strategic advantages on their clients' behalves even when they themselves (correctly) believe that the clients are not entitled to these advantages. Lawyers might, for example, employ delaying tactics, file strategically motivated claims, or exploit a law's form to thwart its substantive purposes. In short, lawyers must cheat.

These charges have of course been leveled at lawyers before,⁶ but they nevertheless prove surprisingly controversial. Suggestions that lawyers display professional "vices" and, more specifically, that they "lie" and "cheat" are startling, unwelcome, and even off-putting to many lawyers, who resist (and resent) them (even as they accept, as a matter of course, that lawyers must display generic partiality in favor of their clients).⁷ The principal burden of Part I is to render plausible the claims that lawyers are professionally obligated to lie and to cheat, both under the positive law of lawyering as it stands and under any alternative regime of professional regulation that remains consistent with adversary adjudication's basic commitment to a structural separation between advocate and tribunal.

I therefore devote substantial attention to elaborating lawyers' professional duties in considerable detail. In order to do so, I take up the specific doctrinal regime that makes up the law of lawyering in most U.S. jurisdictions today, including in particular the American Bar Association's (ABA's) Model Rules of Professional Conduct, as supplemented and amended from time to time. But although I turn to the American case to provide the doctrinal detail necessary for persuading skeptics, and indeed for informing the open-minded, I use the positive law for illustrative purposes only. The center of gravity of my argument remains the genetic structure of adversary lawyering, and in particular the separation between advocates and tribunals that constitutes adversary adjudication's core, rather than what someone once called "the ethical codes' discrete body of subrules."⁸ I turn to the ethics codes out of a belief that the best path to understanding what is essential to adversary advocacy in general is through careful attention to one particular variety of adversary advocacy.

Moreover, in order to avoid the mistake of attributing the idiosyncrasies of one particular species to the basic morphology of the genus, I arrange my interpretive engagement with the positive law around the distinction between the necessary and contingent features of this body of doctrine. In particular, I demonstrate that the pressures to lie and to cheat that the positive law exerts on lawyers arise out of broad and organic rules that establish the necessary foundations of adversary lawyering, whereas the constraints that the positive law imposes on lawyers' professional vices arise out of rules that are narrow, technical,

and contingent. I argue that these technical limits, even when they substantially restrict lawyers' conduct, cannot possibly cancel out the adversary advocate's partisanship or eliminate the professional vices that the adversary system's foundational commitment to a structural separation between advocates and judges entails.

However, even as professional ethics requires lawyers to betray their own senses of truth and justice in ways that contravene the ethic of self-assertion that dominates ordinary morality, this ethics also promises to establish distinctively lawyerly virtues. Most notably, lawyers who specialize in suppressing their own judgments of truth and justice, as lawyer loyalty and client control require, develop a distinctive facility (which others do not share) for assisting persons who cannot themselves speak in a way that engages the authoritative institutions of government to state their claims in an undistorted and yet effective fashion. Part I concludes by foreshadowing the distinctively lawyerly virtue associated with this capacity to give voice to the voiceless in high *fidelity*. Lawyerly fidelity involves more than merely partisan partiality in favor of clients over others; it also includes the capacity accurately to identify and to articulate clients' points of view, including even in clients who are themselves inarticulate (and to do so without distortion from the lawyers' own views of what their clients deserve or ought to prefer). Fidelity, understood as a distinctively lawyerly virtue, offers lawyers their best hope for ethical vindication of their professional lives.

That the argument concludes by vindicating lawyers' professional commitments (at least in principle) should be remembered while considering the account of the lawyerly vices from which it begins. For one thing, this will serve as a useful reminder that even in its most critical moments, the argument's ultimate sympathies lie with lawyers rather than with their detractors. Moreover, and more importantly, remembering these sympathies even in the midst of criticism will serve to emphasize the argument's deep commitment to ethical complexity, both for the special case of lawyers' professional ethics and for the modern moral condition more generally. A successful defense of lawyers' professional ethics must be more than just a whitewashing. The tensions between lawyers' professional commitments and the ethical ambitions of ordinary good people are too deep and too pervasive to ignore; and criticisms that lawyers' professional activities are vicious are too prominent, and too resonant with ordinary moral experience, to dismiss as ignorance or hostility. Instead, friends of partisan lawyers will be most effective if they treat ethical doubts about the legal profession seriously and respectfully and, in spite of the discomfort involved, hard-headedly acknowledge that the charges that lawyers display characteristic professional vices are, on their own terms, accurate. The mark of the complexity of lawyers'

professional ethics is that the legal profession remains worthy of commitment even in spite of its attendant vices. Finally, lawyering is not unique in respect of this complexity, which instead pervades modern moral life quite generally. A sympathetic but honest appraisal of the legal profession therefore promises to yield insights beyond legal ethics, concerning the generally fractured state of modern moral life.

Part II: Integrity

These reflections suggest that the invocation of vice and virtue in Part I is not idle talk, and the second part of the book takes the philosophical measure of the professional vices that Part I identifies. It treats the language of vice and its effects—including the resistance of good lawyers to claims that they lie and cheat—as themselves important features of lawyers' professional ethics. Part II thus asks what it is like—what it is like not emotionally or psychologically but *ethically**⁹—to practice law with an adversary advocate's professional commitments. This question opens up a new front in legal ethics. The forms of argument that dominate traditional debates in legal ethics are by nature inadequate to sustaining the appeal of any life that involves the lawyer's professional vices, so that even if these traditional defenses succeed on their own terms, they cannot render the life of the lawyer worthy of commitment and therefore cannot bring lawyers' professional ethics to a satisfactory conclusion, all things considered.

This is not to say that traditional approaches to legal ethics have been hostile to lawyers. To the contrary, the leading argument in traditional legal ethics—the adversary system excuse—seeks to defend lawyers' professional conduct. According to this argument, the perception that adversary advocates behave immorally is an illusion only, brought on when lawyers' professional activities are viewed through too narrow a lens. In fact, a broader view reveals that aggressively partisan lawyers play an essential part in an impartially justified division of moral labor. Although lawyers may appear impermissibly to favor their clients over others, a

*The emphasis on ethics is important here, particularly in respect of the distinction between the ethical and emotional life of lawyers.

Lawyers, especially young lawyers, work increasingly long hours, and, especially in large city firms, increasingly work on tasks far removed—by two or three layers of seniority—from the clients and causes of action that they supposedly serve. These features of law-firm life, which can make practicing law at once stressful and uninteresting, figure prominently in what it is like emotionally to be a lawyer. But they are much less important to what it is like ethically. I point this out in order to emphasize that my argument in this book does not depend on the organizational structure of (especially large) law firms or on the economic pressures that principally determine this structure.

broader view reveals that competition among partisan advocates concerned primarily, and indeed almost exclusively, for their clients produces, on balance, the best justice for all.

This defense of aggressive partisanship has not gone unchallenged, of course. Indeed, a lively debate about the outer limits of the partisanship that the adversary system excuse can justify has come to dominate legal ethics.

At one extreme is the view that the adversary system excuse justifies a nearly absolute moral division of labor, so that the lawyer's partisan duties to her client know virtually no limits. This view appears vividly in Lord Brougham's remark (perhaps the most famous in legal ethics) that a lawyer "by the sacred duty which he owes his client, knows, in the discharge of that office but one person in the world—*THAT CLIENT AND NONE OTHER*" so that a lawyer must continue pressing his client's interests "by all expedient means" and "reckless of the consequences," and even though (as in the case of Lord Brougham's own defense of Queen Caroline's divorce case) he should "involve his country in confusion for his client's protection."¹⁰ This was surely an extravagant way of speaking, as it was meant to be,¹¹ but the basic sentiment that Lord Brougham immodestly expressed—that a lawyer's partisan duties to her client should control her professional life—remains the standard conception of legal ethics today.

On the other side of the debate, critics of the standard conception argue that in spite of its familiarity and intuitive appeal, the adversary system excuse justifies only a much more limited moral division of labor than is commonly supposed, under which lawyers' partisan obligations to clients are much more narrowly cabined and their direct obligations to truth and justice sweep more broadly. To begin with, these critics question how much partisanship the adversary system excuse can justify in actual, as opposed idealized, legal systems. They observe that when the underlying law is unjust or the underlying distribution of legal services is unequal, it becomes simply implausible that the extravagant partisanship associated with the standard view will best serve justice for all, even only on balance.¹² Moreover, critics observe that even in an ideal legal system, adversary advocates commonly promote their clients' interests through actions that violate the rights of others. In such cases, the aggregative conception of impartiality on which the traditional statement of the adversary system excuse relies faces challenges from rival conceptions, associated with deontological moral theories, that apply impartiality separately to every relation between persons. These conceptions insist that when a lawyer's preference for her client violates a third party's rights, this cannot be simply offset by benefits that arise elsewhere in the adversary administration of justice. And so the adversary system excuse

must be adjusted to reflect the constraints imposed by rights, most likely in ways that narrow the partisanship that it ultimately justifies.¹³

These complications together fix the principal focus of contemporary legal ethics. Reformers propose that they require a retreat from the orthodox view—associated with Lord Brougham’s professed intentions to remain loyal to his client “reckless of the consequences”—that the adversary advocate must use every arguably legal means to promote any legal ends her client sets. Traditionalists, for their parts, resist (in whole or in part) such efforts to temper adversary advocacy.¹⁴ And so the issue is joined and the debate that, as I have said, dominates legal ethics gets underway.

The lawyerly vices, however, will endure regardless of how these disagreements concerning the metes and bounds of lawyers’ impartially justified partisanship are resolved. As Part I argues, lawyers’ professional obligations to mislead and to exploit are incidents not of any specific, extreme elaboration of the adversary ideal but rather of that ideal itself. They arise ineliminably out of the structural separation between advocate and tribunal, and the associated principles of lawyer loyalty and client control, that belong to every conception of adversary advocacy, no matter what its limits.

This renders the dominant debate in legal ethics (in spite of its obvious importance in other respects) on its face inadequate to resolving the basic question whether or not the professional life of the lawyer is worthy of commitment. The adversary system excuse never denies that lawyers must adopt professional vices but merely justifies these vices on the grounds that it is best overall for lawyers to display them. And the insistent focus, among legal ethicists, on the outer limits of the partisanship that the adversary system excuse justifies draws attention away from the important question of whether this argument, within the scope of its competence, can sustain lawyers’ commitment to a professional life that requires them to embrace the lawyerly vices within the scope of their partisanship, wherever its limits are set.

Moreover, there are strong reasons to suspect that the success of the adversary system excuse cannot sustain an appealing professional ethics—one that renders the lawyers’ professional lives worthy of commitment—in the face of lawyers’ enduring professional vices. At best, the success of the adversary system excuse casts lawyers, who remain required to lie and to cheat in the service of justice, as, so to speak, usefully vicious. But even as it does so, lawyers themselves, as evidenced by their resentful responses to accusations that they lie and cheat, badly wish not to be vicious at all.

This wish may seem to rest on a moral confusion. Surely if the adversary system excuse is correct—so that lawyers’ partisanship does in fact

serve justice and therefore is impartially justified—then this is all that lawyers need to say in defense of their profession. Indeed, it is tempting to *define* lying and cheating as involving *unjustified* deception and advantage-taking, so that a successful impartialist defense of lawyers' professional conduct undermines the suggestion that they lie and cheat immediately and at a stroke.

But this view proceeds too quickly. Certainly it is inadequate to the experience of lawyers, and others, who are asked to do acts that would ordinarily be immoral because, in the circumstances at issue, they serve impartial justice. The tension in lawyers' professional ethics is not resolved so easily, and the everyday morality of viciousness does not melt away at the first (successful) mention of extenuating circumstances. Ordinary notions of truthfulness and fair play have more staying power than this, so that they continue to exert their pull even the face of the adversary system excuse. That is why the charges of lying and cheating rankle so.

Part II of the book attempts a philosophical reconstruction of lawyers' dissatisfaction with being cast even as usefully vicious. This effort begins by developing a distinction between two fundamentally different forms of moral argument: impartial argument, which concerns a person's duties to others in light of their equal importance as sources of free-standing moral claims; and first-personal argument, which concerns a person's interest in achieving her own (suitable) ambitions and emphasizes the special relation of authorship that a person has to her own actions and life plans. I develop the idea of integrity in connection with this distinction and argue that lawyers betray their integrity when, abandoning their ordinary ambitions to honesty and fair play, they lie and cheat, including even when, as under the adversary system defense, they are impartially justified in doing so. I argue that this problem of integrity endures regardless of the conception of impartiality that the adversary system defense employs, including in particular when the adversary system defense is adjusted to reflect the deontological conception of impartiality that prominent critics of traditional conceptions of aggressive partisanship have employed. Moreover, I argue that integrity is a substantial (and indeed essential) moral ideal, so that lawyers' resentment at betraying their integrity in the service of their impartially justified professional obligations is no mere self-indulgence.

Part II therefore raises doubts whether lawyers might retain their integrity even as they satisfy their professional obligations. It reveals that this inquiry is every bit as important to lawyers' professional ethics as the inquiries involved in more familiar discussions about the adversary system excuse and the metes and bounds of justified partisanship.

A profession that destroys the integrity of its practitioners cannot be worthy of their commitment.

Part III: Comedy or Tragedy?

Legal ethics must therefore ask whether it is possible for lawyers to conceive of their professional activities, including those associated with lawyerly vices, in a way that permits lawyers to sustain their integrity. To do so, lawyers must develop a professional ethics that speaks not only impartially but also in the first-personal register, casting lawyers' professional commitments as part of a life that a person might honorably pursue. This requires answering the charges that lawyers lie and cheat head-on, arguing not only (as under the adversary system excuse) that these vices are impartially justified, but also that the conduct in question is not in fact vicious at all. The third part of the book assesses lawyers' prospects for pursuing the ethical ideas that their integrity requires.

Part III begins by suggesting that certain familiar ideas in the ethics of role—reinterpreted, along unfamiliar lines, not as a substitute but rather as a complement for impartial morality—are formally suited to preserving lawyers' integrity against the threats posed by their professional obligations. Specifically, role morality allows lawyers directly to reject (as the adversary system defense and cognate impartialist moral arguments did not) the accusations that they lie and cheat by replacing descriptions of their professional conduct that emphasize these ordinary vices with descriptions that emphasize distinctively lawyerly virtues. Such role-based redescription allows lawyers to achieve their wish not to conceive of themselves as vicious at all and in this way to preserve their integrity against the threats that their professional obligations would otherwise pose.

Next, Part III develops a substantively appealing conception of the lawyer's role, which elaborates in detail on the distinctively lawyerly virtue introduced briefly at the end of Part I and recasts the professional activities that ordinary first-personal ethics calls vicious as expressions of this virtue. In this emphasis, my argument resembles an earlier attempt by Anthony Kronman to deploy a distinctively lawyerly conception of virtue—which is embodied in what he calls the “lawyer-statesman,” who displays an uncommon prudence or practical wisdom, a “special talent for discovering where the public good lies and for fashioning those arrangements needed to secure it”¹⁵—in the service of rendering the lawyer's life worthy of commitment, or as he puts it, explaining “the capacity of a lawyer's life to offer fulfillment to the person who takes it up.”¹⁶ Nevertheless, the substantive account of the lawyer's characteristic virtues that I offer in this book is very different

from the ideal that Kronman proposes. In particular, whereas the statesmanship that Kronman champions involves self-assertion by lawyers who are cast as leaders—for being especially skilled at forming and identifying their own views of the good—the account of the lawyerly virtues that I develop requires a kind of self-effacement in lawyers who are cast as servants. This is implicit in the initial statement of the lawyerly virtue of fidelity that appears at the end of Part I, and in particular in the ideals of accuracy and deference that fidelity includes—in the fact, as I have said, that fidelity involves not just lawyer loyalty but also client control (not just partisan preference for clients over other persons but also deference to clients in determining what this preference requires).

Part III elaborates this ideal of fidelity. The argument begins by describing in detail the content of lawyerly fidelity, with a particular emphasis on the ways in which fidelity requires more than the partisan preference in favor of clients that loyalty *simpliciter* involves. The description develops a surprising analogy between lawyers and poets, which provides the raw materials out of which lawyers might construct lawyerly virtues that make it possible to square their professional obligations with their personal integrity. According to this account, lawyers, like poets, are specialists in what I call (following Keats) *negative capability*: that is, in the capacity to speak not in one's own voice but rather, effacing one's private judgments, faithfully and authentically to render the subjectivity of another—in the case of lawyers by giving voice to clients who would otherwise remain inarticulate.*¹⁷ The argument continues by

*Note that opportunities to display fidelity, as I understand it, arise in every dispute, no matter how inconsequential. Accordingly, these opportunities are open to all lawyers, no matter how banal or mundane their practices. Kronman's statesmanship, by contrast, is a much grander virtue, and the opportunities for statesmanship are concentrated in lawyers who play important roles in governing the societies to which they belong.

In past eras relatively many lawyers may have played such roles. Certainly local politics was more likely to involve basic questions of collective self-rule, and therefore to call for lawyers to exhibit statesmanship, before political power became as concentrated in the national government as it is today. Kronman is therefore perhaps right to invoke the country lawyer as one of the pillars of statesmanship, at least insofar as he is discussing historical lawyers, and to insist that in its nineteenth-century heyday statesmanship was always sufficiently near to hand that it might serve as an "ennobling thought, even for those who . . . found that they had only limited opportunities in their own work to exercise [this] virtue."

But over the course of the twentieth century, and in particular as principled decisions concerning collective self-government became concentrated at the national level, relatively fewer and fewer lawyers faced professional engagements that called for statesmanship. And, today, opportunities for statesmanship are intensely concentrated in the very highest echelons of the bar.

This does not, of course, mean that statesmanship is not a real virtue. But it does limit the service that statesmanship can render lawyers' integrity, because it limits the class of

explaining the importance of lawyerly fidelity, so understood. Specifically, the argument, employing an analogy to the democratic political process, connects the fidelity that adversary advocates display to the legitimacy of adjudication. These reflections, which embed legal ethics in political theory, make it possible to supplement the formal support for lawyers' integrity identified by the purely moral argument concerning the ethics of role with a rich, substantive account of the characteristically lawyerly virtues through which integrity-preserving role-based redescription might proceed. Lawyerly fidelity is a high calling, I argue, both in its intrinsic merit and in its central role in sustaining social life more broadly in the face of the disputes that threaten, at every moment, to tear society apart. And the opportunity to cultivate and exercise lawyerly fidelity therefore renders the lawyer's professional life worthy of commitment, even in the face of the fact that, in the eyes of nonlawyers, this life requires lawyers to lie and to cheat.

These considerations incline toward bringing lawyers' professional ethics to a positive conclusion, suggesting that whatever nonlawyers might think, the professional life of the lawyer is in principle worth pursuing for those who are prepared to immerse themselves in it. But the third part of the book (and therefore also the book's overall argument) concludes by returning the argument to a less happy register. I ask what a role must be like in order to be capable in practice of sustaining the forms of integrity-preserving role-based redescription that I propose, and I answer that the role must be authoritatively insular—that is, capable of sustaining idiosyncratic first-personal moral ambitions in its occupants, even as those who do not occupy the role systematically reject these role-based ambitions in favor of more ordinary alternatives. I then trace the history of the American legal profession from the years immediately following the Civil War to the present day and conclude that this history involves the systematic removal of all the key incidents of insularity from the lawyer's role. Lawyering has therefore become increasingly incapable of sustaining any distinctive forms of moral life and increasingly deferential to outside judgments, or, as I say, increasingly and anxiously cosmopolitan. The practice of law, as Kronman has warned, has “los[t] its status as a calling and degenerat[ed] into a tool with no more inherent moral dignity than a hammer or a gun.”¹⁸

Regardless of what is possible in *principle*, the recent history of the legal profession has left contemporary U.S. lawyers without *practical* access to integrity-preserving role-based redescription. Accordingly, the ethical circumstances of adversary advocates today are, overall, anything

lawyers who can appeal persuasively to statesmanship in the role-based redescriptions on which their integrity depends.

but happy. Certainly the biblical charge—“Woe unto you also, ye lawyers! for ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers”¹⁹—does not apply today. If anything, its opposite is true: even as lawyers are called on to integrate clients into a process of adjudication that would otherwise be alien, they are denied the cultural resources needed to shoulder the ethical burdens that arise on answering this call. These burdens threaten to dis-integrate the lawyers themselves.

Finally, the same egalitarian and democratic ideals that render negatively capable lawyers essential to the legitimacy of adjudication also account for the cosmopolitanism of the modern bar. The very forces that make adversary advocacy essential to sustaining social order and therefore in principle worthy of commitment also conspire to shut lawyers out from the ideals that would allow them to sustain this commitment, preserving their integrity against the threats that their partisanship poses. This connection introduces a note of irony, and indeed of tragedy, into the life of the modern lawyer.

• • •

This brief statement of the main ideas of the book is schematic and incomplete, of course, and the body of the book will elaborate systematically what I have only hinted at here. But before embarking on that substantive effort, a few brief reflections about the nature of the argument are in order, specifically with respect to its scope and method.

SCOPE

I have so far been speaking of lawyers as an undifferentiated mass, but of course they are not. Rather, lawyers inhabit many roles and perform many tasks, which bear at most a family resemblance to one another. This makes it necessary to ask: To which lawyers, or classes of lawyers, does my ethical analysis of the legal profession apply?

Certainly this analysis does not apply equally to all lawyers in all legal systems. As the language in which I have introduced them reveals, the professional obligations to behave immorally that lawyers face arise out of lawyers' adversary advocacy: that is, out of lawyers' narrowly partisan loyalties to particular clients and, more specifically, out of their efforts to promote these clients' interests, even at the expense of the interests of more deserving others. But not all lawyering is equally adversarial. First, legal systems differ (across both space and time) in the degree of partisanship that they require or indeed permit lawyers to display. It may

seem that lawyers in legal systems that de-emphasize partisanship face much less ethical uncertainty about professional obligations that they may simply embrace. And second, even in legal systems (such as the American one) that generally affirm lawyerly partisanship, not everything that lawyers do involves advocating for clients and against others with whom they stand in direct competition. Some lawyers—most obviously, judges, but also arbitrators and other “third party neutrals”²⁰—staff tribunals rather than advocating before them. And even lawyers who loyally serve particular clients often work in contexts that involve little or no advocacy. Rather, they focus on counseling clients concerning the legal, economic, and even moral consequences of some project, for example, or on preparing opinions that characterize a client’s legal situation for others.²¹ Finally, the justification of lawyers’ partisanship that I propose will not apply equally to all lawyers even on its home turf, adjudication: in particular, as a later argument will explain, litigators for the government may justifiably display only much more modest partisanship than I describe, if they may display any partisanship at all. For all these reasons, some portion of the professional conduct of people called lawyers may entirely avoid the ethical difficulties that I make my subject here.

This is not a weakness of the approach to legal ethics developed here but rather a strength. For one thing, the class of lawyers who are subject to the moral difficulties from which my argument departs is larger and more inclusive than might perhaps be thought. Certainly, the question whether the professional life of the lawyer is worthy of commitment applies broadly enough so that asking it is no mere curiosity and answering it no idle parlor game. Instead, these activities belong to the natural preoccupations of self-reflective morality, arising directly out of the lived experience of a large group of persons who, moreover, exert a disproportionately prominent hold over humanity’s collective moral imagination.

Thus, although they of course do so to differing degrees, most legal systems require lawyers to display some measure of adversariness in the sense required for the problems of legal ethics, as I identify them, to appear. To begin with, the partisan element of adversary lawyering arises, and calls the ethical standing of the profession into question, whenever lawyers, practicing in the shadow of a structural separation between advocate and tribunal, serve rather than judge their clients’ causes. As Part I emphasizes, the ethical arguments that I develop do not depend on any particular, and certainly not on any extreme, account of the extent of lawyers’ partisanship, but instead apply even when lawyers’ loyalties to their clients are constrained by rules that prevent partisan excess. Although I elaborate my argument through an

intensive engagement specifically with contemporary U.S. legal practice, this is only to fix ideas. Many of the reflections that I develop would survive reforms to the American legal profession and indeed might be applied, *mutatis mutandis*, to lawyers in other legal systems also.

After all, the structural separation between advocate and tribunal that serves as my starting point is not uniquely American. Indeed, in spite of my invocation of adversary advocacy, my ethical analysis is not even confined to one side of the distinction between adversary and inquisitorial processes of dispute resolution. That contrast principally refers to whether, as a matter of procedure, the legal and factual record in a dispute is developed primarily by the disputants or by the tribunal. And, although this choice has important consequences, including for the professional dispositions of lawyers,²² the structural separation between advocate and tribunal may endure however it is made. Even lawyers who practice under inquisitorial procedures generally retain some measure of the partisan loyalties that cast them as adversaries in the sense at issue here. As a prominent comparativist has observed, “the familiar contrast between our adversarial procedure and the supposedly nonadversarial tradition has been grossly overdrawn.”²³ German legal practice, which may be taken as representative of the broader inquisitorial tradition (at least on the European continent), illustrates this point nicely. Although German lawyers play only a very limited role in developing the facts, they “advance partisan positions from first pleadings to final arguments.”²⁴ They “suggest legal theories and lines of factual inquiry, they superintend and supplement judicial examination of witnesses, they urge inferences from fact, they discuss and distinguish precedent, they interpret statutes, and they formulate visions of the law that further the interests of their clients.”²⁵ All in all, then, “outside the realm of fact-gathering, German civil procedure is about as adversarial as our own.”²⁶ And German lawyers, as indeed are lawyers in inquisitorial systems generally, are therefore subject to the ethical complexities and uncertainties that adversary advocacy involves.

Furthermore, although not every activity in which lawyers engage constitutes adversary advocacy, most lawyers do act as adversary advocates at least some of the time. The basic division of labor between advocates on the one hand and tribunals (judges or judge-surrogates) on the other ensures that partisanship penetrates deep into the legal profession. Judges and others who staff tribunals account for only a small fraction of lawyers. And although many more lawyers act principally as counselors and negotiators rather than directly as advocates, these lawyers advise and bargain in the shadow of the law,²⁷ that is, against the backdrop of what they can achieve for their clients through more direct advocacy. Indeed, the regulatory regimes that govern lawyers’ conduct

in these roles, for example, the ethical regime governing lawyers who give tax advice,²⁸ are often designed in express contemplation of end-games that involve such direct advocacy. Additionally, some of the professional duties that lie at the foundation of lawyers' partisanship unquestionably arise even outside the orbit of open advocacy. Thus, the duty to preserve client confidences applies quite generally to all forms of lawyering,²⁹ and may even apply more strictly outside of litigation, when it is less likely to run up against competing duties requiring candor before tribunals.³⁰ Accordingly, many more lawyers than the small minority who regularly engage in litigation count as adversary advocates, so that the ethical uncertainty about lawyering applies well beyond this narrow group.

Indeed, the ethical argument that I develop may also apply, although in an attenuated form, beyond the confines of the legal profession. The central themes of this argument—a circumstance in which persons must abandon their ordinary ethical ambitions in order to satisfy the contingent demands associated with their places in a moral division of labor; the threat to integrity that is posed by acquiescing in this division of labor; and the fragile and perhaps unsustainable hope that this threat might be answered by embracing one facet of the division of labor in order to sustain an ethical identity that stands apart from ordinary ethical ambitions—all reappear throughout modern ethical life. They are simply a working out of one of the characteristic dilemmas of modernity, namely, the problem of being a situated individual, with idiosyncratic commitments and plans, in a pluralist society that can hope stably to sustain social cooperation only on impartial, deindividuated terms. Lawyers focus this problem into particularly sharp relief because they are directly charged with integrating the idiosyncratic perspectives of individual persons into the impartial system. And legal ethics serves, in this respect, as a miner's canary, giving advance warning of ethical problems that, sooner or later, trouble all modern persons. These broader implications of legal ethics will remain mostly in the background in these pages, although I shall again address them more directly in a brief postscript.

Finally, the argument's focus on the genuinely partisan aspects of legal practice is a strength rather than a weakness for another reason also. For various reasons that will become plain in Parts II and III, this focus picks out the segment of the bar whose professional life is morally and politically distinctive, that is, unreplicated elsewhere in the social division of labor, and that plays an important and utterly unique role in this division of labor. Philosophical analysis should organize its energies according to such basic structural distinctions rather than deferring to the often arbitrary, or at least shallowly contingent, categories adopted by a

profession for purposes of self-description. Legal ethics is no exception, and insofar as it aspires to be a philosophically serious field, it should organize itself according to categories that reflect basic moral realities rather than mere conventions.

METHOD

The book's central ambition is to understand the lawyer's circumstances rather than to intervene in ongoing controversies over the positive law governing lawyers or indeed even to prescribe, more generally, a course of conduct for "ethical" lawyers to pursue. Each part of the book elaborates one facet, to repeat a phrase that I have used before, of what it is like to adopt the professional commitments of an adversary advocate: Part I sets out the basic principles of lawyer loyalty and client control that are inscribed in the genetic structure of adversary advocacy and identifies the vices, and gestures toward the virtue, that these principles engender; Part II explains the ethical burdens, specifically with respect to personal integrity, associated with embracing these vices as adversary advocates must; and Part III places the lawyer's legal and ethical practices into a broader social and political context. This focus—on diagnosis rather than cure—is necessary and natural, especially given the connection between legal ethics and the broader ethical dilemmas of modernity. How, after all, could a philosophical argument possibly cure the condition of modernity? But it is also somewhat unusual in legal ethics; and it certainly involves methodological commitments that are highly unusual and therefore worth discussing in some detail before commencing with the argument proper.

Most legal ethics, and indeed most applied ethics more generally, tends towards casuistry:* it begins by identifying general principles of

* Legal scholarship in general has the same tendency, even when it does not invoke immediately ethical ideas. Ever since the realist revolution exploded the formalist myth that legal rules are connected to one another by logic and are independent of the rest of the normative universe, the focus of legal scholarship—and especially of interdisciplinary legal scholarship—has been on asking what values outside of the law a legal regime should serve and what system of legal rules might serve these values best. I have no desire to revive the formalist conception of law as hermetically sealed off from morals or politics. There is anyway no less plausible site for such an ambition than the law governing lawyers, which is obviously rent through with extralegal moral and political ideals. But I do believe that even though the law is ultimately beholden to extralegal values, legal regimes can construct edifices of doctrinal, and indeed human, relationships that cast long shadows in the light of these extralegal values. Life in these shadows is, then, neither purely legal nor purely independent of the law but instead consists of the patterns that extralegal values take on when they are, to change metaphors, refracted through the prism of the

value and right action (which it has usually borrowed wholesale from more abstract work in moral and political theory) and then applies these principles to a particular set of facts in order to generate prescriptions about what should be done. Certainly the many arguments about the adversary system defense have this character, as their express reliance on antecedent theories of justice and their insistent return to the question of the metes and bounds of lawyers' justified partisanship attest.

I am dubious of this approach. To begin with, the general principles from which casuistic arguments in applied ethics begin tend to be too simplistic, and the facts to which the arguments apply these principles tend to be too stylized, for the casuistry to be persuasive. Moreover, it is probably not realistic to expect philosophy to have such mechanical and immediate regulative implications for ethical life as casuistry supposes. After all, moral and political philosophers are notoriously not better or more just than other people, and not only because they are no better at resisting the temptations to do wrong. Instead, ethical life requires forms of sensitivity and judgment that philosophical expertise makes no claims to providing. Ethics—at least in the sense of living well—simply is not a technical subject in the way casuistry presumes, and we mark this linguistically by distinguishing ethical excellence, which we call virtue, from mere technical excellence, or skill.* Ethical life involves complexities and offers possibilities for practical and indeed ethical creativity and judgment that casuistic approaches to applied ethics, which emphasize technical expertise, cannot encompass, so that these approaches tend to have an unappealing air of naïveté and even unreality. Indeed, a person who treats casuistry respectfully, deferring to a casuist's claims of expertise much as a patient defers to her doctor's expertise in a more naturally

law. The distinctive forms of life and action that arise in this context—the values and ideals that are immanent in the law—will be understudied by a scholarly method that stands outside the law and proceeds with the principal purpose of shaping the law to promote one or another set of extralegal ends. So it is, I believe, with much contemporary scholarship in legal ethics.

* We have inherited this distinction from the ancient Greeks (for example, Aristotle in the *Nicomachean Ethics*), who insisted (much more clearly than we do now) on the difference between virtue and what they called *techne*.

Our language is not uniformly helpful in resisting casuistry, however. Indeed, the suggestion that philosophers are appropriate sources of regulative principles for living may owe part of its prominence to nothing more than a quirk of language, namely that the English word “ethics” refers to both the art of living well and the philosophical study of the values that living well involves. If this were not the case—if there were different words for these distinct things—the casuistic impulse would probably seem less compelling. The situation would be more as it is in art, where the fact that “beauty” and “aesthetics” are different words makes it easy to resist the idea that the second offers a regulative guide to creating the first.

technical subject such as medicine, has already committed an ethical error. She has accepted a kind of ethical authority that is inconsistent with her own freedom and responsibility.

This is not to claim (which would be absurd) that philosophy is irrelevant to ethics. Philosophers, including by applying their professional expertise, are unusually able to explain the conceptual structure of an ethical practice, to identify the relationships in which various ethical practices stand to one another, and even to explain what is at stake in a particular ethical conflict. In all these ways, philosophers, and characteristically philosophical forms of thought, do indeed have distinctive contributions to make to ethical life. But their contributions are primarily *interpretive* and *reconstructive* rather than directly *regulative*.

The task of philosophical ethics is therefore primarily to elaborate what is rather than to command what should be. Of course, a philosophical advance in understanding of a form of ethical life may lead to changes in that form of life, as participants and indeed outsiders adjust their engagements with the form of life in light of how they have come to understand it. (In the case at hand, philosophical argument shows that a life of committed professionalism, both in law and more generally, can in principle be reconciled with the broader obligations that apply to persons generally, and that the prospects for a successful reconciliation depend on the social and political structures in which that life is embedded.) But the choices involved in actually making these adjustments have an *independent* ethical content of their own, involving ethical creativity and judgment.³¹ They are not entailed by the mechanical application of philosophical understanding to ethical life.

The question that I have set myself here accepts this account of the limits and possibilities of philosophical ethics: it resists casuistry entirely and invites interpretive reconstruction. I do not attempt to say whether the adversary system is justified or wrongheaded and certainly make no effort to identify the optimal specification of lawyers' professional obligations. Instead of evaluating them with an eye to reform, I take the basic outlines of adversary advocacy for granted and ask, as I have said, what legal, ethical, and political values and forms of life are immanent in this professional regime. To be sure, I intend the philosophical understanding that I present here to influence the ethical life of the legal profession, and indeed of our wider society. But I insist that how this influence plays out depends on further ethical interventions, of a nonphilosophical nature, which my philosophical account of legal ethics therefore necessarily leaves somewhere off the page.

The methods of argument that I apply throughout the book follow from the question that I have set myself and the view of philosophical ethics that this question reflects. Thus I begin my argument not from an

abstract philosophical theory of goodness or justice to which I claim the law governing lawyers should conform but rather from the detailed body of rules that constitutes the law of lawyering as it stands, from which I propose to excavate the ethical content of adversary advocacy. And throughout my argument, I return repeatedly to interpretive engagements with other features of the legal profession, for example, its historical development and institutional structure. Moreover, my commitment in favor of interpretive over regulative approaches to applied ethics works itself inward in my argument, into the details of my engagement with the positive practice of adversary lawyering. Most immediately, I resist the temptation, which often overcomes even the most reflective legal ethicists, to focus discussions of legal ethics on extraordinary cases—for example, cases in which lawyers present an alibi defense that they know to be false,³² keep a life-threatening secret,³³ intimidate an adverse party by investigating her sexual history,³⁴ or even bring a false murder prosecution.³⁵ Instead, I emphasize the ethical questions that arise in adversary legal practice quite generally, in the banal conduct of lawyers' workaday professional lives.

Sensational cases may be suited to casuistry, because they usefully support intuitive tests of the limits of justified partisanship. They may even underwrite more theoretical investigations of the limits of the adversary system defense's power to recast lawyers' partisan attachment to their clients as part of a more broadly impartial scheme of justice.* But exceptional cases are much less useful for my purposes, which are to elaborate a philosophical reconstruction of the constant core of adversary advocacy rather than to fix its variable boundaries, and to identify the moral and political complexities that every form of adversary lawyering, no matter how mild, necessarily involves, because they arise inevitably in the shadow of the structural division of labor between advocate and tribunal. In order to know what a practice is really like, it is better to ask what it is ordinarily like rather than to fixate on what it becomes as it starts cracking under pressure. Sensational cases, which are the mainstays of most discussions of legal ethics, are attention-grabbing, to be sure. But it is a mistake to emphasize them: just as great cases make bad law,³⁶ so they make bad legal ethics.

Finally, the interpretive approach to legal ethics that I adopt here requires the argument to be relentlessly interdisciplinary, stepping out, at

*An undue emphasis on sensational cases can cause troubles even within the casuistic paradigm, insofar as fixating on extraordinary dilemmas overshadows lawyers' more common ethical concerns. It allows critics of the adversary system to paint the entire practice in its harshest colors, and (probably more damagingly) it allows adversary advocacy's defenders to obscure the ethical difficulties that arise in everyday legal practice behind the favorable contrast between ordinary and exceptional cases.

various places, not just into legal doctrine and moral philosophy, but also into political philosophy, history, sociology, and even literary theory. The central role that adversary advocates and adversary adjudication play in legal, moral, and political life brings legal ethics into contact with all these neighboring disciplines. And whereas casuistic approaches to legal ethics naturally narrow their focus according to the concerns of the purely philosophical theories from which they begin, the reconstructive ambition that I am pursuing here requires that my methods adapt themselves flexibly to address all the many aspects of adversary advocacy, each in its own native idiom. As James Agee said of another reconstructive effort, “[i]f complications arise,” they come of trying to address a subject “not as journalists, sociologists, politicians, entertainers, humanitarians, priests, or artists, but seriously.”³⁷