

Daniel Markovits\*

## What are lawyers for?

### I. Introduction

What are lawyers for? What social purposes do lawyers serve? What functions underwrite the special obligations and entitlements that accompany the lawyer's professional role?

I shall try, over the course of the next hour or so, to sketch an answer to these questions, at least with respect to lawyers who function as litigators, in adjudication. The answer will surprise many. Lawyers, I shall argue, do not serve truth or justice, and should not seek them. Instead, lawyers serve to legitimate power. And to produce legitimacy, lawyers should serve their clients.

Of course, not all lawyers work in or around adjudication. Perhaps most do not, at least not most of the time. But adjudication remains the lawyer's characteristic setting. Non-lawyers might provide advice, including about legal compliance or drafting. But only lawyers can litigate; indeed, it is in the nature of adjudication that only lawyers can litigate – so that those who litigate thereby become, functionally, lawyers. The conceptually most important aspect of lawyers' work is not the empirically most prominent. And insofar as legal ethics has, in recent years, adjusted its sights to focus on the commonplaces of legal practice, it has in important respects lost its way.

The bulk of my remarks today will be devoted to defending these claims. I shall speak in favor of a particular substantive account of client-centered lawyering – which emphasizes the virtue that I shall call lawyerly *fidelity*. I shall argue that lawyerly fidelity best captures the role that our positive law accords lawyers – that lawyerly fidelity promotes the social purpose that lawyers serve. In spite of the costs and burdens that fidelity imposes – costs to truth, to justice, and to the moral lives of the lawyers who display it – the positive law is right to insist that lawyers first and foremost display fidelity to their clients. Political legitimacy requires lawyerly fidelity.

But before taking up substance, I want to make a brief remark about method. The arguments that follow present an exercise in applied ethics, which is, to speak politely, a troubled field – one commonly thought adequate neither to the practical questions it takes as its subjects nor to the philosophical traditions in which it attempts to address these subjects.

The source of the trouble, I think, lies in method.

The dominant method in applied ethics is casuistry – an exercise in applying a general philosophical view of ethics to a more particular set of facts in a prescriptive way. The conventional approach cannot provide much advantage, however, either for philosophy or for action. Decisions concerning how to act cannot be well-made by applying theory to facts in a mechanical fashion. Instead, successful practical reasoning requires judgment and even creativity, which are themselves free-standing ethical faculties that no amount of antecedent ethical theory can displace. Philosophical ethics is therefore

structurally unsuited to serving a directly regulative role in practical life.

Instead, philosophy's aim should be interpretive and reconstructive – to identify the ideals that are immanent in some ethical practice and to explain the relationship between these ideals and others, which are perhaps deeper or broader. Philosophical ethics can set the scene, but it cannot (and so should not) drive the action.

In the rest of these remarks, I shall try to provide a philosophically informed interpretive reconstruction of the lawyer's peculiar professional virtue – the virtue that I call *fidelity*. Lawyerly fidelity is immanent in legal practice under the conditions of the rule of law. Lawyerly fidelity arises, I shall argue, wherever lawyers practice subject to the structural separation between advocate and tribunal that characterizes all legal systems committed to the rule of law. I shall elaborate the contours of lawyerly fidelity and explain the contribution that fidelity makes to the rule of law.

### II. The positive law of lawyerly fidelity

As my method recommends, I begin with the raw materials to be interpreted. These raw materials appear in the law governing lawyers. This body of law organizes lawyers' professional obligations according to three regulative ideals, which fix the genetic structure of adversary advocacy. These ideals may vary at their margins across legal orders, but they necessarily appear, embodied in the positive law, in every system of adjudication that separates the roles of advocate and tribunal.

The first and most familiar of the three principles is lawyer loyalty. This is the idea that lawyers should commit their energies in a partisan way, in favor of particular clients rather than directly pursuing truth or justice. Loyalty is written into modern American law through the requirements that lawyers display diligence and zeal on behalf of their clients.<sup>1</sup> Lawyers' partisanship is, of course, constrained, for example, by various duties of candor.<sup>2</sup> But these duties do not, because they are not structurally suited to so-doing, eliminate lawyers' underlying loyalty to clients.<sup>3</sup> There are things that lawyers may not do to serve their clients, but they must nevertheless serve their clients rather than judging them. Lawyers may not act in the interests of justice, directly and all things considered.

Lawyerly loyalty, however, does not yet fix the precise ends in whose favor lawyers should be partisans. This is done by the second basic principle regulating lawyers' professional conduct – the principle of client control.<sup>4</sup> This principle requires lawyers to serve not their clients' interests – and certainly not the clients' interests in justice – but rather the clients' inten-

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1 See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.3 (2011); MODEL RULES OF PROF'L CONDUCT Pmb1. (2011); RESTATEMENT (THIRD) LAW OF GOVERNING LAWYERS § 16 (2000).

2 See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.3 (2011); MODEL RULES OF PROF'L CONDUCT R. 3.4 (2011); FED. R. CIV. P. 11(b).

3 MODEL RULES OF PROF'L CONDUCT R. 8.4 (2011), which might undo partisanship, is thus necessarily narrowly and technically construed.

4 See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2 (2011); RESTATEMENT (THIRD) LAW OF GOVERNING LAWYERS § 21 (2000).

tions or, slightly more broadly, the clients' points of view. It is – emphatically – for *clients* to fix the ends of a representation, and lawyers may not substitute their judgments of what ends clients should pursue for the clients' own. Once again, a lawyer must serve rather than judge her clients; and she must therefore defer to her clients' independent judgments about ends. The lawyer's deference need not be absolute, of course. There remain some ends that a client cannot command her lawyers to assist in pursuing. But the lawyer cannot simply substitute her personal judgment about ends to supplant her client's.

Where a lawyer tries to judge rather than to serve, the law will thwart her efforts. For example, where a criminal defense lawyer who has become convinced of her client's guilt argues for conviction rather than acquittal, her assistance in conducting his defense is treated as constitutionally defective *per se*. The law foregoes the usual requirement of showing that ineffective assistance of counsel was prejudicial to the client's defense. Instead, a defendant whose lawyer judges rather than serves him is treated by the courts as having had an actual or constructive denial of assistance of counsel altogether<sup>5</sup> – that is, as having had *no lawyer at all*. Although lawyers in civil cases turn on their clients much more rarely, similar principles apply where they do. For example, a lawyer may not (prejudicially) withdraw from a representation simply because she regards her client's refusal to settle as foolish or even repugnant.<sup>6</sup> Indeed, this principle (of client control over settlements) is so central to the lawyer client relation that it may not be altered even by contract.<sup>7</sup>

Finally, the principles of lawyer loyalty and client control operate against a fundamental but often overlooked background norm of legal assertiveness. This gives lawyers and clients a right to pursue legal claims free of the ordinary standards of liability that the law imposes on conduct that harms others. Lawyers, for example, enjoy immunity from tort liability for defamatory remarks made in court,<sup>8</sup> and lawyers who encourage clients to breach contracts are immune from liability for tortious interference.<sup>9</sup> More generally, and *much* more importantly, lawyers and clients are jointly protected against liability for harms that they cause by asserting losing and even unreasonable claims and defenses. The various rules that prohibit frivolous filings – from both the law governing lawyers and the Federal Rules of Civil Procedure – do not impose strict liability or even negligence liability for the harms done by asserting losing legal claims.<sup>10</sup> Losing on summary judgment, or even on a motion to dismiss, clearly does not trigger sanctions. Moreover, although tort law recognizes torts of malicious prosecution and abuse of process, these are *very* narrowly cabined.<sup>11</sup> Certainly, clients and lawyers may proceed even when

the social costs of their doing so (far) outweigh the social benefits. (Here note the contrast between this area and the rule of liability for negligence in tort law more generally.)

Legal assertiveness amounts to a special dispensation to cause harm by asserting legal positions. In particular, legal assertiveness departs dramatically from the ordinary standards of liability for harming others imposed by the general law of torts. This is a very deep feature of open legal orders. It is on par with its more celebrated cousins: The rule that free expression should not be constrained by liability for harms associated with the offense that its exercise gives others; and the rule that economic freedom should not be constrained by liability for the harms (for example, being driven out of business by a superior competitor) that economic competition causes.

In fact, the right of legal assertiveness is a direct consequence of the structural division of labor between advocate and tribunal from which my reconstruction of the lawyer's peculiar brand of loyalty set out. That idea is familiarly taken to entail that a party *may* not act as a judge in her own case. But it also – less familiarly but no less importantly – entails that a party, and her lawyer, *need* not act as a judge. It frees parties and their lawyers from the responsibility of reaching and acting upon an impartial assessment of their claims.

The doctrinal materials also provide an organizing principle for these three regulative ideals. This is the principle of professional detachment that appears throughout the formal and informal ideology of the bar, including prominently in the Model Rules of Professional Conduct.<sup>12</sup>

Professional detachment is familiarly invoked by lawyers as a shield against various forms of liability for actions taken on behalf of clients. The discussion of legal assertiveness has already illustrated this with respect to legal liability. And lawyers have also, although more dubiously, tried to assert professional detachment as a shield against moral liability for promoting their clients' wrongful causes.

But the more interesting and important aspect of professional detachment is its operation as a sword, to forbid lawyers from judging rather than serving their clients. Thus, when a lawyer compromises her client's case because of her own judgment that it lacks merit, this in itself renders otherwise unobjectionable conduct impermissible. This is illustrated by the examples of judgmental lawyering that I invoked a few moments ago. In criminal cases, a lawyer's refusal to assert an otherwise permissible defense because of her personal belief in her client's guilt constitutes actual or constructive denial of counsel, and hence renders her assistance constitutionally ineffective even without the showing of prejudice that is usually required. Indeed, one hears courts say that a professionally detached defense counsel is a jurisdictional prerequisite for a criminal trial.<sup>13</sup> And in civil cases, a lawyer must defer absolutely to a client's choices concerning settlement, even when they are unreasonable. Once again, the duty to defer is so strong that a contract that allows the lawyer to judge her client by vesting discretion to settle in the lawyer becomes for this reason invalid and indeed a breach of professional ethics.<sup>14</sup>

Professional detachment is not just a creature of distinctively professional ethics, but may instead be given an interpretation that sounds in ethics, *simpliciter*, which returns the argument to the peculiar form of loyalty that lawyers display. Often, law-

5 United States v. Cronin, 466 U.S. 648, 659 (1984); See also Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980).

6 DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 73-77 (2010).

7 See, e.g., Jones v. Feiger, Collison & Killmer, 903 P.2d 27, 35 (Colo. App. Ct. 1994).

8 See RESTATEMENT (SECOND) OF TORTS § 586 (1977); RESTATEMENT (THIRD) OF AGENCY § 7.01 cmt. e (2006); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 57(1) (2000).

9 See, e.g., Salaymeh v. InterQual, Inc., 508 N.E. 2d 1155, 1159 (Ill. App. Ct. 1987). The lawyer may be liable where her advice to breach arises out of "actual malice" against the contractual counterparty that is "unrelated to [her] desire to protect [her] client." *Id.* at 1160.

10 See MODEL RULES OF PROF'L CONDUCT R. 3.1 (2011); FED. R. CIV. P. 11(b).

11 See generally WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 850-53 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 674 (1977); RESTATEMENT (SECOND) OF TORTS § 682 (1977); Bickel v. Mackie, 447 F. Supp. 1376, 1380 (N.D. Iowa 1978); Garcia v. Wall & Ochs, Inc., 389 A.2d 607, 608, 610 (Pa. Super. Ct. 1978).

12 See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2 (2011).

13 Cuyler v. Sullivan, 446 U.S. 335, 345 (1980).

14 See, e.g., Jones v. Feiger, Collison & Killmer, 903 P.2d 27, 35 (Colo. App. Ct. 1994).

yers' loyalty to their clients is analogized to friendship or, a little more broadly, to fraternity.<sup>15</sup> This is a mistake, and not just for the familiar reason that lawyerly loyalty is for hire, whereas friendship is not. Rather, the analogy between lawyers' loyalty and ordinary fraternity fails for another and very different reason. Friends throw themselves – their whole judgments – into their friendships. But professionally detached lawyers *withdraw* themselves – they do not judge but rather serve.

This combination of other-preference and self-effacement renders lawyers' partisanship highly peculiar – not positive and self-affirming like fraternity but rather much more negative. Like a good music system, lawyers are negatively capable. They can give expression to their clients' points of view without imposing distortions based on their own attitudes. By effacing themselves, lawyers can speak for their clients in high fidelity.

### III. Lawyerly fidelity and the authority of adjudication

Lawyerly fidelity is a substantial virtue. The lawyer's distinctive capacity to reserve her own judgment – to be what Keats once called “a thoroughfare for all thoughts. Not a select party”<sup>16</sup> – is essential to her capacity to help guide otherwise intractable disputes towards a resolution that disputants accept as legitimate.

This is no small achievement. Legitimacy is the basic aim – the first virtue – of politics in open, cosmopolitan, and, hence, pluralist societies. These societies are characterized by intractable conflicts – both among competing interests and among competing views of the general interest. They therefore depend, for their stability and ultimately their survival, on agreement about which collective choices to implement even in the face of entrenched and ineliminable disagreement about which collective choices to adopt.

The problem of legitimacy is most familiar at wholesale – concerning the general rules (the laws) through which collective life should be governed. But legitimacy is also, and indeed equally, a problem at retail – concerning how to apply these rules in particular, problem cases, whose outcomes are not fixed mechanically by wholesale political settlements. Finally, whereas what is commonly called the “political” system aspires to achieve legitimacy at wholesale, what is commonly called the “legal” system aspires to achieve legitimacy at retail. It is, as Karl Llewellyn said, one of the “law-jobs” to sustain authoritative resolutions of “trouble cases,” and adjudication aspires to achieve legitimate authority over such cases.<sup>17</sup>

This idea, that adjudication's principal ambition is authority, is not always well-understood. Lawyers commonly think of adjudication as aiming at truth or justice. But the common view confuses the tribunal or court with the broader system of adjudication – involving disputants and lawyers – in which the court properly plays a starring role. The court might well aim at truth and justice. Indeed, the authority of adjudication might

depend on courts' pursuing this aim.<sup>18</sup> But the court is just as much a part-player in the broader system of adjudication as the other elements of that system – the disputants and the lawyers (who do not aim at truth or justice at all). The thought that adjudication aspires to truth and justice because courts (properly) do involves an unfortunate synecdoche. Adjudication writ large aspires not to the accurate or just resolution of disputes, but rather to their legitimate resolution.

Now some have supposed that political legitimacy might be achieved through purely theoretical argument. According to those who think in this way, political legitimacy might arise out of general agreement on abstract principles to regulate collective life. There is no need, on this theoretical view, for any actual politics or for the participatory engagements among affectively involved disputants that politics invites. The theoretical approach thus places the understanding at the center of political legitimacy.

The theoretical approach to political legitimacy is most familiar at wholesale, in theories of high liberalism that believe philosophical argument can legitimate the liberal state. The most prominent recent theory of this sort came from John Rawls. Rawls argued that principles of justice might be defended by reason alone. When Rawls wrote that “[j]ustice is the first virtue of social institutions, as truth is of systems of thought,”<sup>19</sup> he established the theoretical approach to political legitimacy as an animating assumption of his theory of justice. He proposed, in this vein, that all persons (whatever their peculiar interests and comprehensive moral and religious outlooks) might converge on the basic constitutional principles that characterize a fair political order among free and equal citizens.<sup>20</sup> For Rawls, a successful theory of justice permits no reasonable political dissent (even as the principles of the theory leave much space for moral disagreement). Once principles of justice have received a theoretical defense, therefore, no distinct problem of political legitimacy any longer arises.

The theoretical approach to political legitimacy has an analog at retail, although thinking in such terms is much less familiar in the retail context. The most elaborate theoretical approach to retail political legitimation is the traditional “adversary system excuse” account of partisan lawyering. This view proposes to demonstrate that adjudication managed through partisan lawyers best tracks the accurate and just application of wholesale principles to retail disputes. Proponents of the adversary system excuse aspire to persuade all reasonable people that they cannot better approximate true and just dispute resolution than through adversary adjudication. The adversary system excuse proposes, in this way, to sustain a theoretical legitimation of adjudicative outcomes.<sup>21</sup> In spite of its appeal, the theoretical approach to legitimacy can never entirely overcome the specter of applying its own methods to its conclusions. Human nature and human circumstances conspire so that reasonable disagreement recurs all the way up – at every level of principle. At wholesale, there is ineliminable reasonable disagreement not just about comprehensive morality but also about theories of justice – liberal or otherwise – and, indeed, about theories of legitimacy. And at retail, there is ineliminable reasonable

15 See generally Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060 (1976).

16 JOHN KEATS, *Letter to George and Georgiana Keats*, 17, 18, 20, 21, 24, 25, 27 September 1819, in LETTERS OF JOHN KEATS 326 (Robert Gittings ed., 1970).

17 K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 293 (1941).

18 See, e.g., *United States v. Nelson*, 277 F.3d 164, 201 (2d Cir. 2002), which observed that an impartial fact-finder is an essential element of due process.

19 JOHN RAWLS, *A THEORY OF JUSTICE* 3 (1971).

20 See generally *id.*, especially Chapter 40, “The Kantian Interpretation of Justice as Fairness.”

21 One might perhaps say that whereas Rawls casts justice as fairness in terms of pure procedural justice, the adversary system excuse casts adversary adjudication in terms of imperfect (but best available) procedural justice. See *id.* at 84-86.

disagreement not just about what resolutions of individual disputes are true and just but also about which procedures – adversary or otherwise – best identify these resolutions. The circumstances of practical life are such that every theory admits of reasonable dissent. The understanding, taken alone, cannot legitimate.

A second, very different, approach to legitimacy becomes naturally desirable. This approach is practical. Practical accounts of political legitimacy seek to exploit the affective consequences of actual engagement, by disputants, in the processes by which disputes are resolved and collective choices are made. The practical approach to legitimacy exploits the power of process – through the actual engagements of those who participate in it – to sustain ownership of chosen outcomes even among participants who aimed to produce different ones. The practical approach places the will at the center of legitimacy. It is exemplified, at wholesale, by democracy – understood in the ordinary sense of political competition through parties and elections. The practical approach to legitimacy at retail invites justifications of lawyerly partisanship that emphasize lawyerly fidelity.

A contrast between theoretical and practical accounts of the legitimacy of adjudication initiates the new defense of lawyerly fidelity. Theoretical approaches to the legitimacy of adjudication characteristically treat the legal process as transparent. They suppose that one might look backward through a process – an adjudication, in the case at hand – from its end to its beginning and see the same claims and values asserted throughout. (Theoretical approaches to wholesale legitimacy, and in particular to democratic authority, arise from a parallel premise, and make a parallel mistake, although that is a topic for another occasion.)

Practical approaches to legitimacy, by contrast, borrow from the sociology of law to observe that, in fact, processes, including adjudication, are *transformative* – that mechanisms for dispute resolution influence the objectives that disputants pursue. When adjudication works, its transformative effects are so powerful that, as Lon Fuller once observed, it “reorient[s] the parties toward each other.”<sup>22</sup> The transformed dispute then “can actually become *the* dispute,” as disputants abandon any claims that cannot be accommodated within the transformation.<sup>23</sup> When this happens, the legitimacy of adjudication follows, because the reconstructed disputes and the resolutions that the legal process proposes have been tailored to suit each other. Parties who come (through their affective engagements with the legal process) to see their disputes as the legal process proposes also come to accept the resolutions that the legal process recommends.

Substantial evidence from social psychology suggests that adjudication does work in this way. People’s compliance with the law, as it is applied to them, depends significantly on their judgments concerning the legitimacy of the authorities who apply it.<sup>24</sup> Judgments concerning legitimacy, in turn, depend on judgments concerning the procedures that the authorities employ in determining what the law requires, and especially in resolving disputes about this. Moreover, people’s judgments

concerning procedures are practical and affective rather than theoretical and detached. People assess legitimacy *as participants*, focusing more on their “opportunities to state their case” and less on their “influence” in producing decisions that they regard as accurate.<sup>25</sup> Finally, although people do not require direct influence, they do insist that their participation be more than merely *pro forma* and that it involve genuine opportunities to be heard. The legal process cannot secure legitimacy merely by “providing structural opportunities [for disputants] to speak;” instead disputants “must also infer that what they say is being considered by the decision-maker.”<sup>26</sup>

This is where lawyers and lawyerly fidelity come into their own. Courts remain separated from litigants by their institutional character and obligations of impartiality. Furthermore, both substantive laws and processes of adjudication necessarily possess a formal or technical character. A tribunal’s willingness and indeed capacity seriously to consider disputants’ views thus depends on their receiving a particular and (literally) extraordinary expression. And lawyers (as specialists in the required form of expression) therefore play a central role in adjudication’s legitimacy. Disputants require lawyers to bridge the gap between them and tribunals. And only lawyers who practice lawyerly fidelity can connect disputants to tribunals in the fashion on which the legitimacy of adjudication depends.

Most shallowly, lawyers objectify and organize disputants’ claims, translating particular demands and complaints into the more general and impersonal language of the law. Clients, for their parts, must trust lawyers to understand their claims and, moreover, must trust lawyers’ commitment to and capacity for fidelity in translation. Only lawyers who practice the self-effacement associated with fidelity can sustain such trust. At an intermediate level, lawyers test disputants’ claims, eliminating those that are tangential or implausible in favor of more central and stronger ones. Once again, only faithful lawyers will be able to persuade their clients that their deflationary advice concerning extravagant or unreasonable claims genuinely serves the clients rather than the legal system or even just the lawyers’ personal judgments. And at the deepest level, lawyers reconstitute disputants’ claims, transforming them from brute demands into assertions of right, which recognize immanently the possibility of their own failures. Only lawyers who practice high fidelity will succeed at capturing all of their clients’ grievances for the law’s logic of right and defeasance.

The fidelity of lawyers thus sustains all three levels of adjudication’s transformative powers. By contrast, lawyers who abandon fidelity and aspire to serve their own personal ideals quite literally pre-judge their clients. And when this happens, the legitimacy of the legal process becomes dependent on the legitimacy of the lawyers’ judgments. But these judgments, being creatures of the lawyers’ individual minds, are virtually impossible to legitimate. Certainly, lawyers’ judgments cannot be legitimated by reference to the transformative powers of a legal process that has not yet begun. Lawyers who abandon their adversary role merely shift the burden of legitimation forward to their own assessments, which necessarily address their clients’ demands in an untransformed, and hence intractable, state.

Lawyerly fidelity thus establishes the foundation for adjudication’s practical legitimacy. One might say, by way of summary, that in order for adjudication to achieve legitimacy, lawyers must deny the potentially alienating features of adjudication (in particular, the legal process’s divided sympathies) any foot-

22 Lon L. Fuller, *Mediation: Its Forms and Functions*, in ALTERNATIVE DISPUTE RESOLUTION 115, 135 (Michael Freeman ed., 1995).

23 William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, in THE LEGAL STUDIES READER: A CONVERSATION & READINGS ABOUT LAW 227, 240 (George Wright & Maria Wyant Stalzer Cuzzo eds., 2004).

24 See, e.g., TOM TYLER, WHY PEOPLE OBEY THE LAW (1990); TOM TYLER, WHY PEOPLE COOPERATE (2011).

25 TOM TYLER, WHY PEOPLE OBEY THE LAW 126 (1990).

26 *Id.* at 149.

hold within the lawyer-client relation itself. Instead, lawyers must structure the lawyer-client relation so that they are able, through it, to “bring . . . the client’s case in a nonjudgmental way to the authoritative institutions of society.”<sup>27</sup> Only adversary advocates, who practice the fidelity that I have elaborated, can achieve this. And lawyerly fidelity therefore carries all the ethical significance of being necessary for sustaining the transformations in disputants’ attitudes on which the legitimacy of the legal process depends.<sup>28</sup>

#### IV. Conclusion

Lawyerly fidelity is not a sham or charade. Instead, fidelity lies at the very center of the law’s claim to legitimacy. Indeed,

27 Stuart Scheingold, *Taking Weber Seriously: Lawyers, Politics, and the Liberal State*, 24 LAW & SOC. INQUIRY 1061, 1063 (1999).

28 Once again, this is supported by research in social psychology: A study of felony trials, for example, reported that defendants’ attitudes towards the legitimacy of their trial courts were substantially determined by the intensity of their interactions with their lawyers, measured by factors “such as how often their attorney had consulted with them in deciding how to resolve their case.” TOM TYLER, WHY PEOPLE OBEY THE LAW 105 (1990). See also J. CASPER, THE CRIMINAL COURTS: THE DEFENDANT’S PERSPECTIVE (1970); Casper, J., Tyler, T., & Fisher, B., *Procedural Justice in Felony Cases*, (American Bar Foundation, Chicago, Ill., Working Paper No. 87-03, 1987). Indeed, the subjective experience of legitimacy seems to have been more influenced by the intensity of defendants’ interactions with their lawyers than by the intensity of their interactions with their tribunals (for example, whether their cases were resolved by plea bargain or trial). *Id.*

lawyerly fidelity presents a retail analog to the democratic virtues that are so notoriously celebrated throughout the civilized world. Lon Fuller once observed that “[v]iewed in this light, the role of the lawyer as a partisan advocate appears not as a regrettable necessity, but as an indispensable part of a larger ordering of affairs. The institution of advocacy is not a concession to the frailties of human nature, but an expression of human insight in the design of a social framework within which man’s capacity for impartial judgment can attain its fullest realization.”<sup>29</sup>

Lawyerly fidelity thus serves, ultimately, a high purpose. Persons disagree – pervasively and profoundly – about what impartiality requires. Their disagreements cannot ever be finally resolved by theoretical argument, as theories reproduce intractable disagreement at every level. But even if the disagreements cannot be settled, they must be contained through practical and institutional measures. Lawyerly fidelity belongs to the program that institutes such measures. And so lawyers’ partiality stands in a complex, nested, and even symbiotic relation to impartial justice. The closest approximation to an impartially justified order that persons can reasonably hope to achieve is possible only through the ministrations of highly partial lawyers, who faithfully serve rather than judge their clients.

29 Lon Fuller & John Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958).

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## What are lawyers for?

As a current and somewhat idealistic law student I would probably almost always answer the question why I am doing what I am doing because I have a strong sense of justice. However, I recently came to overthink this spontaneous reaction after a presentation about the professional role of lawyers by Daniel Markovits, Guido Calabresi Professor of Law at Yale Law School and currently fellow at the Wissenschaftskolleg zu Berlin.

Mr. Markovitz stated that neither are most of us aiming to be the happy, healthy and ethical lawyer that Patrick J. Schiltz<sup>1</sup> is talking about nor are most lawyers seeking justice. Lawyers are rather legitimating power merely in order to serve their clients. This is what Mr. Markovits calls “lawyerly fidelity”.

#### Raw materials

As to introduce this term, he referred to three basic principles. First, royal loyalty, that is different from the duties of candor and means the lawyer has serve his or her clients rather than

judge them. Second, client control, which means not serving the clients interests, but their intension; i.e. for the client it only matters if they got what they wanted in the end and not how they got there. And third, legal activeness, the right to pursue legal claims. This is a necessary consequence to the principle of professional detachment. Consequently, lawyers are not their clients friends, because they have to detach from a relationship. So the lawyer is not acting based on his personal belief or sense of justice, but based on what is a good argument to put the case ahead.

#### Lawyerly fidelity

According to Mr. Markovitz, lawyerly fidelity is important because any social order depends on its member’s ability to agree on something. Sociologic research has shown that what matters most in order to have people think a court made the right decision is that the tribunal listened to both sides. Likewise, lawyerly fidelity requests a certain objectivity and ability to “translate” legal problem to the client.

This role comes with a high purpose, because disagreements can’t be dissolved, but they can be contained. That’s what makes a collective life under law possible.

Therefore, next time I am asked about my intensions, I’ll probably come up with a more complex answer.

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1 Patrick J. Schiltz, On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession, *Vandebilt Law Review*, May 1999, p. 871.