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Lawyers in Character and Lawyers in Role

Abstract

Legal ethicists have long been fascinated by the relationships between lawyers' roles in an adversary system of justice and the character, attitudes, or dispositions that best suit the practice of law. Leonard Riskin's scholarship has explored how lawyers' practice of mindfulness can improve their legal practice, and his claim in this body of work – that the practice of mindfulness helps to develop the internalized trait of mindfulness – ties his scholarship to the work of legal ethicists who have endeavored to develop character-based theories of legal ethics. Riskin's analysis of how lawyers might incorporate mindfulness into law practice also embodies the components of empathy and openness to multiple perspectives that legal ethicists promote as a way of developing the character traits they deem necessary for good lawyers in their advocacy roles.

This essay explores the possibilities that Riskin's call for the development of the trait of mindfulness offers for the discussion of lawyers' roles and lawyers' characters in legal ethics. In particular, it explores the connections between Riskin's work and the work of the two most prominent legal ethicists who have proposed the development of distinctively lawyerly character traits: Anthony Kronman's call for the revival of a "lawyer-statesman" ideal in his book *The Lost Lawyer*; and Daniel Markovit's proposal in *A Modern Legal Ethics* that lawyers develop the poetic virtues of fidelity and negative capability. I suggest how Riskin's explorations of the benefits of mindfulness practice for lawyers point the way to a more satisfying solution to the problems associated with legal professionalism.

Keywords

Legal ethics, Leonard Riskin, Mindfulness, Empathy

Disciplines

Legal Ethics and Professional Responsibility

LAWYERS IN CHARACTER AND LAWYERS IN ROLE

Katherine R. Kruse*

Legal ethicists have long been fascinated by the relationship between lawyers' roles in an adversary system of justice and the character, attitudes, or dispositions that best suit the practice of law. Although Leonard Riskin's contribution to this symposium¹ does not specifically address the implications of mindfulness practice for lawyers, there are interesting connections between character-based theories of legal ethics and Riskin's scholarship that has explored how lawyers' practice of mindfulness can improve their legal practice.² Additionally, his claim in this symposium article—that the *practice* of mindfulness helps to develop the internalized *trait* of mindfulness³—ties his scholarship to the work of legal ethicists who have endeavored to develop character-based theories of legal ethics.⁴ Moreover, Riskin's analysis of how lawyers might incorporate mindfulness into law practice embodies the same components of empathy and openness to multiple perspectives that legal ethicists promote as a way of developing the character traits they deem necessary for good lawyers in their advocacy roles.⁵

Despite these connections, there are important differences between Riskin's exploration of the benefits of mindfulness for lawyers and the character-based proposals made by legal ethicists. Most notably, the proposals by legal ethicists call on lawyers to develop character traits that are distinctively professional because the character traits develop out of and support the responsibilities of lawyers acting in their professional roles.⁶ Because the lawyerly virtues that legal ethicists describe are developed and sustained within the lawyers' performance of their professional roles, the character traits of good lawyers set

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¹ Leonard Riskin, *Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation*, 10 NEV. L.J. 289 (2010).

² Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers and Their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002). Riskin himself draws parallels between his work and the character-based legal ethics developed by Anthony T. Kronman. *Id.* at 52-53.

³ Riskin, *supra* note 1, at notes 24-25 and accompanying text.

⁴ The two most prominent legal ethical theories, which I analyze in this essay, are proposed by Anthony Kronman and Daniel Markovits. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* (2008).

⁵ Riskin has noted the connection of his exploration of mindfulness to the work of Anthony Kronman. *See* Riskin, *supra* note 2, at 52-53.

⁶ *See* KRONMAN, *supra* note 4, at 109 (“[T]he figure of the lawyer-statesman may be said to embody not merely a generalized conception of political virtue but a distinctive professional ideal.”); MARKOVITS, *supra* note 4, at 79 (introducing the “distinctively lawyerly virtue” of fidelity).

lawyers apart from other persons of good character. The legal ethicists also tend to be pessimistic about the practical possibility that lawyers will succeed in the project of re-defining their characters along the paths they would prescribe. This pessimism is based largely in legal ethicists' view of the legal profession as lacking the social infrastructure to sustain lawyers in the development of distinctively lawyerly virtues or traits of character.⁷

In contrast, Riskin views the benefits of mindfulness in lawyering as an extension of the benefits of mindfulness in ordinary life.⁸ The path that mindfulness practice paves toward becoming a good lawyer is the same as the path that one would follow to become a more well-balanced and spiritually fit person. Moreover, based on the growth he sees in mindfulness training in a variety of legal and corporate contexts, Riskin is optimistic about the prospects for mindfulness practice improving the practice of law.⁹

Riskin's integrated view of personal and professional virtue thus stands as a more promising way of looking at the development of character traits that promote empathic, open-minded, and non-judgmental approaches to the practice of law, which are commonly viewed as important—if not essential—to the good lawyer's work. However, Riskin has yet to define how the development of the character trait of mindfulness fits within lawyers' professional roles. Legal ethicists who have developed character-based legal ethics ground their answers in political and jurisprudential theory.¹⁰ This theoretical grounding ties the development of lawyerly virtue to the lawyer's role in an adversary system and sets natural boundaries around lawyers' deployment of tools of non-judgmental empathy. Riskin's proposals could benefit from a similar grounding in theory about the nature and purpose of the lawyer's role, and such grounding may provide a useful way for him to move forward in his larger project of linking the practice of mindfulness, the emotional intelligence needed for the performance of lawyering tasks and legal ethics.¹¹

Riskin's as yet unfinished project of linking mindfulness practice, emotional intelligence and legal ethics also holds out the promise of enriching the ongoing discussion of lawyers' characters and lawyers' roles. Riskin's analysis of mindfulness and law practice grows out of his examination of lawyers' work in alternative dispute resolution settings, which he identifies as part of a larger cluster of problem-solving movements in law.¹² He touts the benefit of mindfulness as a method by which lawyers can break out of the narrow legalistic frame of reference and the preoccupation with litigation they typically bring to their work.¹³ The legal ethicists' definition of lawyers' jurisprudential and political roles relies on this same limited framework of adversary advocacy.

⁷ See KRONMAN, *supra* note 4, at 353-381; MARKOVITZ, *supra* note 4, at 212-246.

⁸ Riskin, *supra* note 2, at 23-33.

⁹ *Id.* at 33-45 (describing the growth of mindfulness training programs for lawyers, judges, and law students).

¹⁰ See, e.g., KRONMAN, *supra* note 4, at 87-108; MARKOVITS, *supra* note 4, at 1.

¹¹ Riskin notes that his original plan for this symposium piece was to explore the connections between mindfulness, the use of tools like the Core Concerns for recognizing the emotional dimensions of negotiation, and negotiation ethics. However, he has left the exploration of ethics to another day. Riskin, *supra* note 1, at 289.

¹² See Riskin, *supra* note 2, at 19-20.

¹³ *Id.* at 49-53.

Riskin's exploration of mindfulness within a broader framework for lawyering activity therefore holds out the promise of informing the development of a broader conception of lawyers' political and jurisprudential roles than the character-based legal ethicists currently offer.

This essay explores the possibilities that Riskin's call for the development of the trait of mindfulness offers for the discussion of lawyers' roles and lawyers' characters in legal ethics. First, I explain three ways that the problems associated with legal professionalism have been framed within legal ethics, and critique the underlying assumptions that animate the dominant framing of the problems of professionalism in legal ethics. Next, I expound the work of the two most prominent legal ethicists who have proposed the development of distinctively lawyerly character traits: Anthony Kronman's call for the revival of a "lawyer-statesman" ideal in his book *The Lost Lawyer*;¹⁴ and Daniel Markovits's proposal in *A Modern Legal Ethics*¹⁵ that lawyers develop the poetic virtues of fidelity and negative capability. I conclude by showing how the adversary-advocacy framework shapes and informs each of these theories, and by suggesting how Riskin's explorations of the benefits of mindfulness practice for lawyers point the way to a more satisfying solution to the problems associated with legal professionalism.

I. DEFINING THE PROBLEM: ADVERSARY ADVOCACY AND THE PROBLEM OF LAWYER ALIENATION

The pioneers in the field of legal ethics—many of whom were trained in moral philosophy—framed the basic underlying problem of legal professionalism in terms of the conflict between the demands of lawyers' "role morality" and the dictates of "ordinary morality."¹⁶ They began with the claim that to properly fulfill their role as partisan advocates in an adversary system of justice, lawyers had to develop a "role morality" that was detached from the sentiments and concerns of ordinary morality.¹⁷ The "role morality" of lawyers was defined by the lawyer's partisan pursuit of their clients' interests, combined with a morally neutral stance toward their clients' objectives.¹⁸ As the moral philosophers described it, "[t]he job of the lawyer . . . is not to approve or disapprove of the character of his or her client, the cause for which the client seeks the lawyer's assistance, or the avenues provided by the law to achieve

¹⁴ KRONMAN, *supra* note 4.

¹⁵ MARKOVITS, *supra* note 4.

¹⁶ I date the beginning of legal ethics as a serious field of scholarly inquiry to the mid-1970s. Although not among the first wave of theorists, David Luban was probably the most influential. Luban convened a working group of philosophers, lawyers, and legal academics to study the "hard, unsolved, and mostly unexplored issues in legal ethics that are amenable to treatment by moral philosophy." David Luban, *Calming the Hearsed Horse: A Philosophical Research Program for Legal Ethics*, 40 MD. L. REV. 451, 452 (1981). The papers that emerged from the Working Group on Legal Ethics were eventually published in a collection of essays edited by Luban. *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* (David Luban ed., 1983).

¹⁷ See, e.g., Gerald J. Postema, *Moral Responsibility in Legal Ethics*, 55 N.Y.U. L. REV. 63 (1980); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

¹⁸ Postema, *supra* note 17, at 73-74.

that which the client wants to accomplish.”¹⁹ Rather, the job of the lawyer is to pursue the client’s objectives as far as possible through any available legal means.²⁰

As a result of the morally neutral and partisan stance that lawyers were required to take toward achieving their clients’ objectives, legal ethicists claimed that “the lawyer as professional comes to inhabit a simplified universe which is strikingly amoral—which regards as morally irrelevant any number of factors which nonprofessional citizens might take to be important, if not decisive, in their everyday lives.”²¹ Lawyers’ habitation of this simplified moral universe, legal ethicists argued, created profound personal alienation for the lawyer.²² Duty-bound to “engage in activities, make arguments, and present positions which [they do] not endorse or embrace,” lawyers were thought to gradually lose their sense of personal integrity.²³ Furthermore, cut off from the guidance of ordinary moral considerations, the practice of law was set adrift, permitting lawyers to justify immoral and socially destructive behavior with what one legal ethicist famously called the “adversary system excuse.”²⁴

As I have argued in more depth elsewhere, the early legal ethicists’ characterization of the basic problem of legal ethics is problematic for several reasons.²⁵ Most notably, it requires legal ethicists to posit that clients are basically greedy, selfish, and uncaring toward others—to construct them as “cardboard clients” defined solely by the maximization of their legal interests.²⁶ The drive to view clients in these narrow terms sprang from the intellectual project in which the earliest legal ethical writings engaged: the analysis of conflicts between “role morality” and “ordinary morality.” Under the “role morality” that the legal ethicists described, lawyers’ professional duties are defined by the partisan pursuit of the *client’s* objectives. Clients whose objectives include wanting to do the right thing, maintaining their reputations, sustaining relationships with other, and treating others fairly do not create the kind of conflicts between lawyers’ professional duties and the commitments of ordinary morality on which the legal ethicists wanted to focus.

Notably, the kind of personal identity crisis that the early legal ethicists describe requires a particularly extreme version of the moral demands of law practice. It is one thing to say that lawyers sometimes find themselves representing clients whose causes they cannot personally endorse. But to suggest that the practice of law by its very nature alienates lawyers from themselves assumes that the threats to ordinary moral commitment that arise from law practice are either fairly regular or quite extreme. In other words, one must

¹⁹ Wasserstrom, *supra* note 17, at 8.

²⁰ Postema, *supra* note 17, at 73-74.

²¹ Wasserstrom, *supra* note 17, at 8.

²² KRONMAN, *supra* note 4, at 2; MARKOVITS, *supra* note 4, at 115; Postema, *supra* note 17, at 77-79.

²³ Postema, *supra* note 17, at 77.

²⁴ DAVID LUBAN, *The Adversary System Excuse*, in LEGAL ETHICS AND HUMAN DIGNITY 19 (2007).

²⁵ See Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103 (2010).

²⁶ *Id.*

assume that most clients are greedy, selfish, and oblivious to ordinary moral concerns.

There is an alternative—and in my view more plausible—explanation for the pathologies of legal practice, which also has roots in the writings of the early legal ethicists. In one of the first articles to define the moral issues in legal professionalism, Richard Wasserstrom argued that the lawyer-client relationship is itself morally suspect because, in the lawyer-client relationship, “the client is seen and responded to more like an object than a human being, and more like a child than an adult.”²⁷ Wasserstrom noted that all professionals tend to objectify their clients according to their expertise. For example, professionals in medicine, law, and psychiatry come to view a client “not as a whole person but as a segment or aspect of a person—an interesting kidney problem, a routine marijuana possession case, or another adolescent with an identity crisis.”²⁸ For lawyers, the problem is the tendency to view clients as walking bundles of legal rights and interests rather than as whole persons whose legal issues come deeply intertwined with other concerns—relationships, loyalties, hopes, uncertainties, fears, doubts, and values—which shape the objectives they bring to legal representation.

If we view lawyers’ legal objectification of clients as the root cause of the problems of professionalism, we no longer need to rely on the premise that clients are by nature greedy, selfish, and uncaring. Rather, we can posit that the vast majority of clients are motivated at least in part by ordinary emotional, reputational, relational, and moral concerns. The source of lawyers’ alienation is not primarily that lawyers are duty-bound to press their clients’ objectives; rather, it is that lawyers’ professional training causes them to view their clients’ problems too narrowly. By focusing on how to maximize their clients’ legal interests, lawyers lose sight of the ways in which their clients’ legal issues are embedded and intertwined in other non-legal concerns.²⁹

There is a third explanation—perhaps self-evident, but still worthy of mention—for why the legal profession might be plagued by excessive lawyerly zeal that diverts lawyers away from the multiple dimensions of clients’ problems and larger questions of justice: winning at all costs serves the financial and reputational interests of lawyers. The most common target and frame of reference for legal ethical scrutiny is the large corporate law firm, in which lawyers’ financial incentive to maximize billable hours complements—and may help to explain—the aggressive partisan pursuit of clients’ legal interests.³⁰ In other sectors of law practice, where clients have fewer resources and lawyers have financial incentives to resolve cases as efficiently as possible, the problem is more likely to be neglect rather than over-litigation of claims.³¹

²⁷ Wasserstrom, *supra* note 17, at 19.

²⁸ *Id.* at 21.

²⁹ These arguments have been made persuasively and succinctly in an early essay by Warren Lehman. Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078 (1979).

³⁰ See, e.g., KRONMAN, *supra* note 4, at 272 (explaining that he confines his critique of law practice to the practice of law in large corporate firms).

³¹ This critique of the way legal ethicists were framing the problems of professionalism was raised in an early article by Ted Schneyer. Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1544-50. For a more comprehen-

However, in either hemisphere of law practice—the overly zealous large firm lawyer pursuing every possible claim, motion, or objection, or the small practice lawyer processing cases as efficiently as possible—the basic problem could be described in terms of lawyers’ pursuit of clients’ legal interests in a vacuum that disregards the clients’ other values, relationships, reputations, and concerns.³²

II. CHARACTER-BASED SOLUTIONS: LAWYERS AS STATESMEN AND LAWYERS AS POETS

The way one defines a problem determines how one seeks to solve it; by the same token, the kind of solution one proposes reveals the way one conceives the problem. The solutions proposed by character-based legal ethicists for addressing the problems of lawyer alienation draw on some of the same components of empathy and non-judgmental consideration of multiple perspectives that mindfulness practice promotes, while revealing a litigation-oriented vision of legal practice. One suggestion, launched by early legal ethicists and elaborated more fully by Anthony Kronman, is that lawyers develop the character trait of Aristotelian “practical wisdom,” a capacity to exercise sound judgment by moving back and forth between sympathetic engagement with their clients’ interests and a detached perspective on the common good that also encompasses the perspectives of others.³³ More recently, Daniel Markovits has proposed that lawyers address the threats to their personal integrity by re-describing the “lawyerly vices” of adversary advocacy in terms of the “lawyerly virtues” of fidelity and drawing on the practice of “negative capability,” or the poetic ability to efface oneself, suspend one’s judgments about the world, and enter fully into the perspective of another.³⁴

A. Kronman’s Lawyer-Statesman

In Kronman’s view, the basic problem of the legal profession is a turn toward a narrow conception of partisanship, in which lawyers act merely as technicians with special expertise in helping their clients achieve their objectives, rather than as counselors to whom clients turn to deliberate about their goals and objectives. This narrow, technocratic commitment to furthering clients’ interests has, in Kronman’s view, created a “crises of morale” and “growing doubts about the capacity of a lawyer’s life to offer fulfillment to the person who takes it up.”³⁵

Kronman’s solution to the crisis of morale in the legal profession is to revive what he views as its governing ideal: the ideal of the lawyer-statesman.³⁶ To be a good statesman, Kronman argues, is to have developed a char-

sive analysis of the distribution of dispute resolution resources, see Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89 (2005).

³² I discuss this claim more fully in Kruse, *supra* note 25.

³³ KRONMAN, *supra* note 4, at 66-74; see also Postema, *supra* note 17, at 79-80 (discussing the importance of practical wisdom).

³⁴ MARKOVITS, *supra* note 4, at 11.

³⁵ KRONMAN, *supra* note 4, at 2.

³⁶ *Id.* at 2-3.

acter trait of practical wisdom.³⁷ Drawing on Aristotelian character ethics, he explains that practical wisdom involves the capacity to deliberate well about ends.³⁸ Deliberating well about one's own ends involves playing out the consequences of difficult life choices and imagining how one will feel having followed different possible paths in life.³⁹ It thus requires a combination of compassion and detachment, alternating sympathetic engagement with the way the world looks and feels from a particular perspective with a non-judgmental attitude that avoids commitment to any one perspective and takes all points of view into account.⁴⁰

The development of this same deliberative capacity to shift between compassion and detachment enables statesmen to provide sound leadership in a society struggling through difficult value choices, which help to define the identity of the community as a whole.⁴¹ As Kronman sees it, the alternatives that face a community involve sometimes incommensurable trade-offs, which cannot be resolved with reference to a common metric.⁴² Good statesmanship is the ability to make judgments about the good of the community by engaging sympathetically with multiples points of view while remaining uncommitted to the values and beliefs that give these points of views their force.⁴³ The character trait of practical wisdom allows statesman to provide leadership in society by identifying choices that will best promote sympathetic fellow-feeling and solidarity among differing factions, a condition that Kronman calls "political fraternity."⁴⁴

The lawyer-statesman ideal combines the deliberative wisdom of good statesmanship with training in the law. Lawyer-statesmen become "connoisseurs" of the law, taking pleasure in discovering "the good of the legal order as a whole, the good of the community that the laws establish and affirm."⁴⁵ The heart of the lawyer-statesmen character trait—developed through legal training and legal practice—is the ability to adopt a "judicial point of view," which takes into account the perspectives of litigants but remains primarily concerned with "the integrity and well-being of the legal system as a whole."⁴⁶ Kronman argues that it is by developing and nurturing the capacity to view legal questions from the point of view of judges facing a question of legal interpretation that lawyers best equip themselves to act as advocates before judges and juries.

In the arena of lawyer-client relationships, Kronman views lawyers as better equipped to deliberate about the client's objectives than the clients themselves, not so much because clients are viewed as unfailingly selfish or grasping, but because lawyers are viewed as superior at the craft of deliberation. Lawyer-statesmen do not simply assist their clients as a legal technician implementing their clients' goals, but also help their clients deliberate about

³⁷ *Id.* at 16.

³⁸ *Id.* at 39-46, 53-62.

³⁹ *Id.* at 69-70.

⁴⁰ *Id.* at 70-74.

⁴¹ *Id.* at 87-101.

⁴² *Id.* at 89-90.

⁴³ *Id.* at 98.

⁴⁴ *Id.* at 93.

⁴⁵ *Id.* at 141.

⁴⁶ *Id.* at 118.

what ends to pursue. A lawyer-statesmen provides a particular service to impetuous clients inclined to make hasty or ill-informed choices.⁴⁷ Additionally, a lawyer-statesmen's judicial point of view helps them identify solutions that promote a public-spirited resolution of private disputes.⁴⁸

Thus, the character traits of good statesmanship that lawyers acquire through the study and practice of law position lawyers to be valued leaders in society. The distinctively lawyerly expertise in the resolution of cases allows lawyers to contribute meaningfully to societal debates on issues of public policy, because law is an arena in which a community makes policy choices that define its identity through the expression of communal values.⁴⁹ Kronman's lawyer-statesmen position themselves to be leaders in society because the practical wisdom they have developed through the study and practice of law allows them to lift their heads above the crowd and get a better view of multiple perspectives and the good of society as a whole than ordinary men and women.

Kronman's proposal that lawyers develop a distinctively lawyerly variety of practical wisdom ultimately leads to his pessimistic conclusion about the possibilities for reform of the legal profession. Although the legal profession once prized the capacity to deliberate well as integral to the role of lawyers and made the profession of law an honorable and worthy endeavor, Kronman argues that law school teaching and scholarship have increasingly turned their backs on a conception of law as a learned craft.⁵⁰ Law firm culture has also become increasingly commercialized and specialized, diminishing the opportunities for lawyers to gain experience across a range of legal issues or develop relationships with long-standing clients over time, each of which can nurture the development of practical wisdom.⁵¹ These trends establish and reinforce the narrow, legally technical conception of lawyering, making it doubtful that the legal profession will embrace the statesmanship view of law as a craft requiring practical wisdom.⁵² Without the legal profession's endorsement of the ideal of statesmanship as integral to the craft of lawyering, lawyers will be unlikely to develop and sustain the character traits that make the lawyer-statesman ideal attractive.

B. *Markovits and the Lawyer-Poet*

While Kronman takes a macro-view of the decline of the ideal of public virtue in the legal profession, Markovits explores the crisis in personal identity that individuals experience as a direct result of their work as lawyers. The basic challenge, according to Markovits, "is to explain how the actions, commitments and traits of character typical of the profession . . . may be integrated into a life well-lived."⁵³ Markovits's focus is on developing an account of

⁴⁷ *Id.* at 129-31.

⁴⁸ *Id.* at 146-54.

⁴⁹ *Id.* at 89.

⁵⁰ *Id.* at 165-270.

⁵¹ *Id.* at 271-314.

⁵² *Id.* at 353-81.

⁵³ MARKOVITS, *supra* note 4, at 1.

lawyers' roles and responsibilities that can provide a satisfactory moral justification for adversary advocacy from "the lawyer's point of view."⁵⁴

Following directly in the tradition of the early moral theorists in legal ethics, Markovits analyzes the crisis in lawyer morale as originating in lawyers' duties as adversary advocates to "lie" and to "cheat."⁵⁵ Although the ethical rules that govern the legal profession rule many instances of "lying" and "cheating" out of bounds, Markovits insists that adversary advocacy requires lawyers to engage in practices that ordinary persons would define as "lying" and "cheating." Such practices are written into the foundational structure of adversary advocacy through its defining principles of lawyer loyalty, client control, and legal assertiveness.⁵⁶ Markovits argues that lawyers' professional role as advocates require them to "assert their clients' factual and legal positions even when they privately find the opposing positions more compelling" and to "promote their clients' causes even when they privately conclude that their clients do not fairly deserve to have these causes succeed."⁵⁷ Ordinary persons—and lawyers themselves—understand these activities as "lying" and "cheating."

The usual way of defending the legal profession against the charges of immoral conduct is to absolve lawyers of moral wrong by pointing out that they are merely playing a role within a larger adversary system: although adversary advocacy may require lawyers to advocate false positions and advance unjust claims, in most cases the adversary system is designed to arrive at truth and justice through such vigorous advocacy on both sides of a contested issue.⁵⁸ Markovits argues that this kind of "third-personal" justification is ultimately unsatisfactory from the lawyer's point of view because it excuses the lying and cheating behavior but it does not re-define the activities in ways that "render the professional life of the adversary advocate worthy of commitment."⁵⁹ To make lawyers' professional lives morally worthy, the actions associated with adversary advocacy must be explained as lawyerly virtues, not excused as lawyerly vices.⁶⁰

Markovits finds the seeds of lawyerly virtue in John Keats's description of the sensibilities of a poet, namely in the idea of "negative capability."⁶¹ The negatively capable poet becomes a vessel for his poetic subject, effacing his own identity and allowing "some other body—'The Sun, the Moon, the Sea'"—to come to life through his words.⁶² Although the poet sees the world through his subject's eyes and is able to bring the subject's perspective alive for

⁵⁴ See Daniel Markovits, *Legal Ethics from the Lawyer's Point of View*, 15 *YALE J.L. & HUMAN.* 209 (2003).

⁵⁵ MARKOVITS, *supra* note 4, at 35.

⁵⁶ *Id.* at 26-34.

⁵⁷ *Id.* at 34. Markovits spends nearly a third of the book detailing the many ethical rules that constrain this behavior, and defending the proposition that lawyers are still required to "lie" and "cheat" as a defining feature of their professional role.

⁵⁸ *Id.* at 103-104.

⁵⁹ *Id.* at 107.

⁶⁰ *Id.*

⁶¹ *Id.* at 93.

⁶² *Id.* (quoting Letter from John Keats to Richard Woodhouse (Oct. 27, 1818), *reprinted in* *LETTERS OF JOHN KEATS* (Richard Gittings ed., 1970)).

others, the poet also stands apart from the poetic subjects, maintaining the capacity to suspend personal belief and “occupy multiple points of view simultaneously.”⁶³ Markovits posits that the lawyer’s professionally defined duties are analogous to the poetic sensibility that Keats described.⁶⁴ Lawyers who develop the lawyerly virtues of negative capability are able to advocate well for their clients by addressing the world through their clients’ eyes. Moreover, by suspending their own beliefs about the rightness or justness of a cause, they are able to see “more clearly and widely than ordinary people see and can sustain resolutions to disputes that remain closed off from those who insist, passionately, on substantive justice or right.”⁶⁵

Markovits embeds his account of poetic lawyerly virtue in a theory of procedural justice, drawing on social scientific study of dispute resolution processes. He argues that democratic governmental authority derives legitimacy, not through the results it delivers, but through the participatory nature of the processes that lead to the results.⁶⁶ Consequently, the legal process that resolves individual disputes “does not achieve legitimacy by reaching settlements that satisfy the aims that the participants bring to the process, nor even by employing detached and purely theoretical arguments to persuade the participants.”⁶⁷ Rather, the legal process achieves legitimacy by providing opportunities for genuine participation, allowing disputants the opportunity to have their perspectives heard, and by treating them fairly.⁶⁸ Moreover, the legal process is transformative; the outcomes that disputants are prepared to accept before initiating the process often differ from the outcomes they are willing to accept after having engaged in the process.⁶⁹ Lawyers’ fidelity in voicing their clients’ views of the world and their negative capability to suspend their own views of a conflict situation thus serve the procedural justice goals of legitimizing the legal process.

Although Markovits sees promise in his re-description of lawyerly advocacy as poetic virtue, he is ultimately pessimistic about its chances for successfully rehabilitating the practice of law as a life worthy of lawyers’ moral commitment.⁷⁰ Like Kronman, he cites increasing pressures toward partisanship and specialization in law practice, as well as the disintegration of the legal profession as an insular source of authority on the meaning of lawyerly virtue.⁷¹ For Markovits, it is the conditions of modernity itself—with its increasingly cosmopolitan and pluralistic sensibilities about values—that both creates the political legitimacy of lawyers’ fidelity to their clients and “denies lawyers the cultural resources that they need to fashion these virtues into their own, distinctive first-personal moral ideals.”⁷²

⁶³ MARKOVITS, *supra* note 4, at 94.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 178-84.

⁶⁷ *Id.* at 188.

⁶⁸ *Id.* at 189-90.

⁶⁹ *Id.* at 192.

⁷⁰ *Id.* at 222-23.

⁷¹ *Id.* at 243.

⁷² *Id.* at 245.

The distinctively lawyerly virtues that Kronman and Markovits describe are constructed from the same basic building blocks of empathy and the ability to remain open to multiple perspectives. Notably, these are the same character traits that Riskin describes as accruing from the practice of mindfulness.⁷³ It might be said that mindfulness practice would make one either a good lawyer-statesman or a good lawyer-poet. What differentiates lawyer-statesmen from lawyer-poets is the way the empathetic and non-judgmental practices have been embedded in different conceptions of lawyers' roles. Kronman's lawyer-statesman develops the capacity for empathy and detachment into a "judicial point of view" that positions lawyers for leadership in deliberating about difficult and contested questions of communal values. Markovits's lawyer-poet develops negative capability into the ability to give voice to clients' perspectives in ways that legitimate the legal process by making clients feel that they have been heard.

Although there are significant differences between the jurisprudential roles of lawyer-statesmen and lawyer-poets, both conceptions are shaped by adversary frameworks of litigation. The basic paradigm for developing the character traits of a lawyer-statesman is appellate adjudication, or being able to adopt a "judicial point of view" on the resolution of contested interpretations of law arising from the particulars of specific cases. For the lawyer-poet, the basic paradigm for developing lawyerly virtue is the act of translating an authentic version of the client's story into the language of legal claims and presenting those claims to an authoritative third-party audience who can "hear" the client's story and legitimize the resolution of the client's dispute.⁷⁴

III. THE PRACTICE OF MINDFULNESS AND THE PRACTICE OF LAW

Riskin locates the basic problem of legal professionalism in the attitudes, beliefs, and assumptions—the "adversarial mind-sets"—that lawyers bring to the practice of law.⁷⁵ He offers the metaphor of the "Lawyer's Standard Philosophical Map,"⁷⁶ which provides a variation on Wasserstrom's theme of legal objectification. Noting that maps usually contain only limited and distilled information to guide a traveler, Riskin highlights two assumptions that appear on the "philosophical map" that guide lawyers through the practice of law: "(1) that disputants are adversaries—*i.e.*, if one wins, the others must lose—and (2) that disputes may be resolved through application, by a third party, of some general rule of law."⁷⁷ Based on the guiding assumptions of the adversarial posture of parties and the rule-solubility of disputes, Riskin argues that lawyers tend to reduce the clients' "nonmaterial values—such as honor, respect, dignity, security, and love—to amounts of money."⁷⁸ Furthermore, they tend "to put people and events into categories that are legally meaningful,

⁷³ Riskin, *supra* note 1 at notes 24-25 and accompanying text.

⁷⁴ MARKOVITS, *supra* note 4, at 196-97.

⁷⁵ Riskin, *supra* note 2, at 8.

⁷⁶ Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-46 (1982).

⁷⁷ *Id.* at 44 (citations omitted).

⁷⁸ *Id.*

to think in terms of rights and duties established by rules.”⁷⁹ Echoing Wasserstrom’s twin concerns that lawyers objectify their clients and act paternalistically toward them, Riskin explains that the limiting mind-set created by the Lawyer’s Standard Philosophical Map:

encourages the lawyer to see the client in terms of legal claims or injuries—a Sherman Act violation, a breach of contract, or a sponge left in the abdomen—rather than as a whole person, and to dominate the decision-making process, rather than allowing the client to participate actively.⁸⁰

However, in Riskin’s view, adversarial mind-sets are not simply imposed on clients by their lawyers.⁸¹ In his Saltman Lecture, Riskin uses unrepresented disputants (brothers and business partners Phil and Jack) to illustrate the benefits of mindfulness in negotiation, demonstrating how even non-lawyer disputants can also be plagued by limiting and adversarial mind-sets.⁸² Riskin describes how the framework of the “core concerns” that all persons share for affiliation, autonomy, appreciation, status, and role can be used as both a “lens” to better understand a conflict situation as well as a “lever” to generate positive emotions that can lead to more satisfactory resolutions to a dispute.⁸³ However, Riskin explains that even experienced negotiators who understand the “core concerns” have trouble actually applying them because, like all disputants, they encounter barriers defined by self-centered perspectives; strong negative emotions; automatic and habitual ways of thinking, feeling, and behaving; insensitivity to emotions; insufficient social skills; and inadequate focus.⁸⁴

The promise of mindfulness practice is that it can open up the limiting perspectives that both lawyers and clients bring to a dispute situation. Riskin describes mindfulness as “a certain way of paying attention—intentionally, moment-to-moment, with equanimity and without attachment—to whatever passes through the conventional senses [touch, taste, smell, vision, hearing] and the mind [thoughts].”⁸⁵ The opposite of mindfulness is mindlessness, a condition that leaves one susceptible to automatic or reactive ways of thinking and believing.⁸⁶ Furthermore, the practice of mindfulness leads to a capacity—an adeptness—at sustaining oneself in the state of mindfulness, which he suggests as a “trait” of mindfulness.⁸⁷

Riskin has argued that lawyers can use mindfulness to get out of their limiting frameworks defined by the Lawyer’s Standard Philosophical Map.⁸⁸ Rather than jumping to an analysis of a client’s problems in terms of potential legal claims, mindfulness can help lawyers listen “carefully, deeply and openly” to their clients’ versions of the conflict situation.⁸⁹ By using mindful-

⁷⁹ *Id.* at 45.

⁸⁰ Riskin, *supra* note 2, at 50.

⁸¹ For a similar argument, see Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLINICAL L. REV. 833, 861-64 (2004).

⁸² Riskin, *supra* note 1, at note 36 and accompanying text.

⁸³ *Id.* at notes 55-56 and accompanying text.

⁸⁴ *Id.* at notes 71-85 and accompanying text.

⁸⁵ *Id.* at note 90 and accompanying text.

⁸⁶ *Id.* at note 94 and accompanying text.

⁸⁷ *Id.* at note 112 and accompanying text.

⁸⁸ Riskin, *supra* note 2, at 50.

⁸⁹ *Id.*

ness, lawyers can also help clients make wise decisions that get beyond the limiting self-centered, negative and reactive perspectives that the clients are likely to bring to conflict situations.⁹⁰ Finally, lawyers can reduce the impairment of their own “ego-based cravings” that may distort their professional judgment in favor of their own reputational or financial interests.⁹¹

Much of Riskin’s analysis of the benefits of mindfulness practice—particularly the capacity to develop both empathy and non-judgmental distance—tracks the recommendations of the character-based legal ethicists quite closely. However, Riskin’s version of mindfulness practice offers an antidote to the ultimately pessimistic view that Kronman and Markovits take toward the development of lawyerly virtue. Kronman and Markovits are pessimistic because they perceive the legal profession as inadequately structured to sustain the development of distinctively lawyerly traits of character. Yet, mindfulness is a spiritual practice arising out of what it means to be a better human being, not a professional practice arising out of what it means to be a good lawyer. If Riskin is right that lawyers can use the spiritual practices of mindfulness to transcend the limitations of their legalistic perspectives and their ego-based cravings for “money, power or recognition,”⁹² it hardly seems necessary for lawyers to rely on the legal profession to create a social infrastructure to develop the character traits associated with mindfulness.

To complete the circle, though, and bring mindfulness practice back to lawyers’ ethical behavior, mindfulness needs to be embedded within an affirmative conception of lawyers’ professional roles, and not merely posited as a way to transcend the deficiencies of professionalized ways of thinking. The problems of legal professionalism may be fairly characterized as lawyers’ lack of emotional intelligence and inability to view a client’s situation broadly and holistically. However, the capacities for empathy and non-judgmental entertainment of multiple perspectives do not and cannot provide a complete account of the practice of law.

To aid lawyers in exercising professional ethical judgment, mindfulness practices must be embedded within a coherent theory of the lawyer’s role that can place boundaries and limits on the deployment of empathy and non-judgmental entertainment of multiple perspectives. For example, Markovits notes that not all actions taken in the name of adversary advocacy will pass muster under his redefinition of adversary advocacy as lawyerly virtue.⁹³ The virtues of fidelity and negative capability, understood within the procedural justice framework he presents, would “condemn forms of lying that help clients to *misrepresent* rather than to *express* themselves and forms of cheating that *close off* rather than *open up* the judicial process.”⁹⁴ But these limits on adversarial advocacy do not spring from the practices of fidelity and negative capability; they spring from lawyers’ jurisprudential and political role in legitimizing law.

To move forward in his project of connecting mindfulness practice to lawyers’ ethical practice, Riskin needs to embed mindfulness practices within a

⁹⁰ *Id.*

⁹¹ *Id.* at 52.

⁹² *Id.* at 50-52.

⁹³ MARKOVITS, *supra* note 4, at 209.

⁹⁴ *Id.* at 95.

conception of how alternative dispute resolution mechanisms—particularly those that use interest-based and problem-solving methods—relate to larger questions of justice.⁹⁵ And he is poised—maybe also paused—at the brink of these next important questions. Riskin is too sophisticated a thinker to posit that ethical behavior can be equated with interest-based or problem-solving approaches in all cases. For example, he has recognized that a lawyer who invariably adopts problem-solving approaches to lawyering can leave clients vulnerable to exploitation.⁹⁶ Additionally, he has noted that “the adversary-rule perspective from which the standard map is drawn has real strengths” in that it promotes loyalty to clients and “an allegiance to the system of laws, which in turn serves to unify society, to provide a measure of security of expectations, and to keep open possibilities of fairness between persons irrespective of status and of vindication of the rights of the downtrodden.”⁹⁷

Riskin’s work on mindfulness and law practice walks alongside the work legal ethicists like Kronman and Markovits, who seek to develop character-based theories of what it means to be a good lawyer. Riskin’s description of mindfulness practices provides concrete tools for developing the traits of character that theorists like Kronman and Markovits assign to the good lawyer. Also, Riskin’s work is refreshingly optimistic, largely because his humanistic understanding of the development of the trait of mindfulness avoids the legal ethicists’ gloom about the incapacity of the legal profession to nurture and sustain the distinctively professional ideals of lawyerly virtue. Riskin’s potential answers to the questions of lawyers’ characters and lawyers’ roles—which he approaches through the field of alternative dispute resolution—promises to reveal interesting questions about how the humanism of problem-solving approaches can be reconciled with the respect for the rule of law.

⁹⁵ I have raised this question in response to a previous Saltman Lecture. See generally Katherine R. Kruse, *Learning from Practice: What ADR Needs from a Theory of Justice*, 5 NEV. L.J. 389 (2005).

⁹⁶ See, e.g., Riskin, *supra* note 2, at 54.

⁹⁷ Riskin, *supra* note 76, at 58.