

1990

Lawyering for Justice in a Flawed Democracy [reviews]

Stephen Ellmann

New York Law School, stephen.ellmann@nyls.edu

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters

Recommended Citation

90 Colum. L. Rev. 116 (January 1990)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

BOOK REVIEW ESSAY

LAWYERING FOR JUSTICE IN A FLAWED DEMOCRACY

LAWYERS AND JUSTICE: AN ETHICAL STUDY. By David Luban. Princeton: Princeton University Press, 1988. Pp. xxix, 440. \$55.00 (cloth); \$12.95 (paper).

*Reviewed by Stephen Ellmann**

David Luban's new book, *Lawyers and Justice: An Ethical Study*, is a scintillating and provocative study of some of the hardest ethical questions lawyers face. The issues Luban confronts are not the anxieties of the rich, but the grievances of the poor. The solutions he offers amount to a multifaceted effort to cabin lawyers' penchant for aiding the powerful at the expense of the powerless, and to fuel lawyers' capacity to fight on behalf of the oppressed. They would also, in some respects, radically alter the ethical obligations of the bar.

Moving easily from points of philosophy to political theory to trenchant discussion of courtroom events, Luban offers us an explication of ethics in the context of politics, a delineation of the ethical responsibilities and prerogatives of lawyers who work in a seriously unjust society, as American lawyers do. Luban develops his response to the reality of injustice from several different angles. He begins with the problem of "role morality": whether lawyers ought to be governed by a role morality that permits or even requires conduct not allowed by "common morality."¹ Luban answers that lawyers can properly follow a role morality, but only if the role itself is morally justified. From this starting point, he argues, first, that much of the adversary system does not rest on a sufficiently firm moral foundation to justify rules of legal ethics that violate common morality. Second, Luban maintains that lawyers who represent those without power in our society perform a role with different and especially compelling moral foundations. These law-

* Associate Professor of Law, Columbia Law School. I am grateful to Columbia Law School for financial support for the writing of this essay, and to Victor Goldberg, Jeffrey Gordon, Henry Monaghan, Nancy Rosenbloom and Peter Strauss for helpful comments.

1. For other recent assessments of lawyers' role morality, see, e.g., A. Goldman, *The Moral Foundations of Professional Ethics* 1-33, 90-155 (1980); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *Yale L.J.* 1060 (1976); Postema, *Moral Responsibility in Professional Ethics*, 55 *N.Y.U. L. Rev.* 63 (1980); Schwartz, *The Zeal of the Civil Advocate*, in *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* 150, 161-69 (D. Luban ed. 1983); Wasserstrom, *Roles and Morality*, in *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics*, supra, 25, 25-37; Rhode, *Ethical Perspectives on Legal Practice*, 37 *Stan. L. Rev.* 589, 643-47 (1985).

yers, unlike their adversaries who represent the powerful, *are* morally justified in departing from common morality.

Luban next focuses on the obligations of lawyers to represent those who now go unrepresented. The reconstruction of lawyers' duties that he proposes would strengthen the hand of the have-nots, who so often come out behind both in and out of court.² Their position will not be much improved, however, if they have no lawyer at all. The unavailability of lawyers to many who need them is a chronic problem, and the codes of legal ethics nod in the direction of every lawyer's obligation to remedy it.³ Luban seeks to give this obligation a solid ethical grounding, as well as to propose steps to fulfill it in practice.

If the poor do have lawyers, and if those lawyers are entitled to depart from common morality in representing their clients, the next question is what these lawyers should do on their clients' behalf. Luban's final concern is to describe and justify the role of the "people's lawyer."⁴ Luban defends a particularly controversial form of litigation for the poor—the prosecution of class action "impact" cases in preference to individual "client service" cases—and also argues for even more expressly political lawyering roles, such as lobbying and community organizing.

Luban addresses an array of challenges to these forms of lawyering. The most troubling is the claim that what masquerades as vigorous advocacy of the people's interests may actually be elitist manipulation of clients by lawyers who have appointed themselves the guardians of the poor. Luban's response is by no means a complete denial of this charge. Though he urges lawyers to be as faithful to their clients as possible, he ultimately endorses lawyers who refuse to adhere to the interests of living clients when these interests contradict those of future generations. Moreover, while he does not relish manipulation, Luban sees the relationship between people's lawyers and the people as a

2. For an account of the plight of the have-nots in the American legal system, see generally Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Soc'y Rev.* 95 (1974) (arguing that the "Haves" enjoy advantages including more specialized and experienced counsel, favorability of rules, economies of scale, cultural dominance and wealth).

3. See Model Code of Professional Responsibility EC 2-25, 8-3 (1980) [hereinafter Model Code]; Model Rules of Professional Conduct Rule 6.1 (1989) [hereinafter Model Rule].

4. Other scholars who offer guidance for the work of the "people's lawyer" include Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 *N.Y.U. Rev. L. & Soc. Change* 659 (1987-88); Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 *NLADA Briefcase* 106, 110, 117-22 (1977); Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 *N.Y.U. Rev. L. & Soc. Change* 369, 406-11 (1982-83); Simon, *Visions of Practice in Legal Thought*, 36 *Stan. L. Rev.* 469, 469-95 (1984); Wexler, *Practicing Law for Poor People*, 79 *Yale L.J.* 1049 (1970); White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 *Wis. L. Rev.* 699, 738-43, 754-66 (1988).

potential instance of shared political commitment, and in such shared commitment and struggle he finds manipulation a necessary element.

This brief summary by no means does justice to the richness and depth of Luban's argument, nor can this review probe all of the insights and arguments of this challenging and engaging book. In the sections that follow, I will look closely at the three themes of Luban's argument: the demand for moral limits on the contours of the standard lawyering role; the call for obligatory *pro bono* work and other steps to extend the benefits of lawyers' skills to more of the people; and the endorsement of the political role of the people's lawyer. I argue in Part I that Luban provides a valuable framework for assessing the justifiability of lawyers' role morality, but that he overstates the moral case against lawyers' current ethical principles. Moreover, he proposes a cure that might aggravate rather than ameliorate the moral difficulties of the lawyer's role. In Part II, I suggest that despite the practical and moral arguments he advances, Luban does not succeed in providing a persuasive rationale for imposing the mandatory *pro bono* obligation he advocates. Finally, in Part III, I contend that Luban has correctly acquitted the people's lawyers of many of the charges critics have levelled against them, but that he does not fully justify the substantial prerogatives he would grant these lawyers to manipulate the people they represent. Despite the many insights Luban offers us, the analysis he develops does not convincingly support central aspects of the reformulation of lawyers' ethics that he urges.

I. ROLE MORALITY, COMMON MORALITY AND PROFESSIONAL ETHICS

A. *Luban's Argument: The Moral Limits on Lawyers' Zeal*

Luban begins his book with a ghastly example—one of many vivid examples interspersed throughout this volume—of a lawyer retained by the usurper of an estate to prosecute the rightful owner for murder, for the sole purpose of removing him from the scene (pp. 3–10). If the lawyer believed he was prosecuting an innocent man for a capital crime in return for money, was he not a would-be murderer for hire?

Lawyers are not often so flagrantly unethical. They do, however, routinely act in ways that are difficult to justify using ordinary conceptions of how good people or good citizens should behave. Any lawyer who seeks to obtain for her client any result—be it a massive damages award or an acquittal—to which she does not believe him to be entitled engages in such conduct. Her conduct is all the worse if, in the course of this questionable enterprise, she argues a view of the facts she does not believe, or brutally impugns a witness she believes to be truthful. Her behavior is not much better even if she adopts such tactics in the service of a cause that she is convinced is right. Yet this sort of conduct may be authorized or required by the governing rules of legal ethics.

Luban argues that there is a pointed conflict between the standards

promulgated to govern people as lawyers and the standards of "common morality," the moral principles that govern people as *people*.⁵ He begins with two principles which he maintains constitute the "standard conception" of American legal ethics.⁶ The first is the principle of partisanship: "A lawyer must, within the established constraints on professional behavior, maximize the likelihood that the client's objectives will be attained" (p. 12). The second is the principle of nonaccountability: "'When acting as an advocate for a client . . . a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved'" (p. 7).⁷ Luban develops the position that the conduct these two principles endorse is frequently inconsistent with the demands of ordinary morality.

Luban explores a defense of this inconsistency, a defense that claims lawyers are bound by a distinct "role morality" that properly differs from the moral duties applicable in other contexts. Luban ultimately concludes that conduct can be legitimately justified on the basis of separate moral structures, but that for such a justification to be valid it must satisfy what he calls (somewhat infelicitously) "the Fourfold Root of Sufficient Reasoning." According to this schema, an act in violation of common morality can be justified by role morality only if: (1) the institution of which the role is a part is morally justified; (2) the role in question is required by the institution; (3) the role requires certain behavior; and (4) the act in question is an instance of the behavior required by the role (pp. 131-32).

Applying this test to the seemingly immoral conduct of lawyers, Luban focuses primarily on the first step. He argues that much of the apparatus of adversary justice, within which the principles of partisanship and nonaccountability become the lodestars of lawyers' actions, is justified *only* by the fact that it would be difficult to come up with a better system of justice and accomplish the social transformation required to implement it. That modest claim is enough to make the system morally justifiable. It is not, for Luban, enough to make it *strongly*

5. This conflict between the stated rules of the legal profession and the elements of "common morality" is not the only gap between legal and ordinary ethics that may exist. It may be that lawyers routinely disobey their own rules of professional ethics, and in so doing also breach ordinary moral commands. If the rules of ethics are not meant by their promulgators or enforcers to be taken seriously, and if they therefore tacitly authorize such breaches, we have yet another conflict. However, we can probe the issue of conflicts between lawyers' conduct and general morality meaningfully by focusing on conflicts between the stated rules of professional conduct, however widely dishonored they may be, and the demands of common morality.

6. A number of writers have embraced similar formulations. See, e.g., Postema, *supra* note 1, at 73; Schwartz, *supra* note 1, at 150; Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *Wis. L. Rev.* 29, 36-37 (1978). For a critique of writers who have endorsed this view (including Luban himself), see Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 *Wis. L. Rev.* 1529.

7. Quoting Schwartz, *The Professionalism and Accountability of Lawyers*, 66 *Calif. L. Rev.* 669, 673 (1978).

morally justified. Hence, when lawyers are called upon by their role in the adversary system to act in ways that are not justifiable in terms of common morality, they do not have a sufficient moral basis for adhering to their role in violation of normal moral obligations.

That does not mean that the principles of partisanship and nonaccountability should simply be washed away. On the contrary, whenever zealous advocacy is consistent with common morality, lawyers are required to provide it. Even when single-minded pursuit of the client's objectives calls for conduct that *does* violate common morality, that conduct may still be justified in light of special political considerations. Luban's view is that, when a case amounts to a conflict between the powerful and the powerless, the powerless are morally entitled to the full armament of adversary legal representation even when such lawyering conflicts with common morality. The classic example is what Luban calls the "criminal defense paradigm," in which the hapless defendant is assailed by the full might of the state, and Luban generally endorses full-throttle advocacy on the criminal defendant's behalf.

Luban follows the principle of protection of the powerless to other, more startling conclusions. First, he does not believe that all criminal defendants are entitled to the full measure of adversary protection. When the crime is rape, in particular, Luban sees the woman who is the victim of the crime as among the powerless who need special protection, and so he would constrain the vigor of the alleged rapist's defense. Second, he does not confine this principle to criminal cases. When a civil case reflects an imbalance of power comparable to that in a criminal case—for example, the refrigerator buyer against the large finance company—again Luban would call for zealous advocacy by the lawyer for the less powerful party.

Luban's argument rests on a candid and illuminating look at the realities of our legal and political system. Nonetheless, its conclusions are questionable, and some of the steps along the way are doubtful as well. In the following sections I will seek to show, first, that the principles of partisanship and nonaccountability play a smaller role in the rules of ethics and in lawyers' behavior than Luban seems to believe. Second, I will contend that the behavior of lawyers, even of those who endorse these principles, is not so demonstrably out of kilter with common morality as Luban maintains. Third, I will argue that Luban has failed to show that the deviations from common morality that he claims take place are not strongly justified. Fourth, and finally, I will suggest that even if we accept Luban's challenge to the morality of the principles he attacks, the principles he would adopt in their stead are both ambiguous and in some respects unfair.

B. *The Accuracy of the "Standard Conception"*

Do lawyers really embrace the principles of partisanship and nonaccountability? Oddly enough, Luban argues this point in an ap-

pendix (pp. 393–403), in the course of which he acknowledges that “the Code and Model Rules are ambivalent about the standard conception” (p. 394). He concludes with the observation that “‘in a vague and sometimes contradictory field’” (p. 403),⁸ his “standard conception is never completely dominant: but I have argued that it is largely dominant, and at the very least, it is critically important” (p. 403). The principles of partisanship and nonaccountability may well be critically important. Luban understates, however, the salience of other principles more responsive to common morality. Whether we look to the stated rules of ethics or to findings and inferences about actual practice, we will find evidence that lawyers are neither entirely partisan nor fully unaccountable.

1. *The Stated Rules of Ethics*. — Let us first consider the positions articulated in the Model Code and Model Rules. Luban rightly points out that the codes of professional ethics contain an array of provisions guiding the lawyer toward zealous, partisan advocacy.⁹ It is also true that the codes of professional ethics indicate that lawyers are not accountable for their clients’ objectives.¹⁰ At the same time, as Luban acknowledges, there are various elements of these codes that amount to a “countertext—rules designed to mitigate the more repugnant implications of partisanship and nonaccountability” (p. 394).

Yet the countertext is more extensive than it might seem at first blush.¹¹ Lawyers have considerable freedom to reject cases, to limit their representation so as to exclude repugnant objectives or tactics, and to urge their own moral views upon clients whether or not the clients have requested such enlightenment.¹² These various powers give lawyers the right to suggest or—at least with prospective clients—to demand that their clients accept the lawyers’ moral assessment of means and ends, even when the clients’ contrary inclinations would violate no law. Indeed, one of the major codes of ethics expressly encour-

8. Quoting Schneyer, *supra* note 6, at 1543.

9. According to Canon 7 of the Model Code, for example, a “lawyer should represent a client zealously within the bounds of the law.” The Model Rules remove some of the Code’s emphasis on zealousness, but the Comment to Rule 1.3 still declares, in part, that a “lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”

10. Model Rule 1.2(b) explicitly endorses a form of nonaccountability by declaring that a “lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.” EC 7-17 of the Model Code offers a somewhat less express endorsement of nonaccountability when it declares that “[t]he obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client.”

11. For a valuable discussion of Model Code and Model Rule provisions that depart from the principles of partisanship and “neutrality,” see Schneyer, *supra* note 6, at 1547–48, 1551–52, 1565–66.

12. See Ellmann, *Manipulation by Client and Context: A Response to Professor Morris*, 34 *UCLA L. Rev.* 1003, 1014–15 (1987).

ages lawyers to give moral guidance to their clients. The Model Code of Professional Responsibility declares that, in the course of counseling a client,

[a] lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.¹³

The Model Rules contain much less exhortation, but they too explicitly state that, in giving advice to their clients, lawyers "may refer not only to law but to other considerations such as moral, economic, social and political factors."¹⁴

A lawyer's actions along these lines are, as Luban emphasizes, generally subject to an important limitation: if the client does not go along, the lawyer's only option is to withdraw.¹⁵ This step is not one lawyers take lightly, as Luban rightly points out (pp. 396-97). Nonetheless, in some circumstances and with some clients, this threat may be a potent one. Moreover, this option is widely, though not always, available under the rules.¹⁶ In some cases, the rules may permit lawyers to

13. Model Code EC 7-8.

14. Model Rule 2.1. A Comment following this rule adds that "[i]t is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice." The same Comment indicates that it may in some circumstances be *improper* to give "purely technical advice."

15. If the lawyer has not yet taken the case, her way out is to decline it. In principle, refusing a case might be easier for the lawyer than withdrawing from one that is already underway. Even refusals, however, may be rare. See *infra* note 27 and accompanying text.

16. The Model Rules generally permit withdrawal (unless a tribunal orders the lawyer to stay on the case) whenever the client insists on pursuing an objective the lawyer considers repugnant or imprudent—even if withdrawal would damage the client. Model Rule 1.16(b)(3); see also *id.* Rule 1.16(b)(5) (representation "rendered unreasonably difficult by the client"); and *id.* Rule 1.16(b)(6) ("other good cause").

The Model Code also authorizes withdrawal based on the lawyer's personal moral scruples in cases not pending before tribunals. Model Code DR 2-110(C)(1)(e). Another provision of the same rule might permit such withdrawal even in cases that are before tribunals, see *id.* DR 2-110(C)(6) ("other good cause").

Luban argues, however, that lawyers cannot withdraw under these or any other provisions of the Model Code of Professional Responsibility if their doing so would injure their clients' rights or interests. He is right that the language of Model Code DR 7-101(A)(3), which bars lawyers from "prejudic[ing] or damag[ing] [the] client during the course of the professional relationship," could be read to apply even to withdrawal, which is an event in the relationship. He acknowledges, however, that his view is not widely accepted (p. 397 n.2).

Indeed, the provision of the Model Code that expressly applies to withdrawals, Model Code DR 2-110, is so much less demanding than DR 7-101(a)(3) that this free reading of Model Code DR 7-101(A)(3) cannot be correct. All that Model Code DR 2-110(A)(2) requires of lawyers is that they take "reasonable steps to avoid foreseeable prejudice to the rights of [the] client," including such actions as giving proper notice to the client. This language falls far short of telling lawyers that they cannot withdraw

do more than just withdraw.¹⁷

unless they can prevent their client from being damaged as a result. See C. Wolfram, *Modern Legal Ethics* 543-44 (1986). Moreover, if Model Code DR 2-110(A)(2)—a provision that applies to all withdrawals, mandatory or permissive—actually barred “withdrawal damaging to the client’s interests,” as Luban would read it (p. 397 n.2), then it would follow that lawyers could not withdraw even in those situations in which withdrawal is “mandatory” if their withdrawal would injure their clients’ rights or interests.

17. Model Code DR 7-101(A)(1), which directs lawyers “to seek the lawful objectives of [their] client through reasonably available means,” expressly declares that lawyers do not violate this requirement by, *inter alia*, “avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.” A lawyer constraining this exemption broadly might find in it support for considerably less than purely partisan representation of her client—whether or not the client consented.

The Model Code also offers the cryptic instruction that lawyers may, “[w]here permissible, exercise [their] professional judgment to waive or fail to assert a right or position of [the] client.” Model Code DR 7-101(B)(1). If such conduct is frequently “permissible,” then lawyers’ power to override their clients’ wishes is all the greater.

Luban argues, reasonably, that lawyers can only exercise their professional judgment so independently “in certain areas of legal representation not . . . substantially prejudicing the rights of [the] client,” in the words of Model Code EC 7-7. Moreover, as Luban also points out, Model Code EC 7-8 tells the lawyer to “remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for [the lawyer]” (p. 395). But Charles Wolfram considers the Code ambiguous on the dimensions of the sphere of client decisionmaking. C. Wolfram, *supra* note 16, at 157 & n.78. The narrower the range of decisions that the client is entitled to make, of course, the broader the scope of lawyers’ authority.

Some provisions of the Model Rules seem more relentlessly partisan on this score. No Rule expressly authorizes lawyers to refrain from offensive or inconsiderate conduct that does have some substantial litigation purpose—as Model Code DR 7-101(A)(1) arguably allows. Instead, Model Rule 4.4’s prohibition is directed at “means that have no substantial purpose other than to embarrass, delay, or burden a third person.” Similarly, Model Rule 3.2 directs lawyers to “make reasonable efforts to expedite litigation *consistent with the interests of the client*” (emphasis added). Moreover, the Comment to Model Rule 1.2 not only asserts the client’s “ultimate authority to determine the purposes to be served by legal representation,” but also explains that “[i]n questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as . . . concern for third persons who might be adversely affected.”

Wolfram, however, also points out that the Comment to Model Rule 1.3 follows a call for zealous advocacy with the observation that “a lawyer is not bound to press for every advantage that might be realized for a client.” C. Wolfram, *supra* note 16, at 579-80 n.79. The same Comment affirms that lawyers “may take whatever lawful *and ethical* measures are required to vindicate a client’s cause or endeavor” (emphasis added). The potential claims of morality also find some protection in the Model Rules’ Preamble, which acknowledges the need for “sensitive professional and moral judgment” in the Rules’ application. I think it is unlikely that lawyers have been divested by the Rules of all authority to declare, within the context of generally zealous representation, that some particular lawful step is too morally flawed to be acceptable—whether or not the client agrees.

Luban himself suggests that the professional codes as enforced require only “ordinary zeal,” rather than “hyperzeal” (p. 397). This is a rather confusing qualification, since Luban does not precisely define “hyperzeal” or “ordinary zeal,” and so it is hard to tell just how zealous Luban believes the codes require lawyers to be. Presumably, however, Luban means to acknowledge that lawyers who seriously pursue their clients’

2. *The Evidence from Lawyers' Actual Practice.* — A conclusive empirical test of lawyers' adherence to the principles of partisanship and nonaccountability would be difficult to design. Even without such a test, however, we can say that it would be surprising to learn that lawyers' conduct squares precisely with these two principles. Few of us, after all, have succeeded in ordering any part of our moral lives in accordance with just two coherently defined norms. I will argue, moreover, that such evidence as we do have suggests that much, if not most, of lawyers' behavior is not adequately explained in terms of these two moral propositions alone. Many lawyers are not wholeheartedly partisan, often perhaps for ignoble reasons but at least sometimes on grounds of principle. A great many lawyers, meanwhile, appear by no means fully committed to the idea that they are morally unaccountable for their work.

a. *Partisanship.* — I do not doubt that many lawyers act in a very partisan fashion. The evidence, however, suggests at least two sorts of deviations from Luban's principle of partisanship. First, many lawyers apparently fail to rise to the level of partisanship. Some are guilty not of zealotry, but of disloyalty.¹⁸ Others go beyond mere partisanship by acting in ways that are simply illegal.¹⁹ It is true, as Luban argues, that lawyers who fail to live up to professional ideals may still accept them (pp. 398–99).²⁰ The fact that many lawyers do not live up to an ideal, however, does give us reason to wonder whether they may be rationalizing their conduct by modifying the ideal itself.²¹

Second, some lawyers have deliberately and conscientiously em-

interests are free to pass up *some* tactical advantages that an utterly relentless lawyer might employ.

In saying that the present rules suggest that lawyers have some prerogative to refuse to do their clients' bidding even while remaining on the case, I do not mean to argue that lawyers *ought* to have this authority. The desirability of giving lawyers power over their clients is an important question, to which I will return below. See *infra* notes 60–77 and accompanying text.

18. See, e.g., Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 *Law & Soc'y Rev.* 15 (1967) (examining institutional pressures that lead criminal defense lawyers to be "double agents").

19. See, e.g., Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 *Tex. L. Rev.* 639, 676 n.194 (1981) (citing journalist's report of lawyers' willingness to suborn perjury).

20. Luban makes this point in responding to Schneyer, *supra* note 6, at 1544–45, who had invoked the Blumberg study cited *supra* note 18.

21. For example, consider a defense lawyer who succumbs to the institutional pressure of the criminal courts discussed by Blumberg, *supra* note 18, and becomes to some extent a facilitator of guilty pleas rather than a zealous advocate. Such a lawyer may come to believe that full partisanship is an untenable objective. Perhaps she will tell herself that she cannot do the best possible job for all of her clients if she is too vigorous on behalf of any single defendant. She may also begin to question whether her clients really deserve full-throttle defense, in light of their crimes or in light of their unreasonable treatment of the attorney herself. The fact that her practice deviates from the partisan ideal, in short, may lead her to adopt principles that also depart from this ideal.

braced principles that restrain partisanship directly or indirectly. A number of lawyers today have welcomed the promise of resolving disputes through a careful consideration of the interests of both sides.²² Others have been influenced by the ethic of care for and connection to others that is sketched in Carol Gilligan's work.²³ The Brandeisian idea that attorneys should be "counsel for the situation" has been with us through the century.²⁴ We do not know how widely these ideas are endorsed, but at least two commentators have expressed their sense that there are many lawyers who are prepared to depart from partisanship for moral reasons.²⁵

Luban seems reluctant to admit that there are any lawyers who are not engaged in partisanship. He comments that a study showing that some lawyers try to mediate disputes may simply reflect that the lawyers believed mediation would best serve their clients' interests (p. 399). So it may. Mediation can therefore be a form of partisan lawyering. However, a lawyer who considers her client's interest in harmonious resolution of disputes to be as significant as the client's interest in vindicating legal rights will behave in a much less relentless fashion than the image of partisanship suggests. I would speculate that many lawyers do take pride in designing solutions that protect their own clients' interests while also providing justice or at least satisfaction to other parties. Wouldn't it be odd if lawyers *didn't* find this satisfying?

b. *Nonaccountability*. — Though lawyers find some comfort in the principle of nonaccountability, their adherence to this principle may well be decidedly less intense than their allegiance to partisanship. The empirical case for the importance of nonaccountability is weak on at least two counts. First, when lawyers do disagree with their clients' objectives, their reason for pursuing those objectives may not be that they consider themselves unaccountable for what they do; instead, they may well believe that even the representation of repugnant objectives serves morally valid purposes. Second, lawyers may in fact agree rather often with their clients' choice of objectives, and this agreement may reflect that lawyers do not maintain the detachment from their clients'

22. See R. Fisher & W. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* 14 (1981) (summarizing "the principled negotiation method of focusing on basic interests, mutually satisfying options, and fair standards").

23. See Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 *Berkeley Women's L.J.* 39 (1985); Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 *J. Legal Educ.* 243 (1988); see generally C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 25-39 (1982) (describing the reasoning of "Jake" and "Amy").

24. For an account of the genesis of the phrase "counsel for the situation," see Frank, *The Legal Ethics of Louis D. Brandeis*, 17 *Stan. L. Rev.* 683, 698-703 (1965).

25. Kaufman, *A Commentary on Pepper's "The Lawyer's Amoral Ethical Role"*, 1986 *Am. B. Found. Res. J.* 651, 653; Schneyer, *supra* note 6, at 1554.

goals that complete nonaccountability might support. Let us examine each of these points more closely.

Luban himself demonstrates that a lawyer may represent clients with whom she profoundly disagrees while still acknowledging moral accountability for her work. He focuses on the case of an ACLU lawyer who asserts the Nazis' right to march, while denying that she is morally accountable for the Nazis' repellent political objectives. According to Luban, this lawyer is morally accountable, because the free speech principles she advocates are principles in which she believes (pp. 161-62). It is permissible for her to aid the Nazis because her aid is only an indirect effect of her morally acceptable effort to vindicate the first amendment (p. 162).

The logic of this rationale extends well beyond the ACLU. In particular, it applies to lawyers who believe that the representation of clients within our legal system ultimately produces good results, such as the facilitation of just adjudication. Sometimes their clients seek morally bad ends, but these lawyers represent such clients not because they approve of the clients' goals, but out of a belief that they are achieving a larger good by representing even these clients. Views of this sort are reflected in the codes of professional ethics,²⁶ and it seems reasonable to infer that many lawyers accept these ideas to a greater or lesser degree. Lawyers who act on these beliefs are accountable in essentially the same way as the ACLU lawyer of whom Luban approves.

The second flaw in Luban's argument for nonaccountability is suggested by empirical evidence that at least some lawyers are in substantial agreement with their clients' objectives. In a study of large-firm lawyers, Robert Nelson found that only 16.2% had ever turned down a case for moral reasons, but also found that 91.9% of those who had never done so maintained that they had never been asked to undertake a case they found immoral.²⁷ Moreover, when asked what suggestions they had for legal reforms, only 12.3% offered suggestions that they said would hurt some of their clients.²⁸ This evidence is hardly conclusive even for the corporate bar, and says nothing of the likely attitudes and behavior of other elements of the legal profession. Fragmentary as the evidence is, however, let us consider what it might mean.

At first blush, it seems surprising that lawyers who endorse nonaccountability so infrequently represent clients for whom they might urgently wish to feel unaccountable. Luban says, however, that the fact that so few lawyers have withdrawn from a case for moral reasons "shows almost nothing about lawyers' adherence to the standard conception: their clearest point is that only a small minority of lawyers

26. See Model Code EC 7-1; Model Rules Preamble paras. 7, 12.

27. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 *Stan. L. Rev.* 503, 534-35 (1985).

28. *Id.* at 523. Schneyer discusses Nelson's then-unpublished findings in Schneyer, *supra* note 6, at 1549-50.

have ever confronted the issue of principle raised by the standard conception at all" (p. 400). Perhaps so. But the very absence of occasions on which lawyers might need to invoke the principle of nonaccountability suggests that its salience in lawyers' ethical world has been overstated. The more we find that lawyers actually believe in what they are doing, the less we are justified in asserting that nonaccountability is a guiding force in lawyers' conduct.

Luban argues, however, that this absence of conflict between lawyers and clients actually attests to the working of the principle of nonaccountability. He observes, from Nelson's data, that "an astonishingly large number" of the lawyers surveyed are politically "skeptical of if not hostile to corporate America" (pp. 400-01).²⁹ Luban suggests that "these lawyers' law practices, with their concomitant values, are morally detached, even dissociated, from their more general political attitudes" (p. 402). He infers that lawyers undertake their work with an attitude of neutrality, but that they find it impossible to maintain this neutrality while pursuing their clients' interests. The pressure of cognitive dissonance therefore leads them to embrace, in the field of their professional concern (though not elsewhere), the values of their clients.

Luban's interpretation is not persuasive. Nelson himself views the matter differently. He suggests that one factor accounting for the absence of moral conflict between business people and their relatively liberal lawyers is that "even though the social values of my sample may be somewhat more liberal than those of business elites, the attitudes of lawyers and clients are not widely divergent."³⁰ He also suggests that "[t]he social questions of our time simply do not come up frequently in large-firm practice."³¹

Even if Luban is right that Nelson's data reflect the ideological pull legal practice exerts on lawyers' convictions, his account of the psychological processes generating this ideological change does not demonstrate convincingly that the principle of nonaccountability is central. Luban's account suggests that in their professional roles lawyers set their beliefs aside so fully that the proposition "nature abhors a vacuum" helps explain why they have to develop new beliefs to take the place of the old ones (p. 402). Such moral surgery may be possible. However, lawyers are adults, whose moral and political sentiments have been developing for many years. For them to set these beliefs aside might well entail some psychological cost. Luban offers no evidence that lawyers actually achieve such moments of neutrality. Before

29. See Nelson, *supra* note 27, at 511-21.

30. *Id.* at 537.

31. *Id.* When they do come up, "professional training and experience" may "transform potentially troubling questions of values into matters of technique and strategy." *Id.* This transformation could be an instance of nonaccountability in operation, or it could be so unconscious as not to call that principle directly into play.

we assume that they do, we ought to look for other, less psychologically burdensome explanations for Nelson's findings.

I would suggest that it is more common for lawyers to approach relatively unattractive cases armed with arguments—or rationalizations—to the effect that there is *some* merit to their clients' position, and that their work, therefore, is not clearly immoral. This portrayal may not be terribly edifying, but it also is not a picture of people who really believe themselves to be unaccountable for what they do. Moreover, often it will not even be fair to treat such arguments as mere rationalizations. As Deborah Rhode says, "[p]ure victims and villains are hard to come by; factual uncertainties, extenuating circumstances, and normative dissonance confound all but the rarest cases."³²

Luban's model must also be questioned because its explanation for lawyers' developing new beliefs relies on a psychological mechanism—cognitive dissonance which might not operate as Luban suggests. The impact and nature of this phenomenon are complex questions, to which I do not mean to suggest any definitive answers. We should consider, however, the findings of a classic cognitive dissonance experiment. In this experiment, people were asked to perform a boring task and then were given either one or twenty dollars to tell another person who was about to perform the same task that it was actually very interesting. After they had done so, they themselves were interviewed. In these interviews, the test subjects who were given *less* money reported that their task had been *more* interesting than their better-paid counterparts maintained.³³

In light of this experiment, we might expect cognitive dissonance to have very little impact on the beliefs of corporate lawyers, for these lawyers, after all, are paid handsomely to represent their clients. Cognitive dissonance theory might suggest that they would feel little pressure to shift their beliefs in order to justify work that was so readily

32. Rhode, *supra* note 1, at 618. Schneyer also doubts that lawyers often "unequivocally disserve their personal values by pursuing client objectives." As he maintains, a lawyer who disapproves of her client's goals may nonetheless believe, not only in a civil liberties case but also in many more humdrum matters, that the client has some legitimate claim to act as he wishes. Schneyer, *supra* note 6, at 1562-63.

Particularly if there are genuine ambiguities in lawyers' cases, another mechanism besides the impact of nonaccountability may help to explain lawyers' ability to press these cases without moral anguish. This mechanism is education. Lawyers are immersed in their clients' perception of the world. Some lawyers may consider opposing views primarily with a view to discrediting them. If there is *something* to their clients' position, after some years of this exposure the lawyers will be very well aware of it.

33. See Festinger & Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 *J. Abnormal & Soc. Psychology* 203 (1959). In another experiment involving behavior perhaps more characteristic of lawyers, "students were asked to write a counterattitudinal essay. Those given the larger reward experienced least dissonance and least attitudinal change. Those given markedly smaller rewards modified their previous attitudes to a much larger extent." R. Cover, *Justice Accused: Antislavery and the Judicial Process* 306 (1975).

justified by the money. Furthermore, if, as I suspect, even the money is not sufficient justification for lawyers' conduct in their own eyes, and lawyers do need to persuade themselves of the validity of the views they voice on behalf of their clients, is not that further testimony to the limited psychological power of the principle of nonaccountability? If lawyers adjust their views to those of their clients, in short, they tell us that they do feel responsible for their actions—even if they might claim that the codes' enunciation of the principle of nonaccountability protects them from this moral burden. For lawyers such as these, the principle of nonaccountability is honored primarily in the breach.

C. *The Moral Quality of Lawyers' Conduct*

Though Luban's standard conception is less standard than he suggests, it is a significant part of the normative world of lawyers. To the extent that it is accepted, the standard conception constitutes a role morality for lawyers. Luban argues that this role morality itself requires moral justification because the conduct that it calls for persistently violates common morality. It will be important for us to examine closely Luban's contention that in important respects lawyers' role morality cannot be justified.³⁴ Before we approach that issue, however, we need to consider whether Luban is right in saying that lawyers' ethics do call on them to breach the rules of common morality. We must begin by asking whether Luban gives us a clear and persuasive account of the elements of common morality. Only then can we examine whether the moral principles he discerns are disserved by the practices of lawyers.

1. *The Elements of Common Morality.* — Luban defines common morality as "morality concerned with how persons behave" (p. 110), and distinguishes it from role morality, which is concerned with how the occupants of particular roles behave. Common morality is nonetheless an ambiguous term. Its connotations could suggest that this "morality concerned with how persons behave" is also a set of principles on which persons commonly agree. Luban speaks at one point of "our common moral judgments" (p. 155), and in doing so he seems to advert to just such a consensus.

If Luban's references to common morality were meant to direct us to "commonly accepted morality," we might well respond that he had adopted a moral standard whose elements were neither necessarily valid nor even clearly defined. Whether what most people accept as moral is actually "right" would have to be decided. What it is that most people accept would also have to be determined. I am not sure there is *any* moral common denominator. Even if there is, by the time we reach the question of the morality of particular legal tactics, the diversity of views is likely to be immense. Luban himself has written elsewhere that "[t]he idea that, in a society where people believe in the materialization

34. See *infra* notes 50–54 and accompanying text.

of John Wayne's ghost at the Alamo, there is some criterion of rationality on which consensus exists, seems to me a very doubtful proposition."³⁵ Surely consensus morality is at least as elusive.

I doubt that Luban means to claim that commonly held moral principles provide clear criteria for judging the morality of lawyers' conduct. Instead, I take it that he invites us to debate what the principles of "common morality" ought to be, and to assess lawyers' conduct in light of the results of that debate. Luban does not undertake any systematic exposition of common morality here—a forgivable omission, since that task has filled many other volumes. He does, however, suggest four forms of conduct that common morality prohibits: (1) action that "inflict[s] morally unjustifiable damage on other people, especially innocent people"; (2) "deceit"; (3) "manipulations of morally defensible law to achieve outcomes that negate its generality or violate its spirit"; and (4) "the pursuit of substantively unjust results" (p. 157). By and large, these appear to be reasonable rules.

Even stated so generally, however, these rules raise certain questions. It is a little odd, for example, to see the apparent suggestion that "morally unjustifiable damage" to people who are *not* "innocent" might not be prohibited by common morality. Similarly, it is troubling to encounter a seemingly absolute prohibition on deceit. Surely few of us would blanch at scaring the would-be murderer into surrendering by falsely telling her that she's surrounded by police. The proposition that it is wrong to pursue substantively unjust results may also be too broad, for we might hesitate to label immoral the conduct of someone who pursued an unjust objective out of a reasonable belief that it was just. If it is immoral to seek substantively unjust results, moreover, I am less sure that it is also immoral to "manipulat[e] . . . morally defensible law to achieve outcomes that negate its generality or violate its spirit," if those outcomes are not in themselves substantively unjust.

If these principles are imperfect, each of us is free to try to improve upon them, and then to judge lawyers' conduct in accordance with the refined principles we devise. In fact, each of us would have to make our own assessment anyway, since Luban's principles largely refer to, rather than define, moral rules. What damage is "morally justifiable"? Who are the "innocent"? What results are "substantively unjust"? These are immense questions, and not readily answered.

In short, while Luban's broad concept of "common morality" is reasonable, the specifics are both debatable and imprecise. Only if we succeed in giving content to this concept will we have criteria for evaluating the common morality of lawyers' conduct.³⁶ Without more,

35. Luban, *Paternalism and the Legal Profession*, 1981 *Wis. L. Rev.* 454, 484 (footnote omitted).

36. We will return later to the question of whether the principles of common morality, as such, constitute standards which are precise enough to be embodied in enforceable rules. See *infra* notes 57-59 and accompanying text.

Luban's concept might point the way towards standards for assessing lawyers' work, but it does not tell us much about what those standards should be.

2. *Judging Lawyers' Conduct by a Standard of Common Morality: Are Lawyers Guilty of Contempt for the Law?* — Although the precise elements of common morality remain indistinct, the broad principles Luban has articulated may—in the absence of more specific rules—provide a basis for evaluating lawyers' conduct. Lawyers may be guilty of breaches of each of Luban's four principles of common morality. Luban develops most fully the argument that lawyers' behavior violates one principle in particular: the prohibition against manipulating morally defensible law. In his words, partisan lawyering “displays contempt for the law” (p. 17). This is a serious charge. In fact, even if such behavior would not violate common morality, it *would* violate the stated norms of the legal profession.³⁷ As we will see, however, the concept of contempt to which Luban refers is flawed both by ambiguity and by overbreadth. Moreover, the moral wrongfulness of the conduct Luban holds to be contempt is often far from clear.

a. *The Meaning of “Contempt.”* — Luban does not provide an altogether clear definition of the conduct he considers to be manipulation of or contempt for the law. Our first task, therefore, is to identify the central characteristics of contempt as Luban understands the term; then we will be able to ask whether his definition is an appropriate one.

We can begin our inquiry into Luban's definition with two examples he offers in the course of illustrating the concept he has in mind. Initially, he points to lawyers' helping “a party prevail who shouldn't prevail,” and thus working an injustice (p. 12). Luban then broadens the concept, suggesting that any use of the law “simply as an instrument for gaining the client's interests” is a form of contempt (p. 14). He illustrates this proposition by citing the example of aliens challenging the operation of an immigration detention center based on the lack of an environmental impact statement. Such conduct is troublesome, apparently, even if the clients morally deserve to win (as Luban evidently believes the aliens in this case did), and even if the claim they are making is legally sustainable.

The lawyers in the detention case are indeed using the law instrumentally. This in itself, however, cannot be contempt. The law, after all, is *meant* to be an instrument for protecting certain interests. If a statute demands that buildings be accessible to the handicapped, and a handicapped man sues to enforce that command, he and his lawyer are using the statute “simply as an instrument for gaining the client's interests.” In enforcing rights as the legislature intended, they do not ma-

37. See, e.g., Model Code EC 1-5 (“To lawyers especially, respect for the law should be more than a platitude.”); Model Rules, Preamble para. 4 (“A lawyer should demonstrate respect for the legal system . . . [I]t is also a lawyer's duty to uphold legal process.”).

nipulate the law. Surely this conduct is not contempt, even though it is certainly instrumental.

The detention center case may suggest another interpretation of contempt. Assume that the lawyers who pointed out that the detention center violated an environmental law had no genuine interest in protecting the environment. Perhaps the fact that the lawyers sought to serve a nonenvironmental goal—a goal that Congress did not intend to foster when it passed the statute—means that the lawyers' use of this law amounted to contempt. Indeed, it is fair to say that if Congress intended this statute to be used only by those who had environmental interests at heart, then these lawyers were usurping a legal power Congress meant to assign to others.

It is not at all clear, however, that Congress or any other legislature ordinarily has such a narrow conception of the use to which its laws will be put. Surely an alternative view is at least as plausible: Congress anticipates that people will make use of its laws for many purposes, and may even welcome the fact that people's various self-interests lead them to enforce its statutes with vigor and thereby to protect the interests Congress sought to safeguard. If so, the lawyers who utilized the environmental law for the sake of their alien clients did no more than what Congress broadly intended.

Another example confirms this point. Statutes that award attorneys' fees to lawyers who successfully assert certain rights are often passed in order to encourage lawyers to bring these cases. In theory, at least, these statutes might encourage lawyers to bring cases *solely for the money*. So long as the cases brought as a result were in fact meritorious, the legislative purpose would be well served, for the substantive rights the statutes sought to secure would be enforced—yet the lawyers' motive for litigating would not be their belief in the importance of vindicating the rights in question. Given that these mercenary lawyers would be acting just as the legislature wanted them to, we should not consider them guilty of contempt for the law.

Luban might agree that lawyers whose instrumental use of the law is consistent with the lawmakers' intentions show no disrespect for the law. He maintains, however, that "we can distinguish clearly between the true meaning, purpose, or 'spirit' of the law and 'mere technicalities' (on the one hand) or sophisticated distortions of the law (on the other)" (p. 18). In support of this proposition, Luban argues deftly against the realist notion that the law is merely what legal institutions do—a view of the law which makes technicalities and sophistries perfectly appropriate arguments if legal decisionmakers accept them. If we can make the distinction for which Luban contends, then we can say that lawyers are guilty of contempt for the law when they use technicalities or distortions of the law to achieve their ends, instead of hewing to the law's true meaning. I take this to be the core of Luban's position.

This definition, however, has two serious problems: the criterion

on which it rests—fidelity to the law's true meaning—is often unclear, and yet it is also, in one respect, clearly too broad. It is meaningful to speak of and look for the law's meaning, purpose or spirit. But it does not follow that we necessarily can "distinguish clearly" between these and other arguments which depart from them. In the detention camp case, for example, we might well call the lawyers' use of environmental law a technical objection. No doubt Congress did not require environmental impact statements in order to enable lawyers to challenge the legality of alien detention camps. Yet the lawyers' contention seems quite consonant with the law's spirit, for Congress presumably intended that even alien detention camps should be built in accordance with the environmental law. More generally, a law's "true meaning, purpose or 'spirit'" are not necessarily all the same, as study of the original understanding and present meaning of the fourteenth amendment suggests.³⁸

Indeed, the question of what the law means is a perennially and hotly contested one. Luban does not suggest that some single interpretive theory is the only intellectually, let alone morally, correct one—nor could such a position easily be maintained. So long as more than one method of interpretation can claim legitimacy, however, genuinely reasonable arguments are likely to be available for widely differing views of the law. I am inclined to agree with Luban that lawyers often make arguments that exceed these bounds, but the range of arguments that constitute instrumentalist contempt for the law's true essence must be narrower than Luban seems to suggest.³⁹

The definition of contempt as distortion of the law is also problem-

38. See generally Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955). Bickel concludes that "as originally understood, [the fourteenth amendment] was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation." *Id.* at 58. He urges, however, that *Brown v. Board of Education*, 347 U.S. 483 (1954), can still be justified, because the framers of the fourteenth amendment also acted out of "an awareness . . . that it was a *constitution* they were writing, which led to a choice of language capable of growth." Bickel, *supra*, at 63. Even if the framers did write with this perspective in mind, Bickel's account indicates that the spirit and purpose with which they enacted the fourteenth amendment were only loosely connected to the meaning the amendment has today.

39. It might be argued, however, that a lawyer is guilty of contempt for the law even when her arguments fall within the bounds of reasonableness if she doesn't actually believe her arguments are correct. If so, then contempt is a matter of state of mind rather than of distorted argument. On this premise, we might even conclude that a lawyer who makes *correct* arguments in which she *does* believe is guilty of contempt, if the reason she makes them is not that she believes them but that they serve the interests of her client. Whenever a lawyer acts for instrumental reasons, in short, her conduct would be contemptuous.

I have already argued that instrumental use of the law cannot by itself constitute contempt, because the law is an instrument. In addition, these "state of mind" extensions of the notion of contempt would make the lawyer's moral error consist partly or even solely in her bad thoughts, rather than in any damage actually done to the fabric of the law. Moreover, the "bad thoughts" in question—in particular, the lawyer's belief

atic because it appears to condemn lawyers who rely on mistaken, but authoritative, interpretations of the law. Suppose, for instance, that the Supreme Court wrongly interprets the fourteenth amendment. (It could happen.) The Court's new interpretation—say, a prohibition on affirmative action—is contrary to the amendment's true meaning (however we've succeeded in determining this "true meaning"). If it really is contempt to rely on a distortion of the law, then a lawyer who invokes the Supreme Court's decision on behalf of her clients engages in contempt for the law. It is strange and troubling to think that a lawyer is guilty of a breach of respect for the law when she is faithful to *Marbury's* principle that "[i]t is emphatically the province and duty of the judicial department to say what the law is."⁴⁰

Perhaps Luban would not take the concept of contempt this far. To avoid this conclusion, yet still hold to the idea that lawyers manipulate the law when they depart from its true meaning, Luban would be compelled to say that the true meaning of the fourteenth amendment is what the Supreme Court says it is, even if the Court's interpretation is clearly mistaken. This proposition would be a difficult one for Luban, who believes that "realism is false," to maintain (p. 20). The only alternative, though, would be to accept that at least some instances of lawyers' use of distorted interpretations of the law do not constitute contempt for the law. Thus, even when we do succeed in identifying an argument as a distortion, it may not be contempt.

b. *The Morality of Contempt.* — In order to demonstrate that contempt for the law is a moral wrong, Luban must show not only that the law has meaning, but also that it deserves respect. Luban's argument is that disobeying the law violates the duty of "fair play" each of us owes to our fellow citizens (pp. 37–38), if the law in question is "not evil, unfair, or hopelessly stupid" (p. 35). The duty of fair play, Luban explains, is grounded "in the moral disrespect and the rupture of social solidarity that . . . lawbreaking exhibits. These are wrongs to our fellow-citizens, and the obligation to refrain from them is owed to our fellow-citizens" (p. 37). The reason that certain laws are not entitled to our obedience, Luban suggests, is that fair play creates obligations only when the law in question is generally beneficial. Laws that are evil, unfair or hopelessly stupid are not generally beneficial, and breaching them "exhibits no disrespect for one's fellows" (p. 45).

The standard Luban offers here would excuse a wide range of conduct from moral disfavor. It would certainly acquit lawyers of moral fault if they manipulated laws because they correctly viewed those laws as evil, unfair or hopelessly stupid. In addition, the "fair play" principle raises the question of whether we are bound to obey even those laws that are generally appropriate if they are unfair, evil or hopelessly

that she should help her client within the law—do not in themselves seem so reprehensible as to merit the label "contempt."

40. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

stupid *as applied* to ourselves or our clients. Luban himself does not endorse this extension. Instead, at one point he says that we have no obligation to obey generally beneficial laws "in those unusual or emergency situations where decency clearly tells us to disobey" (p. 45). He also suggests that laws do not cease to be *generally* beneficial even if they have loopholes which can occasionally be used to give particular people unfair advantages (p. 48). In light of these observations, the extent to which we may disobey generally beneficial laws because they are unfair as applied to us might depend on whether their unfairness is so great that "decency clearly tells us to disobey."

Another of Luban's comments, however, could provide the basis for a more radical conclusion. Luban appears to believe that we ought *not* to invoke laws in our favor that, despite being generally fair, are unfair in our particular case. Thus, we apparently should not plead the statute of limitations even when it is clearly applicable if doing so would disserve the law's underlying purpose (see p. 47). If the defendant's invocation of the statute of limitations would be "quite inequitable," as Luban suggests, then it is plausible to infer that efforts by the plaintiff's lawyer to evade the statute would be proper. Hence, it could be argued that fair play binds us to respect the law only when its application *in our case* is neither unfair nor evil nor hopelessly stupid.⁴¹

The inevitable contestability of any claim that a law is or is not evil, unfair or hopelessly stupid also widens the range of permissible manipulation. After all, almost every law on the books is evil, unfair or hopelessly stupid in someone's eyes. It may be quite easy to believe—self-servingly, perhaps, but also sincerely—that many of the laws being applied to *your client* fall into this category. At the very least, this may be easy to believe of laws *as applied* to your client. Yet so long as lawyers act out of a belief that the laws they manipulate are so flawed that manipulation is legitimate, they commit no conscious breach of fair play. We could, if we wished, hold lawyers "in contempt" when they should, but do not, recognize that the laws they misuse really deserve respect. To do so, however, we would have to be prepared to say which laws are

41. If the "fair play" duty to obey the law means no more than this, then I am not certain whether it is really a duty to obey the law at all. If we are only morally obliged to obey the law when, as applied to us, it is neither unfair nor evil nor hopelessly stupid, are we obliged to do anything that we would not be obliged to do in the absence of the law? I assume we would be morally bound to do what is fair and good even if the law were silent, and we would at least be well-advised to do what is intelligent as well. Perhaps fair play would add to this obligation a duty to obey legal commands that are, in themselves, morally neutral—not unfair or evil, but not fair or good either. Presumably the argument for obeying such laws would be that although they are morally neutral in themselves, they provide a common framework for our lives in society, and such a framework is "generally beneficial" and hence entitled to respect in terms of fair play. I suspect, however, that the class of truly "morally neutral" rules (such as "drive on the right") is a narrow one. The narrower this class is, the less it is possible to maintain that lawyers' conduct is troublesome because of its injury to morally binding *law*—though of course lawyers could still be indicted for their injury to morality itself.

deserving. To say the least, this task would be highly controversial.⁴²

Starting from the premise that we are not bound to obey laws that we correctly consider evil, unfair or hopelessly stupid, I have argued that we would also not ordinarily be bound to obey laws if we *believed* them to be evil, unfair or hopelessly stupid in general or, conceivably, just as applied to our case. Now suppose that a lawyer manipulates and thus evades a law that *is* evil, unfair or hopelessly stupid, but that she does not do so out of a belief that the law has these flaws. Is she guilty of a breach of the duty of fair play?

Luban's answer, I believe, would depend on what the lawyer's motive was. If the lawyer manipulated the law simply in order to help her clients, and did so without regard to whether fair play permitted her conduct or not, then she would have breached the duty Luban maintains we have to "offer some reason" for our conduct that sounds, essentially, in terms of fair play (p. 47).⁴³

Suppose, however, that the lawyer in question sincerely tells us, "It's true that I didn't consider whether I had a duty not to manipulate this law because of fair play considerations. But I don't agree that fair play is the correct standard by which to determine my obligations to the law. Under the standard I believe to be correct, my manipulation of the law was proper." This lawyer has demonstrated no disrespect for her fellow citizens so long as the standard by which she decides whether or not to manipulate the law does not itself embody disrespect for them. A lawyer whose guiding principle is simply that she is not accountable for the damage she does *would* be guilty of such disrespect. A lawyer who believes that manipulating the law is appropriate because such zealous advocacy will ultimately produce just legal decisions, however, is not guilty of any conscious disrespect. If her belief is reasonable—though mistaken—it is difficult to indict her even for a disrespectful inattention to the reality of her fellow citizens' lives. Similarly, a lawyer who believes that people are bound to obey only those laws to which

42. One response to this problem would be to merge a particular political perspective into our ethical reasoning, and to condemn lawyers' conduct as unethical when it manipulates laws that *from this perspective* appear to deserve respect. This is not the course Luban takes. Instead, he seeks to demonstrate the moral weakness of lawyers' work without first convincing us of any special set of political propositions. Without these contestable political propositions, however, it seems to me that we cannot second-guess most sincere assertions by attorneys that the particular laws, or applications of those laws, that they are manipulating do not deserve respect. Even if we are convinced that lawyers are manipulating just laws, therefore, we cannot necessarily condemn their manipulation as a breach of common morality itself.

43. It is not clear just what action the duty to "offer some reason" calls for from lawyers. If this obligation requires lawyers to announce that they are engaging in otherwise improper manipulation of the law because of the fair play assessment they have made, their compliance with this duty will undercut the success of their own, morally justified, legal stratagems. A less burdensome interpretation would be that the lawyer's only duty is to decide for herself whether her action is justified in terms of fair play, and to act in accordance with her assessment.

they have consented is at least not guilty of conscious disrespect when she applies that theory to her own actions.⁴⁴

Luban's case against lawyers might be stronger if he asserted that the duty to obey the law embraced even laws that are arguably or actually unfair or evil or stupid. If all of us are bound by some form of implicit consent to our lawmaking processes, then manipulation of even the defective products of those governmental processes could be improper. However, Luban plainly rejects a "tacit consent" rationale for a duty to obey the law (pp. 36-37). Alternatively, we might argue that "fair play" extends to an acceptance of the not always equitable distribution of benefits and burdens our legal system produces because the system, in some broad sense, is generally beneficial. I think this argument has force, although some members of our society may not receive enough benefit, even in the broadest sense, to justify their burdens. In any event, this is not an idea that Luban advances. Nor does Luban attempt to ground lawyers' duty to respect the law in their oaths of admission, although these oaths might be so phrased as to constitute explicit consents to uphold the law.⁴⁵

When we examine Luban's argument, lawyers' conduct turns out to be less morally troublesome than it might first have appeared from his description of instrumentalist contempt for the law. Much of what might be called manipulation of the law does not undercut the law enough to deserve the label "contempt." Much of the manipulation that can fairly be called contempt cannot be condemned in terms of common morality if the duty to obey the law is no wider than Luban's account of the principle of fair play suggests. This is not to say, however, that lawyers' work is always consistent with common morality. When it is not, the question of whether lawyers' breaches of common morality are morally justifiable takes center stage.

44. The discussion in the text focuses on the lawyer's rationale for manipulating a law that is evil, unfair or hopelessly stupid. The same logic suggests, however, that a lawyer who manipulates a law that is *not* so flawed will also be guilty of no disrespect for her fellow citizens if she acts on the basis of a moral principle that is itself respectful of other citizens. If so, then despite her violation of a generally beneficial law, she may not be guilty of a breach of "fair play," for the duty of fair play is itself rooted in an obligation of respect for one's fellow citizens.

45. So read, lawyers' oaths might generally oblige them to obey most, if not all, of the laws under which we live. Luban does not explore this possibility. It might be hard, however, to derive from the oath an obligation not to manipulate the law. If lawyers promise in their oath to practice in accordance with governing rules of legal ethics, and if those rules actually embody the principles of partisanship and nonaccountability, then the oath hardly proscribes the manipulation those principles call for. Indeed, if lawyers have, in effect, promised to obey rules that sometimes call for manipulation, their obedience to this call might be morally appropriate even if, in the absence of such a promise, their manipulation would be immoral. For a discussion of the significance of oaths, including lawyers' oaths of admission, in generating an obligation to obey the law, see K. Greenawalt, *Conflicts of Law and Morality* 77-85 (1987).

3. *The Justification of the Role of the Lawyer.* — If the dimensions of lawyers' contemptuous manipulation of the law are narrower than Luban contends, still it cannot be denied that such conduct takes place. Nor can it be denied that lawyers pursue and sometimes attain unjust results, or that in the process they sometimes inflict what would be—at least if the perpetrators were not lawyers—morally unjustifiable damage on others. We may not agree on which cases reflect unjust conduct and which reflect triumphs of moral right, but we can agree that *some* of the lawyering we see raises moral problems, even though it violates no rules of professional ethics.

In other words, some of what lawyers do within the rules of their profession breaches common morality.⁴⁶ Yet this conduct still may be morally proper if the moral rules that should govern lawyers are different from those that apply to other people—if, in other words, lawyers are rightly bound by a "role morality" that takes precedence over common morality. And so they might be. Luban fully recognizes and confronts the possibility that lawyers' "ruthless behavior" is essential to the operation of the adversary system of justice, and is morally justified by the same considerations that justify the adversary system itself (p. 51). However, before we look at Luban's assessment of the strength of this "adversary system excuse" (p. xix), we need to trace his understanding of the circumstances under which a role morality makes justifiably binding claims on those who perform the role in question.

a. *When Does a Separate Role Morality Justify Breaches of Common Morality?* — Luban develops his answer to this question through a complex and difficult philosophical argument that ultimately entails a brief inquiry into the metaphysics of self. I will outline only its broadest contours. He insists that role morality is not the whole of morality (that is, he claims that we are not defined merely by the various roles we occupy) (pp. 107–11). He also denies that our roles are only trappings that have no genuine moral claims upon us (pp. 111–16). Essentially, Luban maintains that the requirements of role do matter, but that their force must be measured against the common moral quality of the actions the role requires (p. 125).

How should that balancing be performed? Luban answers that a

46. Luban's sketch of the principles of common morality is discussed *supra* notes 35–36 and accompanying text. Even if their conduct violates specific rules of common morality, lawyers are not in breach of common morality as a whole if common morality itself exempts them from the duty to obey those rules. Suppose, for example, that common morality included a principle that people who have made promises to help particular others are exempt from the duty not to treat still other people unjustly. If that moral principle exists, lawyers would simply be a subset of those freed of certain otherwise binding moral constraints. Cf. Schneyer, *supra* note 6, at 1557–59 (discussing theories justifying lawyers' conduct as analogous to human friendship or religious ministry). I doubt that any such broad exemption ought to be part of common morality, however, and I doubt as well that people would commonly assent to a proposition broad enough to cover the full range of behavior now authorized by professional rules.

role excuse exists only if it is generated by the "Fourfold Root of Sufficient Reasoning." The fourfold root posits that an act in violation of common morality is not morally justified by role morality unless: (1) the institution of which the role is a part is morally justified; (2) the role in question is required by the institution; (3) the role requires certain behavior; and (4) the act in question is an instance of the behavior required by the role (pp. 131-32). Only if the four steps of the fourfold root are satisfied is there any role excuse at all, and only if the excuse is strong enough will it outweigh the claims of common morality (p. 132; see pp. 133-37).

Weighing all of these questions sounds like quite a task. Certainly anyone who thought to embrace a role morality for its surcease of care is in for a shock.⁴⁷ Luban recognizes this problem in his usual vivid style: "[I]t all looks like a veritable night in Gethsemane every time a lawyer wants to take what might be described in some circles as 'a lousy four-bill landlord-tenant case'" (p. 140). If Luban's reasoning would make the moral lives of those subject to a role morality unbearable, and if we do not mean to proscribe role morality for all practical purposes by making adherence to it excruciating, then we might well suspect that Luban has overstated the rigor of the examination that role morality must pass.

Luban's response is, in part, that the fourfold root is a "theory of justification and only secondarily a theory of deliberation" (p. 140). As a tool for justification, it can be used by moral analysts. Practicing lawyers need not think through the institutional justifications of their work personally, but can read about them in, as Luban says, "a book like this one" (p. 141). Having done so, practicing lawyers can bring their reading to bear on concrete situations in a few moments' deliberation.

This is not a satisfactory answer. Reading Luban's book takes time, and fully evaluating its arguments also takes a great deal of time (as readers of this review are beginning to guess). The lawyer who conscientiously explores these theoretical arguments may find her uncertainty increasing rather than decreasing. She may also find the task of applying theory to practice impossible to carry out meaningfully in the spare moments she has for such deliberation.⁴⁸

47. Wasserstrom has argued that "for most lawyers, most of the time, pursuing the interests of one's clients is an attractive and satisfying way to live in part just because the moral world of the lawyer is a simpler, less complicated, and less ambiguous world than the moral world of ordinary life." Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *Hum. Rts.* 1, 9 (1975).

48. Deborah Rhode expresses somewhat similar concerns in Rhode, *supra* note 1, at 645. William Simon suggests that wrestling with difficult ethical issues is a defining part of moral life, but his willingness to formulate disciplinary rules embodying rebuttable presumptions to guide the exercise of ethical discretion might operate to relieve the lawyer of much of this task of reflection. See Simon, *Ethical Discretion in Lawyering*, 101 *Harv. L. Rev.* 1083, 1132 (1988). Any such relief would be achieved precisely by alleviating the lawyer's internal moral anxiety.

There is another problem, which Luban also identifies. Does the steady re-examination of the legitimacy of the lawyer's role so undermine her personal commitment to the role as to shake her moral identity? Luban takes this problem seriously, but responds that it is overstated. If a lawyer decides that a particular role act isn't morally justified, he argues, she need abandon the role "only" in this single respect (p. 143). If, on the other hand, the lawyer finds that the fourfold root calls into question a host of her daily role acts, Luban might say that she *does* need to abandon the role altogether—but that step, while wrenching, will hardly be a daily occurrence.

Perhaps it is true that our roles are either so morally questionable that we should drop them altogether, or so morally valid that we will not frequently have to breach their demands. I suspect, however, that there is a middle ground between these two points—a middle ground on which lawyers might find themselves uneasily encamped. If lawyers do occupy such difficult terrain, then they may face genuinely jarring moral lives if they subject each of their actions to the fourfold root inquiry, or indeed to any sustained moral critique. Just as it can be painful and, perhaps, destructive to highlight the political concerns that bear on each moment of our professional and personal lives, so a life of vigilant or hypervigilant moralism may not be a desirable or even a morally good life.

At this point, Luban might argue that the alternative to raising moral questions is "not raising them" (p. 142). This is only partly true. Another alternative might be to raise these issues only at special moments. Perhaps prospective lawyers should consider these issues "once and for all" when they take up legal training, or when they take the oath of admission. This proposal, however, would require people to make conclusive moral judgments based on patently inconclusive information. Perhaps, instead, lawyers should address ethical questions on the occasions when the codes of legal ethics are revised. Unfortunately these occasions have not been the most edifying; conscientious lawyers might well feel that the resulting documents fail to resolve satisfactorily many important issues.⁴⁹

If individual deliberation at the start of one's career and professional deliberation in the revision of the governing codes are not sufficient, perhaps lawyers should also examine the morality of their role in a third, concededly imprecise, category of cases: those that are exceptional. This rule would generally—but not always—permit lawyers to rely on the dictates of their role. In the rare case that posed a particularly sharp ethical problem, however, lawyers would be bound to

49. See generally Abel, *supra* note 19; Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 *Tex. L. Rev.* 689 (1981). Marvin Frankel, responding to Abel, acknowledges that improvement in the bar's ethical standards has been "slow and halting." Frankel, *Why Does Professor Abel Work at a Useless Task?*, 59 *Tex. L. Rev.* 723, 731 (1981).

reopen the moral inquiry. The result might be that lawyers would meet their responsibilities for moral fidelity and effective action better than they could under the more relentless self-scrutiny Luban prescribes.

b. *Is the Separate Role Morality of Lawyers Justified?* — While I am doubtful that lawyers should live their lives with the fourfold root at their side, this concept is helpful as a theory of justification. Luban's assessment of the morality of the role acts of adversary lawyering appropriately—in light of the fourfold root—turns on the moral standing of the adversary system itself.

In evaluating the strength of the “adversary system excuse,” Luban narrows his focus in two important respects. First, he does not examine lawyers' work outside of the litigation context, on the ground that “[i]f [ethical] problems crop up even there, certainly they will be worse outside of a legitimately adversarial institution” (p. 58).⁵⁰ Second, he does not weigh the virtues of criminal defense lawyering in judging adversary lawyering in general; instead, he focuses on what he calls the “civil suit paradigm”—“any litigation context in which, because we are confronted with a dispute between relatively evenly matched private

50. I am inclined to agree with this observation. The lawyer who confronts an equally trained and equally vigilant opponent before a neutral judge is less likely to inflict unjustifiable harm on others than a lawyer who pursues identical objectives outside the courtroom against untrained adversaries who are in no position to invoke other resources in their aid.

To be sure, the differences between litigation and other legal contexts are not absolute, and it will not always be true that the ethical difficulties of lawyers' work outside of court are greater than those encountered in litigation. By no means every adversary in court has adequate legal representation; by no means every adversary out of court is without legal or other sources of support and advice.

It may be, moreover, that lawyers are more relentlessly partisan and nonaccountable in their litigation work than they are when, for example, they counsel their clients and help arrange their affairs out of court. If so, then the ethical problems of litigation could be more, rather than less acute, than those encountered in other settings. Unfortunately, it is not clear how often lawyers actually do moderate their out-of-court conduct in this way.

In Nelson's survey of Chicago corporate lawyers, more than three-fourths “responded that it was appropriate to act as the conscience of a client when the opportunity presented itself.” Nelson, *supra* note 27, at 532. Nelson concludes, however, that the bulk of the advice actually given deals with “business, investment, or fairly narrow legal problems,” *id.* at 533, though it is worth noting that his data do not expressly focus on the extent to which lawyers' advice addressed moral issues. Cf. Chayes & Chayes, *Corporate Counsel and the Elite Law Firm*, 37 *Stan. L. Rev.* 277, 293–98 (1985) (arguing that with the rise of in-house corporate counsel, the “model of the free and independent professional” in the law firm has been undermined); Kagan & Rosen, *On the Social Significance of Large Law Firm Practice*, 37 *Stan. L. Rev.* 399, 422–34 (1985) (contending that “the lawyer-as-influential-and-independent-counselor role is likely to be extraordinary rather than ordinary”). But cf. Macaulay, *Control, Influence, and Attitudes: A Comment on Nelson*, 37 *Stan. L. Rev.* 553, 563 (1985) (arguing that “corporate lawyers occasionally do have the opportunity to exert some influence on clients”).

It would be particularly distressing to find that those who receive vigorous counseling from their lawyers are only those who lack the resources to escape such importuning. Cf. Blumberg, *supra* note 18.

parties, our primary aim is legal justice, the assignment of rewards and remedies on the basis of the parties' behavior as prescribed by legal norms" (p. 63).⁵¹

I will sketch Luban's review of the claimed justifications for the civil suit paradigm only briefly, for I want to accept most of the premises of his argument in order to examine closely his conclusions. Luban reviews a range of different arguments for the adversary system and finds all of them inadequate. He begins by criticizing defenses of the adversary system based on its ability to produce good results. Luban regards the adversary system's capacity to get at the truth as unproven; he denies that it is well designed to secure all parties' legal rights, and he rejects the claim that each lawyer's overreaching is morally neutralized by the efforts of the opposing lawyers to do the same (pp. 68-81).

He then turns to "nonconsequentialist" justifications, which he also finds unpersuasive. Recognizing that lawyers' devotion to serving their clients is a moral value, Luban finds this virtue insufficient to justify working moral harm on others. Agreeing that presenting a party's good faith position in court vindicates that person's human dignity, Luban maintains that adversary lawyering goes far beyond merely presenting good faith positions. Turning to "the social fabric argument," Luban denies that the adversary system is justified by free dem-

51. Luban excludes criminal defense work because he views it as a special case. It is special for two reasons. One is that "[no] tangible harm is inflicted on anyone when a criminal evades punishment" (p. 59), whereas an unjust resolution of a civil suit does tangibly harm the loser. This is not a persuasive argument. Luban acknowledges that unjust acquittals may cause outrage or moral harm, or lead to further crime. I would add that, occasionally, unjustly acquitted defendants may track down their accusers. Luban is not sympathetic to the "public preoccupation with crime and criminals" (p. 59), but I would argue that the harm from the wrongful payment of money damages, however tangible, is often less than the harm experienced in seeing one's attacker, extorter, rapist or family member's killer going free—to say nothing of the other unpleasant results of undeserved acquittals.

Luban's other basis for regarding criminal defense as a special case is more substantial. He argues that "criminal defense is an exceptional part of the legal system, one that aims at the people's protection from the state rather than at accurate outcomes" (p. 63). Zealous criminal defense can promote just outcomes, to be sure, but it is needed even at the expense of justice as a safeguard against governmental tyranny. Criminal defendants therefore have rights, at least on paper, that clearly interfere with the search for truth. Their legal representation also goes beyond the "balance" normally envisioned in the adversary system, for criminal defense lawyers are charged to serve their clients zealously while the prosecutors, as Luban points out, are supposed to seek justice rather than simply victory (pp. 60-61).

Luban is quite right to say that the criminal justice system asserts a special concern for the protection of people from the state. But the distinction between the criminal defense and civil paradigms is not complete. It is, after all, an overstatement to suggest that the criminal justice system has no concern for accuracy—if the system's only goal were to protect people from the state, a more direct method would be just to stop prosecuting altogether. Broadly conceived, both criminal and civil courts seek to determine truth and to protect rights. I am not convinced, therefore, that Luban's exclusion of criminal defense lawyering from an assessment of the "adversary system" is sound.

ocratic consent, for none, he says, has been given. He rejects as well a Burkean appeal to tradition, on the ground that even if the adversary system really is part of our tradition, it is no more than an ancillary feature of that tradition, and one that can be changed without fear of the deluge (pp. 81-92).

These are rich and deft arguments. Having made them, however, Luban advances a different rationale to justify the adversary system after all: the "pragmatic justification." This justification is that "if a social institution does a reasonable enough job of its sort that the costs of replacing it outweigh the benefits, and if we need that sort of job done, we should stay with what we have" (p. 92). The adversary system, Luban writes, "seems to do as good a job as any [other system] at finding truth and protecting legal rights," and would be extremely costly and even painful to alter (p. 92).

On this "pragmatic" argument—which seems somewhat Burkean after all—Luban justifies the adversary system. He illustrates his position, moreover, with an intriguing discussion of the West German procedural system, an inquisitorial system whose profound divergences from our adversary norms do not render it manifestly unjust. Despite its virtues, however, Luban does not urge us to adopt it. On the contrary, he argues that adopting this system would force us to abandon the right to jury trial, would undercut our ideal of "getting one's day in court," and would place perhaps intolerable amounts of trust in the power of a large, bureaucratic judiciary (p. 102). These arguments do not suggest that our system is superior to West Germany's. They do suggest, however, that because of our values and institutional structures, we might find it very difficult to switch.

Having said all this, Luban avers that "the pragmatic justification is about as weak as it could be and still be a justification" (p. 149). As a result, when the fourfold root analysis is carried out, it tells us that the justification the adversary system provides for otherwise immoral role acts is also extremely weak. Hence "the adversary system doesn't excuse more than the most minor deviations from common morality" in the civil suit context (p. 149).

This conclusion does not follow from Luban's evaluation of the adversary system, for two reasons. First, Luban's characterization of the pragmatic justification as "about as weak as it could be" hardly reflects the weight of the pragmatic considerations he himself identifies. This system, he says, is as good at protecting rights and doing justice as any other. That suggests it is as good a system as we are currently capable of devising and putting into practice. Moreover, to abandon it would, on Luban's own account, be a potentially wrenching process that would require us to bid farewell to a number of profoundly important institutional and ideological commitments. These are strong pragmatic reasons for adhering to the existing order, as Luban recognizes, and they are strong largely because they express the force of the ideo-

logical and moral, rather than merely practical, purposes that are bound up, however imperfectly, in the adversary system.

Second, even if the adversary system is as flawed as Luban maintains, we cannot necessarily say that role acts required by the adversary system are weakly justified. That would be the case if the result of forswearing role acts that breached common morality was that we got all the benefits of the existing system *minus* its immoral side effects. But this happy outcome may not come to pass. Instead, the failure to perform the role acts of the adversary system may generate a system of justice that is markedly worse at finding facts and upholding rights than the one we have. This possibility can only be excluded out of hand if we believe that no system could be much worse than the one we have—but Luban hasn't made that claim, nor could he make it.⁵² Luban suggests that we should abandon the adversary system excuse as we would dispense with a scientific theory once we had evolved a better one (p. 153).⁵³ But that's just the problem: the moral case against the present system is not complete without a moral defense of the alternative offered in its stead. Such a defense is hard to make, however, precisely because the alternative to be defended does not yet exist and so can be visualized only imperfectly. Luban acknowledges that the alternative "vision of law practice" that he offers is "vague and idealistic" (p. 160); as we will see, it is also open to serious criticism.⁵⁴

None of this means that every element of current adversary lawyering must remain with us always. It may turn out, on examination, that some of what we now do as lawyers is not required by the institution of adversary adjudication, and so cannot be morally justified by that institution's needs even if the institution itself is strongly justified. As Luban says, the rise of civil discovery did not spell the end of the adversary system—perhaps it has actually aggravated adversary manipulation—and many other changes may also be compatible with it. Luban makes this point (p. 154), but for him it is a fall-back position, and it

52. Luban does write that "we have no reason to believe" that the adversary system produces correct results in hard cases (p. 153). Since he also "suppose[s]" that the adversary system does as well at this task as any other system (p. 74, but see p. 98) (on West German fact-finding effectiveness), Luban may feel that we have no reason to conclude that any system of justice anywhere in the world is more likely than not to produce correct results in close cases. This is not a position that would be easy to prove, but even if it were proven, it would still fall short of demonstrating that tinkering with our system would not make it worse.

53. Luban contends that just as the criterion of success for a scientific theory is an absolute one (truth), so the criterion for the adversary system's justification is also absolute. The test is, then, "does it produce justice?", rather than a relative standard such as "does it produce justice as well as or better than alternatives?" (pp. 153-54). I do not understand how we know that the criterion for the adversary system is the first, absolute question and not the second, relative one. The latter may be a very important criterion indeed.

54. See *infra* notes 55-96 and accompanying text.

represents a significantly less sweeping rationale for change than the broad challenge with which he begins.

D. *Luban's Prescriptions for Lawyering in the Civil Adversary System*

If Luban's indictment of the adversary system excuse is right, it follows that the principles of professional ethics should be revised to remove any requirement that lawyers breach common morality on behalf of their clients when they work in the civil suit paradigm. In such a revision, the "standard conception" of nonaccountability would disappear, for it turns out on Luban's account that lawyers have no excuse for avoiding the moral implications of their acts (p. 154). In addition, lawyers would be permitted—indeed required—to be partisan, but only so long as they violate no rule of common morality (p. 157). Hence, they could be partisan only so long as they did not inflict morally unjustifiable damage on others, or deceive them, or manipulate a morally defensible law, or pursue substantively unjust results.⁵⁵

Luban would not, however, make such sweeping changes in the work of criminal defense lawyers.⁵⁶ Their role would remain much as it is today, with one important exception—that they would be required to temper the zealotry of their advocacy when their unchecked efforts to protect their clients would oppress others (such as rape victims) who, on political grounds, deserve protection themselves. In addition, as we will see, Luban would extend the "criminal defense paradigm" to embrace many civil cases—those in which the powerless confront the powerful—and in these cases the lawyers for the powerless would be governed by the norms of the criminal defense rather than of the civil suit paradigm.

In the following sections I will focus on four issues presented by these guidelines. First, I will argue that without much greater specification, Luban's principles of civil advocacy would encounter intractable problems of enforcement. Second, I will contend that Luban's guidelines for civil lawyering, and the broader vision of "moral activism" within which these guidelines should be seen, portend substantial intrusions on client autonomy, intrusions which I believe Luban has not satisfactorily justified. Third, I will maintain that Luban's endorsement of lawyers' civil disobedience of rules of professional ethics which are inconsistent with his guidelines is mistaken, both because it would place extreme moral burdens on lawyers and because it would not properly respect the moral reasons for obedience to those rules. Fourth and finally, I will urge that Luban's directions for lawyers engaged in criminal defense and comparable work would in some cases

55. Luban calls this " 'partisan' in the very best sense of the term" (p. 157), but the client unlucky enough to prefer goals or methods that do not fit his lawyer's reading of common morality will not find "partisan" an apt description.

56. See *infra* notes 87–96 and accompanying text.

undercut the protection of defendants' rights and in others undercut the system's ability to render just decisions.

I. *The Question of Enforcement.* — It was not important in assessing Luban's case against the morality of existing lawyers to determine whether he was judging lawyers by standards that could be embodied in enforceable rules. When we consider Luban's guidelines for proper lawyering, however, it is fair to ask whether he has developed standards that can be enforced. This is not to say that principles are of no value unless they can be expressed in rules that can effectively coerce compliance. As Luban suggests, new rules articulating these principles might be valuable as an educational message to lawyers or as a support for lawyers who need a basis for resisting their clients' pressure for immoral conduct (p. 158). Even if enforcement of the new principles is both desired and difficult, moreover, the worth of the principles might not be specially called into question, for the enforcement of even the existing rules of legal ethics is far from intense.⁵⁷ On the other hand, legal or ethical requirements that are widely disobeyed are likely to do more harm than good. If some lawyers obey these requirements and others do not, the clients of the latter have an advantage. If most lawyers disregard these principles, moreover, then even the symbolic authority that the principles and rules of legal ethics have is undermined.

Those responsible for enforcing the requirement that lawyers adhere to the obligations of common morality would face a quite intractable problem: the vagueness and contestability of the common moral standards they were to enforce. Even the most general of moral principles, such as those Luban offers, are not without their debatable aspects. Those Luban suggests, moreover, repeatedly invoke undefined moral standards that must somehow be incorporated into the rules' application (for instance, the requirement that lawyers do no "morally unjustifiable" harm to others). If these principles are not reduced to more clear-cut rules—a task Luban might approve but does not undertake (p. 158)⁵⁸—their application will be problematic, to say the least. Surely we would have to expect wide variation in lawyers' understanding of, and obedience to, the dictates of common morality. We would also have to expect lawyers facing disciplinary action to offer a dizzying array of claims that their conduct accorded with a proper interpretation of common morality. The difficulties of distinguishing between sincere and insincere claims, and between proper and improper moral positions, will be formidable indeed.⁵⁹

57. See Abel, *supra* note 19, at 648–49.

58. In two vivid and thoughtful chapters, Luban does closely examine the specific issue of the morality of attorney-client confidentiality (pp. 175–223). Even here, however, the conclusions he arrives at rely heavily on references to the general principles of common morality (see pp. 202–03, 233).

59. Some of the present rules of ethics already refer to principles of common morality. See, e.g., Model Code DR 1-102(A)(4) (prohibiting any "conduct involving dis-

2. *The Ideal of Moral Activism.* — Luban's proposals are not merely negative; rather, he envisions a form of lawyering in which moral principles move to the heart of the lawyer-client interaction. This Luban describes as "moral activism" (p. 160). Earlier in this essay, I suggested that the existing rules of ethics already provide the lawyer with considerable prerogative to act on moral considerations, whether by urging them upon her client or by withdrawing from repugnant cases or, conceivably, by other means.⁶⁰ Luban would expand the role of morality even further.

Two elements of his proposals stand out. First, Luban would unambiguously declare that lawyers whose clients ask for more partisanship than common morality will support are free not only to withdraw, but also to stay on the case *and* refuse to do their clients' bidding (p. 159).⁶¹ Second, Luban would call on lawyers to engage their clients in a potentially profound moral dialogue, a dialogue that in some cases would seek "not merely to save the client from the consequences of her deeds but to transform and redeem her" (p. 163).⁶² (The dialogue is two-way; the lawyer may be changed as well (p. 174)). The result of these proposals would be quite severe interference with client autonomy—an interference I believe Luban does not satisfactorily justify.

Lawyers *should* sometimes engage their clients in moral dialogue,⁶³ and the existing rules of ethics authorize or encourage lawyers to do so.⁶⁴ It is another matter, however, for them to aspire to "transform and redeem" their clients. Luban argues that lawyers' training should enable them "to form a better picture of the human consequences of institutional arrangements" than nonlawyers (p. 171), and this point has force.⁶⁵ As Luban fully recognizes, however, this capacity for

honesty, fraud, deceit, or misrepresentation"); Model Rule 8.4(b) (making it "professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects"). Rules so phrased may well suffer from the same sorts of enforcement problems I suggest Luban's principles could encounter. The more salient unadorned principles of common morality become in disciplinary standards, however, the more enforcement problems can be anticipated.

60. See *supra* notes 11–17 and accompanying text.

61. William Simon appears to endorse a similar prerogative. See Simon, *supra* note 48, at 1090–91, 1123–29.

62. Thomas Shaffer has explicitly hoped for religious transformation in the lawyer's office. He writes that "it is possible to hope that the client will leave with more moral gain than the ethics of autonomy seem to allow for. . . . The object of law office discourse as moral discourse is to serve the goodness of the client, and many of us feel that there is more to goodness than autonomy. Born-again Christian lawyers whom I know tell their client about Jesus Christ as Saviour; some of them have told me that they ask clients to pray with them." Shaffer, *The Practice of Law as Moral Discourse*, 55 *Notre Dame Law. Rev.* 231, 247 (1979).

63. Ellmann, *Lawyers and Clients*, 34 *UCLA L. Rev.* 717, 760–61, 777–78 (1987).

64. See *supra* notes 11–17 and accompanying text.

65. Cf. Kronman, *Living in the Law*, 54 *U. Chi. L. Rev.* 835 (1987) (arguing that life in the law can enable the lawyer to develop the virtue of judgment or practical wisdom).

“practical judgment” (p. 171) does not mean that lawyers are “more virtuous, decent, courageous, or compassionate than the rest of us” (p. 171). If they are not, then we must wonder whether they generally have the capacity, or the right, to attempt the sweeping moral reformation of their clients.

Even if lawyers do have the right to engage their clients in moral transformations, what means should they use to press their case? Lawyers practicing moral activism would be able to threaten to withdraw from their clients’ cases—a threat frequently possible under present rules as well. They could also simply refuse to carry out steps essential to the client’s ignoble ends;⁶⁶ the legitimacy of this step under present rules is much more ambiguous.⁶⁷ Finally, moral activists might threaten “betrayal” (p. 174); clients do not face this penalty under today’s rules for invoking their legal rights against their attorneys’ ethical advice. Luban says that moral activism accepts the possibility of betrayal “without flinching.” To his credit, he adds: “Without flinching much, at any rate” (p. 174).

It is one thing to endorse a moral dialogue between people in conditions of rough equality of understanding and status. Each of the responses I’ve just mentioned, however, is a use of power over the client. The techniques of religious transformation are not always pretty, and a transformation induced by threat may be a genuine transformation, but we can hardly ignore the extent to which these techniques weaken, or even trample upon, the autonomy of clients.⁶⁸

Luban’s answer to the client autonomy question is not persuasive.

66. If lawyers rarely take the professional risk entailed in withdrawing from a case, however, it is not clear why they would frequently dare to tell their clients that they refused to do their bidding even though they were remaining on the case. Presumably any client who disagreed strongly enough with the lawyer’s scruples would get a new lawyer if he could. The professional cost to the first lawyer might turn out to be as severe as if she, rather than the client, had been the one to terminate the relationship.

67. Present rules restrict, though they do not fully eliminate, the lawyer’s authority to remain on the case while not taking every legally available step that would serve her client’s interests. See *supra* note 17. Even when the lawyer cannot reject her client’s instructions and continue to represent the client, she may be permitted to declare, “I will not do this thing that you ask.” If the client insists on her doing his bidding, then she will have to withdraw, but the client might *not* insist. In that case, the lawyer’s announcement could be a permissible step in reaching an agreement with her client on what she will do on his behalf. See Model Rule 1.2(c) and Comment thereto. Compare Model Code EC 7-8 and 7-9.

68. Another autonomy concern arises if the lawyer, but not the client, knows of the existence of a legal, but immoral, course of action that would benefit the client’s interests. A lawyer committed to engaging the client in moral transformation might feel obligated first to inform her client of this option and then to try to persuade him not to undertake it. A lawyer committed to the principle that she should not contribute to immoral courses of action might feel that she should never mention this option at all so as to avoid the possibility that the client, once informed of it, would adopt it.

It is not clear which of these stances Luban would urge. William Simon seems to suggest the legitimacy of lawyers’ remaining silent in Simon, *supra* note 48, at 1104-05.

He invokes *Lysistrata*⁶⁹ to illustrate his argument that “informal filters”—the pressures of our spouses, friends and colleagues—are an important part of the implementation of moral principles. “Among those filters,” he writes, “is noncooperation,” whether by the client’s spouse or by the client’s lawyer. “It is no more an affront to the client’s autonomy for the lawyer to refuse to assist in the scheme than it is for the client’s wife to threaten to move out if he goes ahead with it” (pp. 168–69).

This argument is flawed on two counts. The first is that when we marry we expect to share our lives with our spouses; few of us plan so intimate an engagement with our lawyers. Luban’s equation of a spouse’s pressure with a lawyer’s is therefore wrong. We do face many informal filters on our behavior, most coming from people with whom our connections are less intense than marriage. The less intense the connection is, however, the less powerful any single other person’s informal filter is likely to be. Lawyers present the unusual specter of *strangers* able to *veto*—or at least sabotage or betray—our deeply valued plans.⁷⁰

The second is that “noncooperation” is not really all that Luban argues for. Even now, lawyers often have the right not to cooperate, by withdrawing from the case. That right—though it undoubtedly confers power on lawyers as against their clients—may well be justified by concern for the lawyer’s own autonomy as a moral agent, but Luban calls for more than that: he envisions lawyers taking the case but refusing to fight it all the way, or even betraying it. The analogy is not just to *Lysistrata*’s moving out, but to her appearing on the witness stand to testify against her husband. I see no sign that we view *that* as one of the informal filters on which our moral lives rely.

Nonetheless, the intrusion on clients’ autonomy by moral activist lawyers could be justified if client autonomy is not morally entitled to protection. In one sense, every legal advantage a client can extract is a boon to his autonomy, for each advantage translates into greater freedom and opportunity for him. However, it is far from clear that clients have an ethical claim, or even a strong legal claim, “to anything that the courts can be made to yield.”⁷¹

It is more troubling, however, if moral activists also interfere with clients’ enjoyment of rights that are genuinely theirs in light of (in

69. In Aristophanes’ classic play, *Lysistrata* and other wives refused to make love with their husbands so as to force the husbands to stop making war. Aristophanes, *Lysistrata*.

70. Stephen Pepper emphasizes the lawyer’s effective control over access to the law in arguing that lawyers should be considered “part of the *formal* system of law *imposed* by the community” rather than part of the network of informal filters on our autonomy. Pepper, A Rejoinder to Professors Kaufman and Luban, 1986 Am. B. Found. Res. J. 657, 665–67.

71. See Simon, *supra* note 48, at 1123.

Luban's words) the law's true meaning, purpose or spirit. The right of clients to pursue their ends within the law has been vigorously defended.⁷² It may be that this right would not hold up under the scrutiny of the fourfold root. Luban does not explicitly undertake such an analysis in this book, but elsewhere he has emphasized "the crucial distinction between *the desirability of people acting autonomously* and *the desirability of their autonomous act.*"⁷³ In light of his explication of the limits on the duty to obey the law, Luban might argue that clients have no moral right to invoke any legal rights except those secured by laws which fair play obliges us to obey. One could also argue that clients should not be assisted to pursue even these rights, if in doing so they would gravely impair the moral or legal autonomy of others.⁷⁴

These are serious arguments. I am not satisfied, however, that they justify empowering lawyers to accept cases and then to block or betray their clients' immoral, but legal, objectives. To show that these arguments justify such intrusions (if we put the Lysistratian prerogative to one side), Luban needs to address the scope of protected autonomy more fully than he does in *Lawyers and Justice*.⁷⁵

Finally, the possibility of betrayal is as plain a violation of client choice as one could envision.⁷⁶ What would such betrayal consist of? The refusal to take lawful steps on a client's behalf, which Luban would approve, might rise from mere interference to the level of betrayal. Certainly a failure to cross-examine a witness effectively, motivated by a desire to see one's client's position defeated, could be called betrayal. A breach of confidentiality might also amount to betrayal. Luban argues that in the civil litigation paradigm, lawyers should not keep client confidences if doing so would "work an injustice or . . . substantially

72. See, e.g., Fried, *supra* note 1; Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613.

73. Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 Am. B. Found. Res. J. 637, 639 (emphasis in the original).

74. Cf. Simon, *supra* note 48, at 1125 (emphasizing the conflict between the autonomy of clients and that of third parties).

75. Luban raises, and responds to, another autonomy concern: the fear that giving lawyers this power over clients will vest effective legislative power in an "oligarchy of lawyers" (p. 167, quoting Pepper, *supra* note 72, at 617). Luban says that there is no such oligarchy. I agree that the range of views held by lawyers is wide, and that the degree of coordination among lawyers is low. Moreover, lawyers can already refuse almost any case, and so can already make it costly and time-consuming for a client to find representation (though they may not choose to exercise this power). As informal filters, however, even individual lawyers under Luban's proposal will wield enhanced power, and to the extent that there are any shared norms among lawyers the cumulative impact of this power will be all the greater.

76. Luban is not alone in endorsing betrayal as an element of lawyer-client relations. William Simon has also urged an "advocate-client relation [that] will sometimes end in betrayal." Simon, *supra* note 6, at 134; see also Burt, *Conflict and Trust Between Attorney and Client*, 69 Geo. L.J. 1015, 1031-32 (1981) (arguing that limiting attorney-client confidentiality might encourage inquiry which would ultimately foster greater trust between lawyer and client).

damage an innocent party” (pp. 202–03). Other forms of betrayal may be possible as well.

Luban’s somewhat hesitant acceptance of betrayal is difficult to square with the very principles of common morality on which so much of his argument turns. Betrayal is a strong word, connoting as it does a profound and probably deceitful breach of trust. Luban’s brief discussion of the principles of common morality seems to proscribe deceit unreservedly, and so it is all the more startling to find that lawyers may be called upon to betray their clients. Perhaps a fuller account of common morality would identify a role for betrayal.⁷⁷ Without a more complete delineation of the sorts of conduct that might be legitimate treachery by a moral activist, the full import of Luban’s position cannot be precisely gauged. By now, however, we are on truly dangerous moral ground. Luban is right to flinch as he crosses it, for surely most, if not all, of the *conduct* that would fall in this broad and ominous category of behavior could not withstand moral scrutiny.

3. *The Lawyer as Conscientious Objector.* — Luban’s challenges to existing legal ethics suggest the possibility of revising the professional codes of ethics to reflect his moral guidelines. Luban, however, does not focus on arguing for revision of the codes (in fact, he is quite lukewarm about that task). Instead, he declares that “[w]hen moral obligation conflicts with professional obligation, the lawyer must become a civil disobedient. (And yes: if the professional obligations are part of an enforceable code, the lawyer may have to run the risks of other civil disobedients.)” (p. 156). This mandate imposes duties on lawyers that are both unreasonably burdensome and morally questionable.

Perhaps the most onerous aspect of this injunction is that it apparently would require lawyers to become civil disobedients *often*. Luban does not say how often lawyers might find themselves obliged to breach their stated professional duties. If, however, the obligations of partisanship and nonaccountability really are built into the professional codes, and if these obligations really do commonly require lawyers to act in ways that breach common morality, then it follows that lawyers’ daily work will feature occasions of civil disobedience and perhaps punishment as well. Certainly there could be many times when civil disobedience is in order, for Luban asserts that “[a]nything except the most trivial peccadillo that is morally wrong for a nonlawyer to do on behalf of another person is morally wrong for a lawyer to do as well” (p. 154). It is difficult to believe that lawyers would spring to the task of repeatedly and publicly disobeying the binding rules of legal ethics. Perhaps more important, to impose such an obligation on the daily routine of legal practice—or of any other form of employment—is to make this

77. If not, then the obligation of betrayal might be a feature of a revisionist “role morality,” to be honored—like the principles of partisanship and nonaccountability in Luban’s “standard conception”—despite the contrary demands of common moral judgment.

practice deeply burdensome morally, psychologically and perhaps economically as well. Lawyers' immorality is not so exceptional as to justify this exceptional daily burden.⁷⁸

It is also startling to learn that the rules of professional ethics impose little, if any, obligation of obedience. Luban does not directly explain why this is so. This conclusion may follow, however, from Luban's interpretation of the theory of fair play. Luban's general position on this score is that no law need be obeyed if it is unfair, evil or hopelessly stupid. If the normally applicable professional rules are so flawed as to deserve these adjectives, then we owe them no "fair play" duty of obedience.

This proposition sweeps too broadly. Even if Luban is right that the rules embody his "standard conception" of legal ethics, and even if he is right in his moral criticism of the standard conception, it would not follow that *each* of the rules of ethics could be described as unfair, evil or hopelessly stupid. Some rules, after all, may establish norms that are generally appropriate, even if in occasional cases there are sound moral reasons for violating them. For example, a lawyer who came to abhor her client's objectives might decide that she should withdraw from the case and should do so without in any way cushioning the harm to her client that withdrawal would bring—and yet the requirement that lawyers take "reasonable steps to avoid foreseeable prejudice" to their clients when they withdraw from a case is in general a fair one.⁷⁹ Similarly, a rule against suborning perjury may prevent a lawyer from securing relief to which she believes her client is morally entitled, and perhaps in such a case suborning perjury could be morally justified—and yet the rule against such conduct is a proper one.⁸⁰

Lawyers may also have an obligation to obey the rules of ethics that

78. If lawyers are obliged to disobey the rules of ethics where they conflict with common morality, we might ask why their disobedience should take the form of public civil disobedience rather than simply covert lawbreaking. At least one commentator on legal ethics has in fact endorsed action amounting to, or approaching, covert disobedience. Alan Goldman appears to believe that in some circumstances lawyers are justified in helping their clients to fabricate evidence, if this conduct is necessary to secure their clients' "moral rights." A. Goldman, *supra* note 1, at 139–40. William Simon has maintained that there are *legal* arguments for "action involving perjury," though he does not endorse "explicit lawyer assistance in perjury." Simon, *supra* note 48, at 1116–18.

Luban does not address this issue. He might argue against covert disobedience on the ground that "fair play" requires the person who violates a law to "offer some reason" for her action to her fellows (p. 47). I have already suggested, however, that this requirement may only mean that the violator must justify her action to herself in terms of fair play. See *supra* note 43. If so, and if common morality's prohibition on deceit is not absolute, then covert disobedience might well be morally defensible, provided it would better achieve the lawyer's moral aims than civil disobedience. This prospect is a chilling one.

79. See Model Code DR 2-110(A)(2); cf. Model Rule 1.16(d).

80. For a discussion of arguments supporting lawyers' involvement in perjury, see *supra* note 78.

is based on promise or consent, rather than on fair play. Luban does not focus on this possibility, but there are two distinct grounds on which such an obligation might rest. The first is that lawyers may actually promise to obey these rules when they take their oath of admission. The exact dimensions and significance of the oath are debatable, but a promise to "faithfully discharge the duties of the office"⁸¹ might entail a promise to obey the rules specifying those duties.

Second, lawyers may consent impliedly as well. Is the decision to become a lawyer a voluntary one, from which consent should be implied? It is true that by the time the new lawyer actually enters the profession, she has made a heavy investment of time and money in preparing for it.⁸² When the prospective lawyer enters law school, however, she is likely to have a number of alternatives open to her, alternatives that would also enable her to achieve many of the objectives lawyers seek for themselves (such as status, power and wealth). Her choice of this profession is thus relatively free.⁸³ Since she chose to play in a game governed by certain rules, she may be held to have consented to abide by those rules.⁸⁴

Although lawyers may have promised to obey the rules of ethics, it is possible that their promises do not justify their obedience. A promise to commit murder does not make it morally right for the promisor to kill. On the other hand, a promise to act in a way that generally is morally correct might bind the promisor even if, in particular cases, her

81. N.Y. Const. art. XIII, § 1. The "Proposed Uniform Application for Admission to the Bar" in New York asks the applicant whether he or she will "conscientiously endeavor to conform your professional conduct to" the Code of Professional Responsibility. Proposed Uniform Application for Admission to the Bar, 22 NYCRR 3305, 3320 (1986) (question 29(b)). It is hard to believe that an applicant who answers "no" will soon be sworn in. See also 22 NYCRR 603.2 (1988) (any violation of the Code deemed "professional misconduct").

82. See K. Greenawalt, *supra* note 45, at 78.

83. The situation might be different if the would-be lawyer chose the profession because she felt that this was the path that would best enable her to carry out a moral obligation to improve the lives of her fellows. In that case, she might feel that the decision to become a lawyer was morally required. To threaten to prevent someone from performing a moral duty—here, to block the applicant's entry into the bar unless she gave tacit or express consent to the existing rules of ethics—might be a form of coercion. See generally *id.* at 78–80.

84. Implied consent may also be conveyed by lawyers' participation in the process of making the rules of legal ethics. This is a process in which lawyers have a very strong, not to say excessive, voice. See generally Rhode, *supra* note 49 (criticizing the failure to accord nonlawyers a meaningful role in formulation of standards of legal ethics and in governance of the bar). Despite lawyers' collective power over this process, however, individual lawyers may participate in it simply because they have no other way to address moral issues, and their participation might not suggest any acceptance of the legitimacy of immoral results. More generally, the lawyer's choice to join the profession or to participate in its development of rules may be a necessary, but not a sufficient, condition for finding that she has impliedly consented to the rules. For a discussion of the conditions for such a finding, see K. Greenawalt, *supra* note 45, at 64–68.

actions would be morally wrong.⁸⁵ When lawyers promise to obey the rules of ethics, even on Luban's account, they promise to act in ways that will often, perhaps more often than not, be morally right.⁸⁶ Whether in these circumstances their promise has any effect when their conduct would not be morally right is a difficult question. Whatever the resolution of that question, however, it is clear that Luban's logic does not justify the near-automatic civil disobedience he seems to envision.

4. *The Retention of Traditional Advocacy in the Criminal Defense Paradigm.* — I mentioned earlier that Luban's attack on the adversary system excuse focuses on civil contexts. In criminal defense work, by contrast, Luban treats adversary lawyering as justified by the fact that we need special protection for criminal defendants in order to restrain the state's potential for tyranny.⁸⁷ Accordingly, in criminal defense work the principle of nonaccountability remains valid, in the sense that lawyers need not think of themselves as endorsing or complicit in their clients' desires to avoid just punishment or to commit crimes. What the lawyers must endorse, presumably, is only the principle that criminal defense serves important values in our society.⁸⁸ Moreover, zealous advocacy, and thus presumably fully partisan advocacy, are also ordinarily in order in the criminal defense field.⁸⁹ I agree with Luban at least to this extent: that our concern for the defendant's rights and the state's capacity to overreach goes far to explain and justify the special zealotry we accept from criminal defense lawyers. However, Luban, who properly recognizes that oppressive power exists in many quarters, derives from this recognition two startling conclusions.

The first is that the zealotry of the criminal defense lawyer must

85. See K. Greenawalt, *supra* note 45, at 84–85.

86. Luban points out that zealous advocacy may be consistent with common morality "even when it frustrates the search for truth or violates legal rights" (p. 154). He also urges lawyers engaged in criminal defense, or similar work on behalf of the powerless, to fight for their clients much as a traditional lawyer would. See *infra* notes 87–96 and accompanying text.

87. See *supra* note 51 and accompanying text.

88. I argued earlier that a lawyer who believes that her efforts are justified by some greater good is accountable. See *supra* text accompanying note 26. If so, then the criminal defense lawyer who acts out of a conviction that resistance to potential state oppression is morally justified is an accountable lawyer. She does not, however, condition her defense work on being persuaded of the justice of her particular client's objectives; for these objectives, she may consider herself not responsible.

89. Conceivably Luban would recognize some general limit on the utter partisanship even of criminal defense lawyers. He says at one point that the famous claim of Lord Brougham that "[a]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client," (p. 54) (quoting 2 *Trial of Queen Caroline* 8 (J. Nightingale ed. 1820)) "may well hold in criminal defense" (p. 63) (emphasis added). If this maxim "may not" apply, then Luban must entertain the possibility of some limits on the advocacy even of the criminal defense bar. But he does not appear to develop these limits (except as indicated in text *infra*), and it seems safe to say that he endorses criminal defense lawyering that is broadly similar to what we see today.

be tempered when the targets of her zealotry are themselves in need of protection from oppressive power. The example Luban gives is the rape victim.⁹⁰ He says that “[w]omen require prophylactic protection from patriarchy, and so the criminal process must ensure that rape victims can step forward to accuse their assailants without their own sexuality being turned into the centerpiece of the trial” (p. 151).

Suppose, however, that in a particular case the complainant did in fact consent to the sexual intercourse she now labels rape. Suppose also that the defendant’s lawyer has located the complainant’s ex-boyfriend, who is ready to attest, perhaps accurately, to her promiscuity. Luban maintains that even in this extreme case the defense lawyer’s tactics must be restrained. For just as a criminal defendant in general is entitled to a zealous defense even if he is guilty as charged, so a particular woman is entitled to be protected against sexist slurs even if she is guilty of what the slurs assert. Thus the defendant’s lawyer must stop short of “cross-examination that makes the victim look like a whore” (p. 151). The same logic suggests that the lawyer should refrain from calling the ex-boyfriend to testify.

This is a disturbing conclusion. (Luban himself arrives at it “without much confidence” (p. 152)). What is disturbing about it, however, is not that it restricts the vigor of criminal defense for policy reasons—laws restricting the admissibility of evidence of rape complainants’ past sexual conduct are not uncommon. These laws are not meant to foster false claims of rape, but rather to prevent truthful claims from being discouraged or disbelieved. (Nonetheless, a law that restricts the defendant’s right to cross-examination limits his defense, and on occasion it may contribute to the conviction of an innocent person.)

Rather, what is troubling is the breadth of the authority Luban confers on the individual lawyer to weigh an innocent person’s defense against political considerations. The lawyer, to be sure, has a knowledge of the particular case that the legislature cannot have. That knowledge might be invoked as a reason why lawyers should not be obliged to seek for a client every right that the legislature has accorded him.⁹¹ Here, however, the lawyer is not restricting the cross-examination because of some special knowledge either of the defendant’s guilt or of the irrelevance of this complainant’s chastity to the truth or falsity of her accusation. On the contrary, the individualized knowledge that the lawyer has points in favor of vigorous cross-examination. If most

90. Luban deserves the same compliment he pays to Monroe Freedman: No one could accuse him “of ducking the hard cases.” (p. 53).

91. Alan Goldman has argued that “[t]he law is a blunt social instrument. . . . [L]egal rights can never be made perfectly congruent with generally recognized moral rights, not even by well-intentioned legislators acting for the public good rather than for political interests.” A. Goldman, *supra* note 1, at 140. Cf. Simon, *supra* note 48, at 1101–02 (similar point concerning counsel’s potential for knowing more about a case than the judge will).

rape cases were like this one, legislatures would not be likely to enact limits on cross-examination.

Instead, the lawyer is weighing the value of establishing the defendant's innocence against the value of achieving a broader political objective—the protection of women. On this judgment, the lawyer has no special expertise as compared to the legislature, which has apparently not seen the prohibition of this sort of cross-examination as appropriate. Perhaps some other rationale can be devised for the lawyer's enforcement of a prohibition the legislature failed to enact. For example, the legislature's inaction may be the result of a political process breakdown; even if the process is intact, the legislators' moral judgment may be profoundly wrong. However, the danger to democratic values entailed in such conduct by lawyers should not be gainsaid.

In sacrificing the client's defense, moreover, the lawyer does more than simply vindicate the rights of women, assuming we would permit lawyers effectively to make law for that purpose. The lawyer also denigrates the principles of proof beyond a reasonable doubt and the presumption of innocence. These are principles upon which the criminal justice system rests, and to which society appears to give widespread assent. I doubt that individual lawyers can lay claim to an intellectual or moral understanding that justifies abridging principles so firmly rooted.

Luban's position is also troubling because its implementation would entail a blatant use of the lawyer's power over the client. Imagine for a moment how the lawyer would put this judgment into practice. One possibility might be that the lawyer would engage the client in a transformative moral dialogue—but I cannot believe that many men falsely accused of rape would conclude that sound moral principles require them to forego cross-examination that may exonerate them. Another possibility would be that the lawyer would simply tell the client the tactics that the lawyer is refusing to implement. Any defendant who has time and money would find himself another lawyer. It follows that a lawyer could not implement this line of reasoning unless the client had no alternative available to him or unless the lawyer did not tell the client what was going on. If the lawyer did implement this course of action, it also follows that an innocent man would be more likely to go to prison.

What is most important about Luban's argument, however, is its implication that every criminal defense lawyer must assess in a range of cases where the balance of oppression lies, and modulate the zealotry of her work on behalf of her client in accordance with this calculus. Woe betide the white charged with a racial crime against a black, or the businessman charged with defrauding the poor. Or, to vary Luban's own example: where would the balance of oppression lie in the case of a young black man charged with the rape of a white woman? Such questions may be impossible to answer. At best, lawyers' calculations

on these issues will be bound to vary with their political convictions, unless certain political beliefs are ruled out of bounds.

Luban is well aware that his example is controversial. He writes that he chose it "to stress what should be obvious, namely that any moral theory that allows you to answer hard questions confidently is simple-minded" (p. 152). His example, however, and those I have added, support a different conclusion. The risk that defense lawyers will allow their personal predilections on this extremely ambiguous comparison of oppressions to cause innocent defendants to be convicted is clear. The question Luban has posed for defense attorneys is, I submit, one that should not be asked.

The second of Luban's inferences is equally startling. Luban believes that the "criminal defense paradigm" should be understood to embrace civil cases as well, if those cases involve relatively weak clients "in confrontations with powerful organizations," public or private (pp. 156-57; see p. 65). As Luban declares, this means that lawyers for powerless clients "can fight dirtier than their adversaries' lawyers can fight back" (p. 157). Workers against employers, tenants against landlords, welfare recipients against the welfare agencies, and so on; the list would be a long one and, again, no two lawyers' lists would necessarily be the same.⁹²

Even if we can decide who is powerful and who is not, we may, as Luban points out, consider it unfair for one side to get a more zealous lawyer than the other. The effect of this principle is to give all powerless people a tactical advantage against all powerful organizations. The powerless enjoy this advantage without regard—if we generalize from Luban's discussion of the rape case—to the merits of the particular case in which this advantage is conferred. Luban's reason for giving the lawyers for the powerless this special advantage is not just that doing so will promote more accurate decision making (for example, by compensating for other advantages enjoyed by the powerful), but that the powerless need the prophylactic protection of the criminal defense paradigm "even at the expense of justice" (p. 63).

Luban asserts that the charge of unfairness is misleading because the more powerful party's lawyers can still be zealous within the bounds of common morality (p. 157). Those, however, are quite stringent boundaries. If the lawyers for the powerful adhere to them,⁹³ then letting the lawyers for the powerless breach them is a form of affirmative action quite unrelated to any immoral lawyering conduct actually taking place in the case at issue.⁹⁴ Indeed, if lawyers for the powerful obey

92. The inevitable differences in views presage equally inevitable problems if this principle were actually made the subject of enforcement proceedings.

93. If the lawyers for the powerful themselves continue to breach the bounds of common morality even after Luban's constraints are in place, then we might quite readily authorize such conduct by the lawyers for the powerless as a form of self-defense.

94. Perhaps, however, it would be a singularly ineffective affirmative action scheme.

Luban's common moral prohibition on seeking substantively unjust results, and if their notions of justice reflect a proper grasp of common morality, then they should concede all cases against the powerless in which common morality calls for the powerless to win. The litigation advantage Luban gives to the lawyers for the powerless would then operate *only* in cases in which the powerless are not morally entitled to prevail.

Here, therefore, as in the weighing of criminal defense tactics in light of the balance of powerlessness in the courtroom, Luban's progressive correction generates results that are seriously questionable. I do not find it disturbing that Luban seeks to protect the powerless at the expense of the powerful. The protections Luban devises, however, seem painfully crude. The rape complainant is shielded from cross-examination, despite the falsity of her charges, on the judgment of an individual lawyer. The lawyers for the powerless are authorized to act immorally, while lawyers for the powerful are not, even though sometimes, at least, the claims of the powerful ought to be vindicated.⁹⁵

Whether these rules would effectively protect the powerless is not clear. That they could distort the truth-finding function of the law is clear. Perhaps there is nonetheless some room for lawyers to make "progressive correction[s]" (p. 65) of the disparities of power in the cases they handle, but the instances of such corrections that Luban has outlined suggest that we should be very cautious in applying this principle.⁹⁶ Otherwise we risk undermining, rather than promoting, equal justice under law.

I have tried to show that in this respect and others Luban's guidelines for the reform of legal ethics risk grave moral harm themselves. Undercutting client autonomy, lawyers' obligation to obey lawfully adopted rules of ethics, and the system's ability to achieve just results—

Judges, after all, will know that in any conflict between the powerful and the powerless, only the lawyers for the former are bound by the rules of common morality. Can they possibly trust the lawyers for the latter in these circumstances?

95. George Orwell once observed, "I had reduced everything to the simple theory that the oppressed are always right and the oppressors are always wrong: a mistaken theory, but the natural result of being one of the oppressors yourself." G. Orwell, quoted in M. Walzer, *Obligations: Essays on Disobedience, War, and Citizenship* 46 (1970). Luban does not make this error, but his distribution of the right to act immorally has something of this flavor.

96. By contrast, William Simon's concept of ethical discretion appears to call on lawyers, when they decide how they will handle a case, to focus substantial—though perhaps still not exclusive—attention on the merits of the individual case. See Simon, *supra* note 48, at 1090–113. The price of greater responsiveness to individual facts may be that Simon's lawyers would be more likely than Luban's to make arbitrary distinctions between genuinely similar cases. Nonetheless, I am inclined to see such individualized discretion as preferable to the more exclusively political judgments Luban makes. I am not at all sure, however, that even individualized discretion can properly guide lawyers' exercise of the broad power to modulate the vigor of their advocacy that Simon would confer on them.

and presenting potentially insoluble enforcement problems—these reforms turn out to have significant costs. Given that, as I have also sought to demonstrate, Luban's challenge to the morality of the existing rules of ethics is considerably overstated, I believe he has not made the case for the new regime he urges.

II. SERVING THE POWERLESS

A more conventional, and less theoretically problematic, response to the impact of inequalities on the legal system is to try to ensure that those who lack power in our society do not lack lawyers in our courts. This approach has had some noteworthy successes, such as the rise of public interest law firms and the establishment of the Legal Services Corporation. It would be less than candid, however, to claim that this response has satisfactorily addressed the impact of inequality on the law.

In the second half of his book, Luban turns from a consideration of lawyering in general to a focus on the issues involved in the effort to address inequality through lawyering on behalf of "the people." He identifies "two fundamental normative problems" to be considered (p. 238). The first is whether our society is obliged to provide legal services to people who cannot pay for them. The second is whether providing such services in what Luban calls a "politicized manner" (p. 238)—focusing on law reform and social change rather than on implementing individual clients' expressed wishes—is justifiable. In this Part, I will look at the first of these issues; in Part III, I will take up the second.

A. *Luban's Proposals for the Expansion of Legal Services*

As Luban demonstrates, the gap between the legal services poor people in this country need and those they actually receive is appalling (pp. 241-43). In order to narrow this gap, Luban makes a valuable series of "modest proposals" (p. 267). He calls for the "deregulation of routine legal services"—that is, the end of the bar's monopoly on drafting wills, arranging uncontested divorces and the like (pp. 269-70). At the same time, private practitioners would be encouraged to serve a wider range of the legal needs of the poor through "judicare," the legal equivalent to Medicare, providing government payments to private lawyers and paralegals for services rendered to the poor (p. 271). In addition, Luban would establish "legal advice bureaus" whose function would be to solve simple legal problems and funnel more complex cases to higher tiers of the system (p. 272). With all of this in place, the final tier would be full-time legal services lawyers who would handle the most intricate cases and those with the greatest impact (p. 272).

Moreover, Luban would establish a system of mandatory *pro bono* work by lawyers (p. 277). He recognizes that this idea has been attacked on a number of practical grounds, and his proposal ingeniously seeks to limit the force of those objections. For example, Luban at-

tempts to minimize the growth of a *pro bono* bureaucracy with a simple referral and record-keeping system, in which clients would be issued "coupons" with which to "pay" their lawyers, and lawyers would turn the coupons in at the end of each year to prove that they have met their obligations (p. 279). The plan reduces—though Luban recognizes it may not eliminate—the risk of incompetent *pro bono* work by requiring lawyers to spend up to ten of their forty *pro bono* hours per year (and all of their first-year hours) in appropriate continuing legal education programs. Luban's system also responds to the reality that some lawyers can ill afford forty hours a year of unpaid work by implementing a "graduation feature," which would remove part or all of the *pro bono* obligation from those lawyers for whom the full forty hours would be unusually burdensome (pp. 279–81).

The result of these and other features, Luban argues, would be a substantial increase in the legal services provided to the poor (p. 288). I agree. These proposals demonstrate Luban's ability to work fruitfully as a planner as well as a moralist, and in most respects they have great merit as policy ideas. However, I want to look closely at two issues. The first is whether it is true, as Luban argues, that an increase in legal services for the poor is not only wise, but also an obligation of society as a whole. The second is whether the call for mandatory *pro bono* legal services is sound as a matter of policy or morality.

B. *The Societal Obligation to Provide Legal Services*

Luban argues that the "denial of access to legal services is a form of the denial of access to the legal system" (p. 244). Moreover, he contends, poor people lack access to legal services not simply as the result of the invisible hand of economics, but rather, even primarily, because of social and governmental decisions such as the grant to the bar of a monopoly on the right to give legal services (pp. 246–48). I believe this point is largely correct. We must recognize societal responsibility for the lack of legal services for the poor, especially if we remember that the state has helped to shape the economic system as a whole.

Luban does not draw from this foundation the conclusion that the poor have a *moral right* to legal assistance. Applying a definition of moral rights as "claims to goods necessary for expressing our moral personality" (p. 248), Luban argues that, normally, putting our case in court is not in itself essential to expressing our moral personality. Instead, what is essential is what we are seeking in court; appearing in court and having a lawyer's assistance are just paths to those goals (p. 249).

Even if access to legal services is only a means, however, we may have a moral right to it. If the good we seek is something to which we have a moral right, then I would suggest that we have a moral right not only to the good, but to a means of obtaining that good. If legal services are necessary to obtaining that good, we have a moral right to

legal services. Even if it is *possible* to obtain the good without legal services, the fact that there is a moral right to the good might well carry with it a moral right to reasonable access to that good—and so make legal services a moral entitlement if this assistance is reasonably, though not absolutely, integral to achieving our goal.⁹⁷

This argument would not give us a moral right to legal services in every case, for sometimes what we want legal assistance to attain will not be one of our moral rights. Often, however, the poor may well be making legal “claims to goods necessary for expressing [their] moral personality.” In other instances, poor people may be asserting legal rights which, though not falling in this category, are conferred by laws that are consistent with the principle of fair play and so morally entitled to obedience. Perhaps legal rights comporting with fair play are moral rights as well. In a considerable range of cases, in short, poor people could have a moral right to legal assistance.

These arguments are tentative, but they deserve exploration because the rationale Luban offers instead proves to be unpersuasive. This is not to say that Luban conclusively rejects the idea that there is a moral right to legal services (though at one point he writes that he has “denied” that we have such a right (p. 265)). He does find it easier to rest this right on a different foundation (pp. 248–49).

Luban asserts that our political system is premised on the idea that people are entitled to equality of rights (though not of fortunes), and that this idea embraces not merely moral but also legal rights. In Luban’s terms, equality of legal rights is a “legitimation principle” of our government—that is, one of the “unwritten understandings within a polity, forming the framework of political legitimacy from which positive law derives its authority” (p. 250). Moreover, he argues, “[w]hatever is necessary to the legitimacy of a form of government it must grant as a matter of right” (p. 264). Since access to the courts is necessary to equality of legal rights, and access to legal services is essential to meaningful access to the courts, there is a right to legal services, not as a matter of moral right or legal right, but as a matter of “legitimation right” (p. 251).⁹⁸

If our legitimation principles are those we *ought* to believe in, and if our acceptance of a principle means that we also accept its logical implications, then Luban’s argument is a powerful one. However, Luban does not appear to be prescribing legitimation principles; instead, he observes that “legitimation rights will differ from system to system” (p.

97. Cf. *United States v. Kras*, 409 U.S. 434, 445–46 (1973) (upholding constitutionality of bankruptcy filing fee as applied to indigent petitioner, in part of the ground that bankruptcy is not the “sole path to relief” from debt).

98. See also Excerpts from Committee to Improve the Availability of Legal Services Report, N.Y.L.J., July 12, 1989, at 6, col. 3 (committee appointed by Chief Judge of the New York Court of Appeals expresses concern over the impact of the unavailability of legal services on “the legitimacy of the legal system itself”).

265), depending on the legitimation principles which the governments in those systems offer to their citizens (p. 251) and which those citizens may or do embrace (see p. 265). His claim is based on "the rules of the game," albeit unwritten rules (p. 250).

Even so, if we conceive of the government as a coherent, precisely reasoning and unitary entity, then we might well expect to find that it offers its citizens a similarly well-defined set of legitimation principles, from which it would be entirely appropriate for individual citizens to derive rights by sheer logic. If our government is not like this—if, instead, our government is substantially a government of and by the people—then its legitimation principles presumably tend to be those that the people give to each other. That is, our legitimation principles are roughly the principles we believe in.⁹⁹ Given this premise, it seems perfectly possible for people to adopt legitimation principles which are illogical or unpleasant—say, the view that equality of rights is guaranteed so long as rich and poor alike are forbidden to sleep under bridges.

It is not necessary to take this argument to such an extreme to see the problem with Luban's position. People do not hold broad principles that can be wholly separated from their specific intentions and understandings.¹⁰⁰ We as a nation may agree that equality of rights entails equal ability to enjoy legal rights. Yet we may also agree that government should encourage self-reliance or that scarce governmental resources should go first to the provision of true moral rights and only secondarily, if at all, to other goods. The legitimation principle of "equality of rights" may not exist in absolute form, but only as qualified by other widely held convictions, some of which may be legitimation principles themselves.¹⁰¹ Luban himself writes that "[t]he historical

99. Luban finds proof of the existence of the "equality of rights" legitimation principle in "a fair reading of American political history," which, he argues, reveals that this principle "has always been a common denominator of American political life" (p. 253).

100. See Sandalow, *Constitutional Interpretation*, 79 Mich. L. Rev. 1033, 1046 (1981) ("Intentions do not exist in the abstract; they are forged in response to particular circumstances and in the collision of multiple purposes which impose bounds upon one another.").

101. Luban's characterization of legitimation principles as "unwritten understandings within a polity, forming the framework of political legitimacy" (p. 250) by no means etches a sharply defined category. It seems possible that quite a number of beliefs, including mutually contradictory ones, might form part of this framework of unwritten understandings.

It is also possible that a nation might have no unwritten understandings that form a framework of political legitimacy. One could imagine a society whose members agreed only on certain written understandings and took all other questions as "up for grabs." Less fancifully, a society as diverse as Luban has said the United States is, see Luban, *supra* note 35, at 483-84, may not have any universally shared understandings but only some core of widely (but not universally) held beliefs. Or perhaps we have a number of groups of believers, among whom there are many beliefs shared by various groups, but none held by all.

record shows that few of those who espoused equality-of-rights-not-fortunes contemplated the possibility that the government would play any role at all in affirmatively providing for substantive equality" (p. 256).¹⁰²

I do not mean to reject the effort to derive our understanding of rights at least in part from our understanding of the ideas that have held, or still hold, sway among Americans. What seems flawed in Luban's analysis is his effort to ground this derivation in the argument that it flows ineluctably from principles that demonstrably form part of the basis on which our government rests. I think such derivations should be understood as arguments for the adoption of moral (or political) values—and good arguments—rather than as delineations of what already shared values *demand*.¹⁰³

102. The difficulty with invoking the seemingly necessary consequences of the imperfectly logical beliefs people actually hold is clear if we consider a further implication of the idea of "equality of rights." Luban correctly points out that since lawyers are employed to deal with other lawyers, supplying the poor with minimally adequate legal services does not give them equality with the rich, who are purchasing superior legal services (p. 240). He denies, moreover, that the rich are "in some sense *entitled*" to superior legal defense (or, presumably, offense) (p. 277). But *if* equality of rights is achieved by the provision of minimally adequate counsel to the poor, and *if* we do not question the moral right of the rich to spend their wealth as they wish so long as equality of rights is preserved, then the rich *are* entitled to purchase superior legal defense.

Luban's rejection of the idea that the rich are entitled to superior legal services thus may imply that "equality-of-rights-not-fortunes" actually calls for everyone to receive the same level of legal services. This position is quite logical: if legal services are not equal, then rights are not equally guaranteed. Luban has offered elsewhere an argument, though not on the basis of legitimation rights, for such equality of services. Luban, *supra* note 73, at 643–45. I believe the majority of our citizens, however, would reject this social policy, at least in part because they would see it as a denial of their liberty to spend their resources as they wish. If so, then Americans do not embrace the legitimation principle of equality of rights in anything like its full potential rigor.

103. Luban suggests that a society that violates a legitimation right of access to the courts is a society in which those denied this right are justified in resorting to "the law of the streets" (p. 255; see p. 266). This is a loaded, but ambiguous, phrase. Its most troubling interpretation—though this may not be Luban's intention—would be that the violation of this legitimation right morally justifies armed rebellion. Liberal theory does recognize a right of rebellion in the face of sufficient injustice. See M. Walzer, *supra* note 95, at 49–50 (discussing Locke and Rousseau). Even if we assume that the right to legal services is a legitimation right, however, it does not follow that breach of this right *ipso facto* triggers any right of rebellion.

There would be two distinct problems with a claim of a right to rebel. First, a moral right to rebel is presumably a moral right to kill at least some other members of society. It strikes me as odd that the rebels would have this moral license, since on Luban's account they might not be able to claim that they themselves had been denied a moral right when this legitimation right was breached—for Luban has refrained from arguing that access to legal services is a moral right. Second, I would suggest that whether citizens of the United States or any other country have a right of rebellion should depend on far more than an assessment of whether they have the legal services to which they are entitled. It seems unlikely that any society fully lives up to its legitimation principles, and it would be a mistake to contend that all societies are fitting targets for rebellion as a result.

C. *The Bar's Mandatory Pro Bono Obligation*

The debate over the imposition of mandatory *pro bono* responsibilities is not new. Although the efforts of the Kutak Commission to embody such a duty in the Model Rules ultimately came to naught (pp. 277-78), years of executive branch efforts to reduce the funding for legal services help make the issue remain a timely one.¹⁰⁴ Luban has offered a thoughtfully designed *pro bono* system, but his proposal presents both practical and moral problems.

As a practical matter, even Luban's plan does not dispel concern over the quality of mandatory *pro bono* lawyering. It creates the troubling prospect of lawyers with forty hours' training and annual ten-hour supplements taking whatever cases come their way from the vast array of legal problems encountered by the poor. Although case screening and "backup" support services might ensure that the work of *pro bono* lawyers is at least adequate, lawyers with this amount of training and experience cannot be experts in poverty law generally. If *pro bono* lawyers and full-time poverty lawyers have roughly equal innate skills and would spend roughly similar amounts of time and resources on any given case, then it is reasonable to predict that *pro bono* lawyers will tend to provide services that fall below those provided by full-time poverty lawyers. Wouldn't it make sense, therefore, to abandon the effort to extract labor from the rest of the bar and extract money instead? Each lawyer might be required (with suitable hardship exceptions) to buy forty hours' worth of time at her normal billing rate. The funds could be used to hire lawyers who would in aggregate provide just as many—and probably more—hours of lawyering, and would in due course become experts in what they are doing.¹⁰⁵

104. For recent state bar reactions to this issue, compare Excerpts from Committee to Improve the Availability of Legal Services Report, *supra* note 98, at 6, col. 3 (endorsing mandatory *pro bono*) with Feeley, MSBA Decides on Pro Bono: Bar Won't Require Lawyers to Donate Services, *Baltimore Daily Rec.*, Oct. 3, 1988, at 1, col. 3 (Maryland State Bar Association Board of Governors rejects mandatory *pro bono* while increasing support for voluntary efforts). Luban notes that as of 1987 seven jurisdictions had mandatory *pro bono* programs (p. 277 n.15).

105. Luban's *pro bono* system does include a "buyout feature," but as a subsidiary element rather than the core of the system (pp. 279-80).

While the cash-out proposal might generate better lawyering, it has its own practical defects. The first is that spending one's money may garner even less support from the bar than spending one's time, in part because the principle of *pro bono* work has a quite substantial place in the traditions of the profession. See Model Code EC 2-25; Model Rule 6.1; Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. Rev. 735, 756 (1980); see also *Mallard v. United States Dist. Court*, 109 S. Ct. 1814 (1989). The second is that, as Luban points out, *pro bono* service (unlike *pro bono* payments) will acquaint the members of the bar as a whole with the realities of the lives of the poor in our country. (Admittedly, this virtue of mandatory *pro bono* service—if virtue it be—is a paternalistic one. Shapiro, *supra*, at 782.) To some extent these objections might be handled, however, with a plan that offered each lawyer the choice of whether to donate her time or money; the price of cashing out could be fixed so as to provide each lawyer an

Determining whether to seek lawyers' time or their money, however, is less fundamental than determining whether the imposition of any special obligation on members of the bar is morally appropriate. If access to legal services is a legitimation right, after all, it is a right that society as a whole is bound to honor. A mandatory *pro bono* plan at first blush appears to mean that lawyers pay for the realization of this right, while a system of government-funded legal services imposes the cost on society as a whole.

In fact, this contrast may not be so stark as it appears. If lawyers are able to pass the cost of their *pro bono* work on to their paying customers, then a mandatory *pro bono* system would not actually single out lawyers for a disproportionate moral burden. It is possible, moreover, that many or most lawyers will be able to pass on the cost of their forty hours per year of *pro bono* work. Presumably, a complete pass-through, after all, would raise the paying client's fees by only about two percent.¹⁰⁶ The more the present demand for legal services is insensitive to price, the more successful lawyers would be, at least in the short run, in passing this cost on.¹⁰⁷ If lawyers would succeed in passing on much or all of the cost of meeting their *pro bono* obligation, then it seems to me that we could accept comparably less forceful moral justifications for the remaining, modest economic imposition on lawyers.¹⁰⁸

It is not clear, however, just how successful lawyers would actually be in passing this cost on to their clients. It is not certain just how competitive the market for legal services is, but the more competitive it is, the less of their *pro bono* cost increase lawyers may be able to pass on, even in the short run.¹⁰⁹ Even if some lawyers are well-positioned to

economic incentive for whichever form of *pro bono* contribution (time or money) the planners preferred.

106. Forty hours of work is two percent of a working year of 2000 hours—fifty forty-hour weeks. This estimate does not take account of the administrative costs of the program or, perhaps, of individual lawyers' participation in it. If Luban's design succeeds in making administration relatively simple, however, then these additional costs would not dramatically alter the two percent estimate.

107. See Shapiro, *supra* note 105, at 783.

108. As David Shapiro has also noted, the requirement that lawyers perform services for clients has implications distinct from a requirement that lawyers pay money equivalent to the value of the time they would spend. Conscripting lawyers to represent positions in which they do not believe may be morally problematic. It is doubtful, however, whether most lawyers would find the tasks of poverty law morally intolerable. Those few who do might be granted conscientious objector status, as Shapiro suggests. See Shapiro, *supra* note 105, at 764–67. Or, in a plan that permitted lawyers to choose between giving money and giving time, these lawyers could simply choose money.

109. In a perfectly competitive market, lawyers would not be able to pass on the full cost of their *pro bono* obligation, because an increase in prices would reduce demand. Economic theory also suggests that if lawyers can currently pass on noncompetitive portions of any cost increases, in the long run there will be incentives for new lawyers to compete for the clients on whom these costs have been imposed by offering services at lower prices.

It is quite possible that the market for legal services is by no means perfectly com-

pass on their costs, moreover, many others may be in much less flexible economic circumstances. Some of these lawyers might avoid the burden of *pro bono* on the basis of a "graduation feature" taking account of hardship, but others—for example, reasonably well-paid government lawyers—might neither be eligible for exemption nor have any way to pass their costs on.¹¹⁰

Even if we could dismiss the burden on lawyers from our moral calculus, we would still have to ask whether imposing the cost of *pro bono* work on lawyers' paying clients would be appropriate. Perhaps we should think of these costs as a fee, paid by those who make use of the bar to cover the cost of seeing to it that the bar's work contributes to a system of justice rather than injustice. As a general proposition, it may be fair to charge users of a service or facility in proportion to the benefits they receive, or in proportion to the costs they generate. I am not satisfied that a two percent price increase for all clients would in any precise sense correspond to the clients' generation of costs in the form of injustices, for many clients use lawyers to achieve rather than to subvert justice. The case for this charge being proportionate to the benefit clients receive, however, is stronger. The price hike is precisely proportionate to what clients spend on legal services, and if what clients spend is roughly a proxy for what benefit they receive, then the price increase

petitive, and there may be ground to doubt that it will ever become so. The steady rise in salaries and hourly fees at many firms suggests that these firms do have considerable ability to pass along their increased costs. See *Lawyers' Billing Rates Are Rising As Firms Try to Cope With Costs*, *Wall St. J.*, July 28, 1989, at B8, col 5. For additional evidence that corporate clients are not very price-sensitive in their shopping for lawyers, see Lochner, *Comment on Chayes and Chayes, Corporate Counsel and the Elite Law Firm*, 37 *Stan. L. Rev.* 305, 308-09 (1985).

Corporate clients, moreover, are particularly astute. There is evidence that other potential clients do so little effective searching for lawyers that it would be surprising if they were able to monitor and resist small price increases successfully. See D. Rosenthal, *Lawyer and Client: Who's In Charge?* 65 (1974) (every member of a sample of 59 Manhattan personal-injury claimants retained the first lawyer who agreed to take the client's case); *id.* at 129 ("Generally speaking, clients choose the first lawyer they know who comes to mind, the first lawyer recommended to them, or the first lawyer they meet."); *id.* at 131 ("only three of the 24 clients dissatisfied with their attorney took the case to another lawyer"); see also Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 *U. Pa. L. Rev.* 41, 90-92 (1979) (on weakness of market controls over lawyers).

Even if the market for lawyers' services were perfectly competitive, a pass-through of costs attributable to the lawyers' *pro bono* obligation might win some acceptance from those clients (if there are any) who would view such a pass-through as fair. For an intriguing exploration of the role of perceptions of fairness in economic decisionmaking, see Kahnemann, Knetsch & Thaler, *Fairness and the Assumptions of Economics*, 59 *J. Bus.* 285 (1986).

110. The mandatory *pro bono* proposal in New York would permit lawyers at small firms to "buy out" of their twenty hour per year obligation for \$1000, a seemingly modest rate of \$50 per hour. The proposal has encountered sharp opposition, in part on the ground that the buyout price is too high for many lawyers. See Solo, *Small-Firm Lawyers Oppose Pro Bono Report*, *N.Y.L.J.*, July 12, 1989, at 1, col. 3.

is proportionate to the benefit clients enjoy.¹¹¹

A second argument would analogize this price increase to a tax. If the users of legal services over time reasonably resemble the taxpayers as a whole, then imposing this cost on them might be morally justified for the same reasons that taxing them to obtain the money would be. This rationale could apply even if the users of legal services resemble only the wealthier members of our population; their shouldering of the costs of *pro bono* work could be seen as a form of progressive taxation. As a tax, the *pro bono* charge is subject to objections on grounds of both inefficiency and unfairness.¹¹² If these objections can be answered, however, then we have a further basis for accepting the morality of charging clients for the cost of *pro bono* work.

111. However, to the extent that some clients, but not others, are able to resist their lawyers' efforts to impose this price increase, then a moral question would be presented by the disparate treatment of different clients.

112. One such objection is that "taxing" people through this mechanism may be less efficient than taxing them directly. Conceivably this inefficiency should be seen as a moral as well as an economic problem. I am not convinced, however, that this particular inefficiency would stand out morally from a host of others which government or private action may impose on us every day. While we should not incur avoidable inefficiencies even if they are not specially troublesome on moral grounds, one major reason for accepting inefficiencies is that they are *not* avoidable. If no other politically feasible plan for supplying legal services to the poor is now on the horizon, then I believe the tax inefficiencies of mandatory *pro bono* would be worth accepting.

A second objection is that even if the population of clients in the long run "reasonably resembles" the taxpaying population as a whole, in the short run some taxpayers (the current clients) rather than others (the potential future clients) will be paying the bill. For clients who are regular users of legal services, this potential "lumpiness" of their obligation will not materialize. For clients who use a lawyer only a few times in a lifetime, however, the contribution they make to *pro bono* costs on the few occasions when they do retain lawyers will be quite disproportionate to their hypothetical liability as regular "taxpayers" at those times.

This lumpiness could be unfair. Yet the size of the *pro bono* "tax" will be small in proportion to the legal fees the client is already paying. Moreover, the fact is that we tolerate potentially far greater lumpiness in one aspect of the actual tax system already—the estate tax. The wealth of a family may be significantly reduced by estate taxes, and obviously the incidence of these taxes is not proportionate to any increase in the family's wealth during the year of the death that leads to the tax. Only in the long run, if at all, is the impact of estate taxes fairly spread through the population.

The impact of this charge as a tax might also be challenged on a third ground, that it is unduly progressive or regressive. The tax will tend to be progressive if the users of legal services are relatively prosperous, as noted in text. If the users of legal services roughly resemble the entire population, on the other hand, a "tax" of two percent of their legal costs might fall harder on clients of modest income than on clients who are wealthy. Whether the tax would actually be regressive or not would require careful calculation. I will not attempt, however, to address the morality of either progressive or regressive taxation here.

Finally, if lawyers did succeed in passing through all of their *pro bono* costs to their clients, then it might be argued that lawyers had escaped altogether from an obligation which is, after all, no less theirs than anyone else's. To the extent that lawyers would pay these costs when they themselves were the clients of other lawyers, however, this objection would lose its force.

If the cost of mandatory *pro bono* work is really to be borne by lawyers, however, then I think Luban's arguments for the fairness of this imposition are problematic. He asks, properly, why we should require lawyers to represent the poor if we do not require grocers to feed the poor. His first answer is that "[t]he grocery business could exist without state participation," whereas lawyers "retail a commodity manufactured by the state: law" and have a monopoly on their business. Indeed, "[t]he community . . . has made the law to make the lawyer indispensable. The community, as a consequence, has the right to condition its handiwork on the recipients of the monopoly fulfilling the monopoly's legitimate purpose" (p. 286).

Let us consider the several strands of this argument. First, there undoubtedly would be food distributors in any society whose economy entailed any substantial division of labor. *Grocers*, however, may not have been in business in the state of nature. The shape that food distribution takes is very much a matter within the actual or potential control of the modern state, so that even if lawyers are entirely a social creation it is not clear why they, and not grocers, should be subject to enforced donation of their stock in trade.

Second, although it is true that the bar has a monopoly on the right to perform legal services, individual lawyers do not exercise monopolistic power.¹¹³ The law is a field with huge numbers of participants and by no means sharply restricted entry. The monopoly on the right to practice law is a valuable prize, in status and in monetary terms, and the market for legal services may be considerably less than perfectly competitive, but the state has granted lawyers less than it grants to genuine monopolists.

Third, we have no general doctrine that requires state-created monopolists to donate their wares to those who cannot pay for them. The power company and the telephone company are not ordinarily expected to provide services without pay to the poor.¹¹⁴ Nor are doctors legally required to perform such services, though they may often provide them. Perhaps such legal duties should be recognized, but until they are we need some reason why such an obligation should be imposed only on lawyers.

These arguments might be irrelevant if it were true that the community had shaped the law *in order* to make lawyers indispensable. The more society has conferred a special boon on lawyers, and the more lawyers are swaying our political processes to serve their interests, the more we might call on lawyers to pay recompense. The claim that the law has been shaped to fit the interests of lawyers, however, is over-

113. Shapiro, *supra* note 105, at 776.

114. But cf., e.g., 16 U.S.C. § 2624 (1988) (requiring state power commissions and unregulated utility companies either to fix below-cost rates for provision of electricity for "essential needs," or to determine, after an evidentiary hearing, whether or not to do so).

stated. Luban himself says elsewhere in his book that he is “skeptical about how simple the law could be made in a society as enormously complex as ours” (p. 245 n.20). Moreover, even though the political influence of lawyers can hardly be denied, it should not be exaggerated. Undoubtedly lawyers are trying to prevail on lawmakers (many of them lawyers) to accommodate their needs. Undoubtedly these efforts sometimes bear fruit. However, society at large does not presently consider it a priority to accommodate lawyers. I doubt, moreover, that all lawyers are guilty of seeking unfair advantages—yet all lawyers will have a *pro bono* obligation. In addition, lawyers are hardly alone in trying to feed at the public trough. Again, it isn’t clear why lawyers should have an obligation not shared by all guests at the feast.

Though the monopoly argument is not persuasive, Luban’s other rationale may be more compelling. This point is that lawyers’ work imposes costs on others—externalities¹¹⁵—in a way that grocers’ work does not (p. 287). Perhaps grocers’ externalities *are* fairly modest. However, the externalities of the food industry in this country may not be modest at all (consider the effects of food additives or pesticides, for example).

Still, it is true that the food industry’s externalities do not include directly depriving anyone of food, whereas the externalities of lawyers do include depriving others of their legal rights. Feeding the poor would not redress the food industry’s externalities in any precise way, while representing the unrepresented *would* tend to reduce the unjustified damage lawyers may do to those without lawyers. In the aggregate, the total injustice done by the profession might be reduced.

Looked at more closely, however, the fairness of exacting such redress is questionable. The externalities on which Luban focuses are those harms inflicted upon the unrepresented. Not all lawyers inflict the same degree of harm on unrepresented third parties. At least some of the harm that lawyers do inflict (say, the successful embarrassment of a truthful prosecution witness in a criminal case) Luban would consider socially justified. If Luban’s prescriptions for lawyering in accordance with common morality were accepted, all of the lawyering on behalf of the powerful would be constrained by moral considerations whose effect is to avoid the unjust imposition of harm on others.

It is not clear why lawyers whom we *want* to inflict externalities should be liable for those externalities at all, nor why lawyers who inflict varying degrees of externalities should all be subject to the same measure of redress. Even when a particular lawyer is guilty of conduct that imposes unjustified harm on unrepresented adversaries or third parties, her forty hours of *pro bono* work on behalf of an entirely differ-

115. Samuelson describes “external diseconomies” as “harmful effects upon other people that result from one man’s production.” P. Samuelson, *Economics: An Introductory Analysis* 451 (7th ed. 1967).

ent set of people hardly recompenses the particular harm she caused, and may not even be proportionate to that harm. These considerations do not deprive the "redress of externalities" argument of all force; they do, however, weaken its appeal.

The imprecision of this argument is easier to defend if, in reality, lawyers pass on most of their burden of redress to a legitimately taxable portion of society at large. Let me suggest, however, two other arguments that might help justify the imposition of a *pro bono* obligation. First, if we think of this obligation as comparable to a tax, there is nothing unusual about the idea that those who are more prosperous should carry a greater tax burden. We hold to this idea even if we do not assert that these taxpayers' prosperity is the result of monopoly power or of unjustifiable profits at the expense of others.

Second, if we ask why lawyers alone should pay this extra tax, we might offer two responses. One is that other groups should pay as well, but that the inequity of imposing the tax on lawyers first is less severe than the sorts of inequities we hope to combat by this means. The other is that lawyers, perhaps more than many other groups, have a tradition of acceptance of *pro bono* service as an ethical obligation. To ask lawyers to improve their performance of this obligation may violate fewer settled expectations than a similar demand of most other professions. To call on lawyers to give meaning to their declarations of principle, finally, has a certain moral justice.¹¹⁶

III. THE PEOPLE'S LAWYER

Luban begins the chapters that focus on the work of the people's lawyer with a vivid example (pp. 293-97). He asks us to focus on a Public Interest Law Center which has decided, after discussions that included community groups and potential individual clients, to target the problems at the local public housing authority. To do that, the Center starts turning away all would-be clients who do not have housing problems. It even turns away potential housing clients who do not seem to be promising plaintiffs. It also refuses to represent clients seeking public housing unless those clients agree "to refuse assignment to housing projects that would perpetuate existing patterns of racial separation" (p. 295). Then, in the face of extensive opposition from many city residents, the Center brings one class action challenging conditions in the projects and another to compel the construction of a new project in a racially "transitional" neighborhood. This second suit is brought despite opposition not only from the Mayor but also from many black residents of an existing project in the same neighborhood.

116. As Etienne Mureinik has commented, "if there is a discrepancy between our protestations and our actions, others have a right to bridge the discrepancy and hold us to what we affirm." Mureinik, *Pursuing Principle: The Appellate Division and Review Under the State of Emergency*, 5 S. Afr. J. Hum. Rts. 60, 67 (1989).

This example aptly illustrates many of the problems of what Luban calls "politicized law practice" on behalf of the poor (p. 293). As usual, Luban incisively states the elements of the critique of this work, a critique that raises two broad and important concerns. One is that lawyers' politicized work for the poor, especially when it is publicly funded, is an undemocratic attempt to undercut majority rule. The other is that lawyers doing this work are misrepresenting and manipulating their actual and so-called clients. I believe that Luban correctly rejects the "objection from democracy," though my reasons for rejecting it are not quite the same as his. I also agree with much in Luban's treatment of the relations between the people's lawyers and their clients, but I will argue that he has nonetheless granted these lawyers too much power over those whom they seek to represent.

A. *The Objection from Democracy*

What Luban calls the "objection from democracy" is that "[i]t is wrong for groups that are unable to get what they want through ordinary democratic means . . . to frustrate the democratic will by obtaining in court what they cannot obtain in the political rough-and-tumble" (p. 303). Actually, the objection from democracy can be raised by lawyers' work out of court as well as in court. Lawyers for the poor may trigger this objection by inducing the courts to make decisions that alter the law as made in the political process, by lobbying in the political process itself, and by organizing new groups to enter the political arena. Luban points out that lawyers funded by the Legal Services Corporation are banned from both lobbying and organizing and are subject to tight restrictions on the bringing of class actions (pp. 300-01, 371, 387). His aim is to demonstrate that none of these activities, whether carried out with or without government funding, is antidemocratic.

Luban's rationale for each of these forms of lawyering is broadly the same. He argues, correctly, that our political system is far from perfectly democratic. From the weaknesses of our putatively majoritarian political institutions he draws the conclusion that resort to the courts to correct their failures is consistent with true democracy (pp. 360-70). From the integral role of lobbying and pressure groups in our political system, he reasons that if the poor are effectively denied the use of such tools, they are also denied their rightful political voice (pp. 371-80 (lobbying); pp. 381-86 (pressure groups)). And because a great deal of our tax money is spent in support of objectives opposed by at least some of the taxpayers, he argues that there is no special reason to treat the spending of tax money on the empowerment of the poor as problematic, so long as this empowerment is not itself antidemocratic (pp. 304-06).¹¹⁷

I agree with Luban that the poor should have access to the same

117. Luban gives a name to the claim that our tax dollars should not be spent to

lawful means of influencing political choices as the powerful enjoy. On this ground by itself, governmental spending to fund litigation, lobbying and organizing on behalf of the poor is justified.¹¹⁸ Luban's defense of litigation, however, rests on a rationale considerably more sweeping than the desire to equalize political resources and deserves a closer examination.¹¹⁹

The idea that the courts can correct flaws in majoritarian political processes is not, to be sure, a radical one. Luban's contribution is to take this rationale well beyond *Carolene Products*:¹²⁰ he looks to the courts for a response to two problems that may be virtually universal. The first is that legislatures are so exposed to political pressure groups that they need to be structured to make the passage of legislation difficult. "[A] legislature cannot be designed which will pass good legislation in a timely manner and simultaneously prevent the passage of dangerous legislation" (p. 363).¹²¹ The second problem is the difficulty of collective action. Because the organization of large groups of people for a given purpose is costly, and because there are always temptations for individuals to "free ride" on the efforts of others, "the larger the group, the farther it will fall short of providing an optimal amount of a collective good" (p. 364).¹²² Legislation, Luban adds, is "a paradigmatic example of a collective good, because when it is 'provided' for one person it is provided for everyone" (p. 364).

If these two problems are as endemic as Luban believes, then they will provide a ground for judicial intervention in almost any case challenging legislative action or inaction. Luban acknowledges that his theory greatly expands the scope of permissible judicial legislation, although he maintains that courts for various reasons should not choose to intervene in every case of legislative failure. Judicial inter-

support values we oppose: the "taxation objection" (p. 302). He maintains that this objection collapses into the objection from democracy.

118. The use of tax money for these purposes is not, however, quite the same as the regular governmental practice of making us pay for projects we oppose. In the normal case in which taxpayers' funds provide for objectives with which they disagree—defense spending, for instance—what happens is that the majority enacts a law and the minority is required to help pay for it. What Luban argues here, however, is in effect that the majority should help pay the minority to challenge what the majority wants to do. Thus, calling for such spending dilutes the principle that "the majority wins."

The upshot of this argument is to reinforce the importance of finding that, all things considered, governmental spending on the empowerment of the poor promotes democracy. Since I think Luban is right on this score, I think that this spending—despite its flavor of forced contributions to the undermining of one's own political position—is justified. Indeed, arguments for access to the political system might prove so strong as to generate moral or (following Luban) legitimation rights to such funding.

119. Luban does raise the issue of equal access to this form of litigation, but it is not his central focus (p. 370).

120. *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

121. Quoting R. Neely, *How Courts Govern America* 47-48 (1981).

122. Quoting M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 35 (1971).

vention might, after all, be unwise or ineffective or too provocative (pp. 367–68).

What Luban does not appear to accept is that judicial intervention would in any of these cases be antidemocratic. If he did accept this, then he might not be able to say, as he does, that “public interest lawyers are not usurping the functions of democracy by advocating that courts should intervene: a court can, after all, decline the invitation” (p. 368). For if judicial intervention would be antidemocratic, then inviting the court to intervene would be an effort to induce antidemocratic action, and so would presumably be antidemocratic itself—precisely what Luban wishes to deny on behalf of lawyers litigating for law reform.

It is hard to know how Luban’s conception would work in practice. As a matter of theory, however, I do not agree with him that judicial intervention in this immense array of cases would be consistent with democracy. As Professor Ely has commented, “[w]e may grant until we’re blue in the face that legislatures aren’t wholly democratic, but that isn’t going to make courts more democratic than legislatures.”¹²³ Authorizing judicial invalidation of statutes because of endemic imperfections of democratic structure plainly risks that courts will throw out those statutes that *do* express the popular will instead of, or in addition to, those that do not. Furthermore, authorizing such judicial action denies to the people the ability to entrust the making of certain sorts of decisions to their admittedly imperfect representative institutions.

Therefore, Luban’s defense of law reform litigation for the poor on the basis of this broad authorization of judicial intervention does not escape the objection from democracy. More modest theories of the judicial role than Luban’s have also stirred “countermajoritarian” concerns. It might be argued that these concerns call into question the democratic character of much of the law reform litigation that is presently brought. This essay is not the place for a defense of judicial intervention, even intervention on narrower grounds than Luban’s. Suffice it to say that I believe we have integrated a considerable range of law reform litigation into our polity without doing substantial damage to the fabric of our democracy.¹²⁴ So long as this appraisal holds true, denying the poor the ability to engage in such litigation while granting that right to the rich is undemocratic, and on this basis I agree with Luban’s rejection of the objection from democracy.

123. J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 67 (1980).

124. Compare Lynch, Book Review, 80 *Colum. L. Rev.* 857, 864 (1980) (reviewing J. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980)) (on the role of judicial consideration of fundamental values in the functioning of a representative democracy).

B. *The People's Lawyer and Her Clients*

Luban also addresses the claim that in important ways public interest lawyers do not properly represent their clients or their client communities. Luban identifies two distinct aspects of this issue: the "equal access" objection, which challenges government-funded lawyers' choices to target certain cases and to refuse to handle others, and the "client control" objection, which focuses on the relations between "people's lawyers" and those people they choose to represent.

1. *The Equal Access Objection.* — This objection, derived from the very right of equal access on which Luban has premised the right to legal services, challenges the legal services lawyer's prerogative to refuse to take cases because they do not fit her litigation priorities.¹²⁵ Luban's initial hypothetical illustrates the issue: the Center has stopped taking any clients who do not have housing problems. If all citizens are entitled to access to the legal system, and if the Center is meant to vindicate this right, then its refusal to serve those who do not have housing problems seems inconsistent with its mission (pp. 307-08).

Luban is quite right, however, to say that where resources are scarce, choices must be made (p. 306). He is also right to reject reliance on a lottery, on the ground that such a system could not ensure that the most significant cases are taken (pp. 308-10). The issue then becomes one of how to define significance. Perhaps significance should be equated with "urgency"—the more acute the particular client's need, the greater the obligation to take the case. Luban argues, however, that cases can be urgent because they are emergencies, because they are extremely important or because they affect a great many people. This argument may distort the word "urgency." It is not a distortion of our usual understanding of human need, however, to say that we take into account the number of people in need, or what they need, as well as the immediacy of their need.¹²⁶ If targeting the housing authority will help more people than would taking cases in a wider variety of fields, the Center's decision to adopt the exclusive focus on the housing authority and on clients with housing problems does respond to an important aspect of its potential clients' needs.

Though Luban has demonstrated that the extent of the problem that will be addressed—its "extensive urgency"—is an appropriate consideration in choosing cases, he has not demonstrated that extensive urgency can properly be made the only factor to be considered.

125. For other discussions of the equal access issues in legal services case selection, see generally Failing & May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 Ohio St. L.J. 1 (1984); Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C.L. Rev. 282 (1982).

126. Perhaps surprisingly, the morality of taking into account how many people we can help is subject to some philosophical dispute, which Luban deftly discusses (pp. 311-13, 405-07).

He touches on this point only briefly, suggesting that “[w]hen resources don’t permit universal access, maximal access is the closest we can get to equal access” (p. 315). It is not clear why this is so. So long as “urgency”—or let us say, rather, human desperation—takes a variety of forms, why should we feel we are closer to achieving “equal access” if we serve more people even though their needs are less immediately demanding or less important than the needs of those we send away? Here, the Center’s policy in effect denies that any client without a housing problem can have so pressing a problem that she should receive the Center’s aid. Indeed, this policy even excludes the possibility of making exceptions if nonhousing clients with acute and profound problems still make their way to the Center after word of its restrictive client selection policy gets out to the community.

An additional feature of Luban’s hypothetical makes this absolute exclusion particularly worrisome. Once the Center takes a housing client, its lawyers are prepared to address that client’s nonhousing as well as housing problems (p. 296). The Center handles these nonhousing issues to sustain its own lawyers’ morale, to strengthen its relationship with its housing clients, and to help the housing clients avoid trouble that would interfere with their housing. All these may be important reasons, but the upshot is that the lucky clients receive a benefit unrelated to any assessment of the significance of their nonhousing needs. At least one of these considerations, the lawyers’ morale, is only indirectly related to the extensive urgency that was the touchstone of the Center’s case selection. This combination of absolute exclusion of many clients and windfall benefits to others amounts to a denial of equal access.

It might be argued that equal access is being provided because these selection decisions are the result of a decision by the client community. This response is not persuasive, for two reasons. First, these decisions were not made by the community itself, but by the Center. As Luban says, though, the Center could hardly have held a referendum, and it did make a genuine effort to consult with the community and to respond to its needs and preferences.¹²⁷ Second, and perhaps more important, Luban did not suggest, in discussing the need for increased legal services in this country, that the majority of American citizens were entitled to deprive the minority of their right of access to the courts. If the right of equal access is a right the majority cannot legitimately override, it is not clear why the client community should have any greater power to deny it.

None of this is to suggest that legal services lawyers, or the communities they serve, must foreswear making choices among potential

127. For a skeptical appraisal of the extent to which legal services programs actually ascertain the true “desires of the client community” by involving clients in priority setting, see Breger, *supra* note 125, at 333–35.

clients. On the contrary, Luban is right that such choices are compelled because the lawyers are in such short supply. The import of this argument, however, is that although the range of client selection systems that a legal services office might adopt is wide, it is not unlimited. I am sure Luban would concur with this observation; we disagree only over the range of legitimate options. In this hypothetical, the Center has allowed its concern with public housing to lead it to provide housing clients with what amount to windfall services; it has also in effect asserted that "extensive urgency" always trumps other aspects of client need.¹²⁸ On both counts, the Center seems to me to have gone too far.

2. *The Client Control Objection.* — The equal access objection concerns those people whom the people's lawyers choose not to serve. The client control objection concerns those who are served. It has two facets, both illustrated by Luban's hypothetical. The first is that public interest lawyers may manipulate or coerce those they represent.¹²⁹ Luban's Center, for example, will only accept people as clients if they agree to refuse those offers of housing authority apartments that would perpetuate racial separation. The second is that many of those people whose interests the public interest lawyers claim to serve have not requested, and may not even be aware of, the lawyers' efforts "on their behalf." They may even be opposed to what the lawyers are attempting.¹³⁰ The Center, for example, brings a housing discrimination class action that is opposed by many black members of the neighboring community.

Luban expressly acknowledges that public interest lawyers do sometimes manipulate their clients for the sake of the cause. He also agrees that they sometimes file class actions despite the opposition of a majority of the members of the class. He writes, however, that "[w]hat I do not concede is that there is anything wrong with this" (p. 317). By this he means not that such conduct is always legitimate, but that it is appropriate under certain circumstances. Although I think his analysis of those circumstances is illuminating, his defenses of the manipulation of individual clients and the representation of people in their absence or against their wishes remain, in important respects, insufficient.

128. Cf. Failinger & May, *supra* note 125, at 45-46 (urging a "partnership model" of relations between lawyers and present or potential clients, in which lawyers' case selection rules "should not close off the client/applicant's right to plead the special circumstances of his or her case").

129. People's lawyers may also recruit their clients, but this does not raise a serious "client control" problem so long as the recruitment is not manipulative and the client's decision to accept the lawyers' services is free and informed (pp. 318-19).

130. This problem is likely to be most apparent in class actions, in which the fact of class certification may highlight the size of the group of absent, but very much affected, class members. (In some, but by no means all, federal class actions, members of the class are accorded an opportunity to opt out. See Fed. R. Civ. P. 23(c)(2).) Cases styled as actions on behalf of single individuals, however, may also be meant to have broad reverberations for others similarly situated.

a. *Manipulation of Clients.* — Although public interest lawyers do sometimes manipulate their clients for the sake of the cause, Luban denies that there is anything wrong, or at least unforgivably wrong, with this conduct (p. 317). He defends it on the ground that public interest law is a “political law practice” (p. 321), and that such conduct as this is part of politics. That might mean that the political end justifies the means, and Luban briefly explores this argument. Luban also advances, however, a more affirmative defense: that manipulation is an integral part of shared political life and so when lawyer and client have become political comrades, manipulation is inevitable and forgivable.

On its face, Luban’s argument that good political ends can justify otherwise unacceptable means may be chilling, but it is not unfamiliar. The belief that in politics “dirty hands” are inevitable can be traced back at least to Machiavelli (pp. 321–22).¹³¹ Moreover, the idea that we may have special responsibilities that require us to violate common morality will not be strange to lawyers, whose daily work may call on them to obey a professional role morality that breaches common moral demands. If the conduct that dirties our hands in politics violates common morality, we should still undertake it if political life generates a contrary and justifiable role morality of its own. The test of the validity of a political role morality is the same fourfold root analysis that Luban applied to the validity of the “standard conception” of lawyers’ role morality (p. 321).

Luban does not develop this analysis at great length. There are, however, certain difficulties in moving from the abstract statement that a political role morality might properly exist to the conclusion that lawyers’ manipulation of clients is justified. First, to apply the fourfold root analysis we must begin by asking whether the institution that calls for the particular conduct at issue is itself morally justified. What is the institution here? If it is political action as a whole, it is hard to know what we would say of its overall good or evil, since this is an institution presenting both spectacularly grisly and undeniably heroic examples of human action. Perhaps for this reason, Luban focuses not on the goodness of political action as a whole, but on “the substantive justice of the cause that the actors are trying to promote” (p. 323). Yet “the cause” itself may not be an institution, for there may be many different institutions seeking the same cause. Perhaps we must define the institution even more narrowly, for example as “lawyering devoted to realizing the cause.”

Second, we must ask whether the institution we have identified actually imposes a role obligation that entails manipulation of clients. If lawyers can achieve their goals without manipulation, then the institution of “lawyering for the cause” does not require, and so cannot jus-

131. Quoting Walzer, *Political Action: The Problem of Dirty Hands*, 2 *Phil. & Pub. Aff.* 160, 164 (1973).

tify, such conduct. Moreover, it is no proof of the existence of this requirement to point out that politics in general produces "dirty hands." What is at issue is precisely whether lawyering for the cause is an instance of the politics that produces this moral ambiguity.

It is not clear that lawyering that seeks to affect public *policy* is necessarily a form of *politics* at all. Much, if not most, of the work that lawyers do has some effect on public policy. The "people's lawyer" may act out of a desire to implement or make good public policy, but this impulse may be shared by many other lawyers. Lawyers who bring class actions for damages, for example, may well see their work as vindicating the rights of people who are unable to sue individually. The role of such lawyers may not evoke heroic images of the "people's lawyer." Yet it is difficult to construct a definition of the "people's lawyer" which separates those who rightly may claim to be involved in politics from those who, despite having political concerns, should still be viewed as practicing nonpoliticized law. Luban's brief description of politicized lawyering as "striving to reform laws, to advance the aims of social movements, or to change the social landscape" (p. 238) does not provide a clear basis for making this distinction.

Assume, however, that we can identify the people's lawyers, those lawyers who *are* engaged in a form of politics in which they seek "to enact a political agenda in the name of empowering the powerless in our society" (pp. 238-39). It does not follow that their particular avenue of political action necessarily embraces manipulative conduct. War is a continuation of politics, yet not all politics entails violence; lawsuits may be a continuation of politics, yet not all entail manipulation. Litigation as a political tool may operate in a relatively confined fashion and have relatively limited scope, in contrast to broad public mobilizations, which often generate far greater policy shifts and rely much more on freewheeling, even dirty, tactics. Even when lawsuits are part of major political movements, the lawsuits may make a contribution to the larger contest without being shaped in a dirty-handed way.

Even if manipulation is truly needed in public interest lawyering, we might still prefer to hamper law reform efforts rather than to accept the propriety of politically-motivated manipulation of clients. Lawyers of many different political convictions may imagine that they are working in the institution of political lawyering for the cause. A lawyer's decision that manipulation is politically justified will inevitably reflect her particular sentiments. A rule that permits otherwise unacceptable manipulation in the service of what the lawyer believes to be a good cause will open the door to a dreary range of client abuse. If this authorization of manipulation is not embodied in a rule, and political manipulation becomes a form of principled (though of necessity covert) disobedience of the law, then we must add to the other costs of this concept the price of encouraging lawyers to disobey the law. It seems to me, in short, that although ends may well justify means we should

look with great hesitation at the suggestion that political ends justify lawyers' manipulation of their clients.

Luban's second argument also relies on the nature of political life, but it rejects, in part, the claim that the troubling conduct inherent in politics dirties our hands. Luban sketches what he sees as the emotional experience of political comradeship, a relationship in which trust and suspicion, manipulation and loyalty, are deeply interwoven (pp. 329-35), and in which transgression is so essential that forgiveness is a necessity (pp. 336-37). Perhaps this is an accurate description of a good political life, though I must say I hope not.¹³²

In any event, people's lawyers and their powerless clients are quite unlikely to engage in the political comradeship Luban envisions. According to Luban, "mutual political commitment must be undertaken freely and reciprocally by people who regard each other as political equals" (p. 337). Where clients do not have a political commitment to the lawyer's goal, the lawyer cannot manipulate them under the mantle, or cloak, of comradeship. As Luban suggests, the Public Interest Law Center's demand that new clients—who have not yet become the lawyers' comrades—agree not to accept racially discriminatory housing assignments is therefore not justifiable on the basis of comradeship (p. 338).¹³³

Luban poses another example, however, that suggests that he may be prepared to find comradeship, and hence a basis for manipulation, too readily. Suppose a Center lawyer represents a tenants' organization member who agrees to be the named plaintiff in a case which the lawyer hopes will set an important precedent. Later, the landlord offers the client a tempting settlement, which would block the establishment of that precedent. Luban says that the lawyer and client are in comradeship. Therefore it is "entirely appropriate" for the lawyer to "pressure" the client not to take the settlement even if it is in her individual best interest. It is also permissible—at least in the sense that it is forgivable—for the lawyer to deliberately antagonize the opposition so that the settlement offer is withdrawn, provided the lawyer is sure she will win the resulting trial and provided she does not get caught (p. 338).

Is this tenant in comradeship with the lawyer? To say that she is

132. For a description of a different vision of lawyering on behalf of the oppressed, see White, *supra* note 4. Drawing on the work of Paolo Freire, White describes a process in which the lawyer, "[r]ather than manipulating the group to preserve her own authority, . . . tries to engage the group to displace her as authority." *Id.* at 763. Luban might well find much to admire in this vision. I suspect he would say, probably correctly, that manipulation cannot be excised even from such idealistic transformations.

133. Not all political life, however, rests on comradeship. Surely Machiavelli did not mean to forbid manipulation outside of such relationships. If good political ends can justify lawyers' manipulation of their clients, then the Center's manipulation might be defended after all as necessary to political action, albeit not comradely political action, directed to a good goal.

means, on Luban's account, that lawyer and tenant undertook this commitment freely and with the belief that they were political equals. It is open to question whether the tenant's commitments satisfy either of these standards. If the tenant did not appreciate that manipulation was at the core of political life, then she did not know that she was exposing herself to such conduct. Moreover, while Luban properly indicates that the lawyer should disclose to the client "all of the attorney's own political aims" (p. 318), it is difficult to imagine anyone disclosing to the new comrade that she has signed on to be manipulated. In short, the tenant may have freely decided to join the movement, but never decided to put up with manipulation.¹³⁴

Nor is it likely that lawyer and tenant will frequently act out of an unalloyed belief that they are political equals. When this happens it is to be welcomed, but the lines of race, class and status in this country affect thinking in ways that are hard to escape. Even public interest lawyers and their low-income clients may rarely achieve a whole-hearted belief in their mutual equality.¹³⁵ The comradeship of equals, in short, is not easy to achieve; unfortunately, lawyers may find it all too tempting to imagine they have achieved it, and so have acquired a moral basis for manipulation.

In offering his arguments for the legitimacy of manipulation in political lawyering, Luban does not mean to justify widespread manipulation. On the contrary, he regards the moments of client manipulation as "rare events in the career of the people's lawyer" (p. 317). There may indeed be circumstances, however infrequent, in which lawyers and clients do achieve full comradeship. There may also be situations in which, even without comradeship, a special role morality applicable to political lawyering may justify otherwise unacceptable manipulation.

134. Nor does the assumption that she agreed to be the plaintiff in the case in order to help the cause in any way demonstrate that she knew she was subject to comrades manipulation. In practice, moreover, I doubt that many clients undertake litigation solely to help the cause; more, I would speculate, also hope to help themselves. When the tempting settlement offer arises, these two motives come into conflict. Unless a client is warned in advance of this prospect and of the likely response of the lawyer, she may well not anticipate (let alone consent to) the manipulation she then encounters.

135. Perhaps in part for this reason, William Simon urges the "critical lawyer" to "further the client's interests, as she [the lawyer] understands them," while "also try[ing] to enhance the client's capacity to express her own interests. The authoritative test of the lawyer's judgment is that the client come to share it under conditions in which the lawyer believes that the client's understanding is not affected by conditions of hierarchy." Simon, *supra* note 4, at 486.

For a study of lawyer-client interviews in a legal services office, interviews in which the lawyers maintained persistent domination over the course of the conversation, see Hosticka, *We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 Soc. Probs. 599 (1979). Hosticka suggests that this conduct, however well-intentioned, "can communicate to clients the feeling that the 'system does not care' about the unique individuality of persons." *Id.* at 610.

As Luban presents his arguments, however, they authorize manipulation in a potentially quite wide range of contexts. Much litigation affects public policy, many lawyers and clients share public policy objectives—but these circumstances, even for lawyers for the people, do not generally go far towards justifying manipulation.¹³⁶

b. *The Lawyer's Duty to the Client Class.* — Luban's discussion of the lawyer's role in class actions is an effort to respond to the truly intractable problems of representativeness posed by the class action device, while still retaining it as the potent weapon for change that it can be.¹³⁷ His thoughtful argument embraces the proposition that democracy requires that people be permitted to make their own mistakes, and seeks to explain how a mode of legal representation in which lawyers may act in direct contradiction to the views of many or even most of their clients can be squared with this principle.

His answer is that class lawyers should be as representative of the class as possible. How representative is that? In some cases, Luban tells us, the entire class can actually be canvassed; the lawyer who acts on the class members' instructions thus acts on their "direct delegation" (p. 351). Where direct delegation is impossible, the lawyer may obtain "indirect delegation" by acting on the instructions of class members who have themselves been directly selected by the class (p. 351).¹³⁸ If indirect delegation is not feasible because the class is not organized enough to select its own representatives, then the lawyer may engage in "interest representation." In this setting, the lawyer chooses class members she believes are representative of the interests of the entire class and acts in light of what the representatives tell her (p. 351).¹³⁹

136. See Ellmann, *supra* note 63, at 773–74 (suggesting that lawyers' manipulation of their clients on behalf of third parties is generally inappropriate).

One further aspect of the manipulation question deserves mention. Assuming the landlord in the landlord-tenant case is one of the powerful rather than the powerless, Luban's earlier arguments, see *supra* text accompanying note 55, indicate that the landlord's lawyer will be obliged to refuse to carry out any immoral objectives of her client. Meanwhile, the powerless tenant's lawyer will be empowered to manipulate *her* client for the sake of the cause. The result is that instead of being a forum for the resolution of the conflicting desires of landlord and tenant within the framework of the law, this piece of litigation (and others) may be turned into an encounter between two lawyers' notions of what is right.

137. For an extensive discussion of these problems, see Rhode, *Class Conflicts in Class Actions*, 34 *Stan. L. Rev.* 1183 (1982).

138. Luban describes the lawyer with indirect delegation as "acting on the wishes of, or taking as nominal clients," the people selected by the class as a whole (p. 351). I assume that he means that the lawyer—unless she is engaged in politically justified manipulation—obeys these individuals' instructions.

139. In interest representation, as in indirect delegation, Luban describes the lawyer as "acting on the wishes of, or taking as named clients," the particular members of the class (p. 351). Elsewhere, however, Luban writes that in interest representation the lawyer should "consult with a part of the class that adequately represents the values of the class members, without worrying too much about their actual wishes" (p. 346 &

Finally, if "interest representation" is not reliable because the class members include future generations, whose interests the living class members may fail to represent, then the lawyer may have to resort to what Luban calls "best-world representation" (p. 352). As he acknowledges, "best-world representation" may not deserve the term "representation" at all, since in it the lawyer acts on *her own* conviction of what is right (pp. 351-52). Luban argues, however, that the lawyer's freedom to act in this fashion must be constrained by three considerations: the degree of uncertainty about the interests of the future generations, the extent of the sacrifice that will be exacted from the present class members, and the extent to which the present class members' choice could effectively be reversed in the future. The greater the long-term uncertainty and short-term sacrifice, and the more reversible the present decision, the more the lawyers should defer to the judgment of their existing clients (pp. 349-51).

These guidelines are valuable, and they are far from toothless. As Luban points out (pp. 349-50), a lawyer seeking to desegregate schools who realized that her client class actually wanted to improve separate black schools might be obliged to follow the class's lead unless she was, for example, quite sure that the interests of future generations demanded that she press on for desegregation.¹⁴⁰ Nonetheless, Luban's guidelines for representativeness do not resolve certain important problems in the representation of classes.

First, although Luban raises the problem of disagreement within the class (p. 344), his guidelines leave much of this problem unresolved. Disagreement, after all, is not necessarily confined to cases in which the lawyer provides only interest representation or best world representation, and so is not, on Luban's account, closely bound by what the class members want. Suppose, to put the most difficult case, that the lawyer is acting on direct delegation from her class, the views of whose members she is able to canvass. She learns, however, that the class members disagree.

Luban does not explicitly address this sort of conflict. He draws support for his guidelines, however, from a discussion of representative democracy (p. 352), and it may be that he believes that people's lawyers should aspire to represent their communities in something akin to the way that elected officials represent their constituencies. This is not necessarily an unwise aspiration. Certain aspects of electoral representation, however, do not transfer well to lawyers' roles.

In an election, a difference of views between majority and minority

n.12). I will return below to the question of lawyers' power over their clients in interest representation. See *infra* notes 147-49 and accompanying text.

140. Cf. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *Yale L.J.* 470 (1976) (criticizing gap between total desegregation position pressed by some civil rights lawyers and sentiments of many black parents).

is resolved by the victory of the larger group. Their candidate takes office, and the other side's does not. By analogy, when a majority of a class voted to instruct its lawyer to pursue a particular litigation objective rather than another, the lawyer bound by the majority's decision would simply obey. A lawyer who deliberately refused to voice the views of a portion of her class, however, would not have given the dissenters their day in court. In legal terms, they would not have received adequate representation;¹⁴¹ in the terms of Luban's argument, their right to equal access to court would have been impaired.

To remedy this problem, even in part, it is necessary to devise procedures to bring the existence of dissension to the attention of the court and to enable dissenters to obtain independent representation.¹⁴² Such steps are desirable, in my judgment, although they may undercut advocacy of the class majority's interests. I am inclined to endorse them even if, as William Simon suggests, in some cases all members of the class might be worse off if the differing views are separately represented,¹⁴³ although this strikes me as a much closer question. Desirable or not, however, the members of the class majority may oppose such devices. In that event, if the class lawyer is to act in accordance with winner-take-all principles, she should not facilitate the presentation of minority views. If, on the other hand, the class lawyer is to follow another principle of elective politics—that elected officials are to represent all of their constituents—then she should encourage separate minority voices. The implications of principles of electoral representativeness for the duties of lawyers litigating on behalf of divided classes, in short, remain unclear.

Similarly, a faithful application of the principle of majority rule might mean that some lawsuits were never brought at all, despite the fact that a minority of the class wanted to bring them. Had most black parents opposed school desegregation lawsuits, a lawyer committed to this form of representativeness would not have brought *Brown v. Board of Education*,¹⁴⁴ even if the lawyer herself and her named plaintiff believed that desegregation was constitutionally mandated.¹⁴⁵ If all law-

141. See Fed. R. Civ. P. 23(a)(4). As Rhode notes, Rule 23's requirement of adequate representation is "of constitutional dimension." Rhode, *supra* note 137, at 1192.

142. See Rhode, *supra* note 137, at 1247-57 (describing reforms meant to assist in these functions). Rhode herself emphasizes that these steps have only "bounded potential." *Id.* at 1258; see also Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 *Tex. L. Rev.* 385, 405-09 (1987) (proposing an alternative response to similar concerns).

143. Simon, *supra* note 4, at 481-82.

144. 347 U.S. 483 (1954).

145. The statement in the text assumes that the lawyer considered herself bound to represent the wishes of the black parents. If she concluded, however, that the parents could not speak properly for blacks who would be affected by segregation in the future, then a lawyer following Luban's schema might decide to bring the suit after all as a form of "best-world representation."

yers followed the same reasoning, or no other lawyers were available, the minority would be denied access to the courts, and any right they sought to assert would be denied vindication—surely in at least some cases an unacceptable result.¹⁴⁶

Second, Luban's description of "interest representation" may not fully reflect the extent to which the lawyer's decisions in this form of representation will be the fruit of her own convictions rather than the sentiments of the class. The duties of interest representation do call on the lawyer to pay attention to the thinking of class members in situations where the class is not organized enough to give the lawyer direct or indirect delegation. This is a valuable requirement, but it is important to see clearly how much power lawyers will still wield in this form of representation. Luban's description of this role is somewhat ambiguous on this score,¹⁴⁷ but I do not take him to be urging the lawyer to try to learn from her consultations what the class *wants*. The lawyer would have great difficulty doing so, for she has no way to be sure that the preferences of the representatives with whom she consults are the preferences of a majority of the class. Luban's hope may be, rather, that a lawyer who has taken care in her selection of representatives has some assurance that their problems and concerns are typical of those of the entire class. Moreover, since the class is not mobilized enough to select representatives from whom the lawyer can receive guidance, the class members' preferences may be too unconsidered to be entitled to obedience (p. 346 & n.12).

Luban appears to acknowledge that the result is that the lawyer engaged in interest representation will make paternalistic decisions concerning her clients' needs (*id.*). He hopes, however, that the lawyer will make those decisions in light of an accurate understanding of the values of the class members (p. 346). She is to get that understanding from the class representatives whom she selects. There is no reason to believe, however, that the values of these class members will be any more representative of the class as a whole than their preferences. The lawyer's effort to abide by the clients' values while not "worrying too much about their actual wishes" (*id.*), moreover, may lead her to essentially the same faulty distinction between broad principles and specific applications that we encountered earlier.¹⁴⁸ When the lawyer looks to the clients' values, she is all too prone to be looking to her own ideological and sociological convictions or those of the experts on whom

146. It is true that in this particular legal context a single plaintiff could sue for, and win, structural relief without denominating her case a class action. Rhode, *supra* note 137, at 1196. While this is correct as a matter of substantive law, a lawyer who understood her obligation to represent the affected community to call for fidelity to majority wishes would, I think, have to refrain from bringing this case whether it was labelled an individual or a class action (*cf.* pp. 342-43).

147. See *supra* note 139.

148. See *supra* note 100 and accompanying text.

she chooses to rely.¹⁴⁹

Third, the discretion that Luban vests in lawyers to override their living clients on behalf of future generations in “best-world representation” is problematic. I do not want to overstate this discretion, for Luban is careful to constrain quite sharply lawyers’ prerogative to decide on behalf of the future. Nonetheless, it appears that Luban would permit lawyers to intervene for the sake of the interests of future generations in some cases in which he would consider it unjustifiable paternalism for lawyers to intervene simply to protect their living clients’ interests.¹⁵⁰ His premise for permitting lawyers to use their own judgment is that when the interests of present and future generations are not identical, the members of the present generation may be poor representatives of their unborn descendants. If this premise is right, then the lawyer may not be justified in acting on the wishes or needs of her present clients, because the views of the representatives of the present class members may disserve the needs of the future.¹⁵¹

There is force to Luban’s argument, for there are cases in which the interests of present and future class members conflict. This problem can arise even when all the class members are part of the *present* generation. Current employees, to give one example, may have interests in a discrimination suit that are different from those of future applicants. If the present class members are unable to put aside their own interests so that they may speak for the entire class, and if another attorney is not available to voice the interests of the future class members, then Luban may be right that the lawyer must decide for herself what will protect those who are not yet in a position to protect themselves. Yet we should not welcome such occasions for “best world” representation, for in these cases the lawyer represents her own views rather than those of her clients.

Qualified as it is, Luban’s willingness to permit “best world” representation on behalf of future generations is questionable on three

149. Especially in light of the fragility of the lawyer’s representative status, the problem of class conflict is important here just as in cases of direct or indirect delegation. If we are to provide representation as fully as possible, then we must seek to insure that those class members who actually want something which the lawyer believes they do not need are able to make their voice heard in court.

150. Luban would consider paternalism unjustified if it was directed at clients whose decisions were well-informed and accorded with their own well-considered values (p. 346 n.12). Clients who make such decisions, however, may still have a conflict of interest with their future descendants, for what fits the clients’ values may not fit the future generations’ needs. In these circumstances, intervention on behalf of future generations could be justified by Luban’s logic.

151. Presumably this point would hold whether the lawyer’s relation to her living clients rested on interest representation or on direct or indirect delegation. Thus it would seem to follow that even if the lawyer could canvass the views of every living class member—so that direct delegation from them would be possible—she might have to reject their instructions if their interests differed from those of future generations.

counts. First, the unborn may not legally be persons.¹⁵² This is not simply a legalistic point. If we acknowledged that the unborn, despite their nonexistence, had enforceable rights against the living, we would have to accept that our entire process of self-government was subject to control by whichever of the living were empowered to enforce those rights.

Second, to grant lawyers a right to override the decisions of the living seems in tension with our treatment of the one future generations problem that our law does address quite extensively: the question of parents' rights and responsibilities towards their living, minor children. Parents do not have unlimited rights to make decisions for their children, but parental authority is very substantial. They can be forced to forfeit this authority altogether only in limited circumstances and with considerable procedural safeguards.¹⁵³ "Best world representation" is a far more modest intrusion than termination of parental rights, but the vesting in individual lawyers of authority for even this lesser intrusion remains troubling.

Third, there is much to be said for the proposition that people are quite altruistic and concerned judges of what their descendants need from them. I do not claim that we are perfect on these scores; our capacity for inadvertent or self-serving errors is clear. The well-being of their descendants, however, is *not* something to which people are indifferent. Nor is it something people are generally unwilling to sacrifice for, as the efforts of countless parents to provide for their children's education attest. Moreover, while parents undoubtedly fail in these duties, lawyers—who are also members of the present generation—are clearly prone to roughly the same sorts of errors and self-deceptions as are their clients. While Luban calls on lawyers to intervene less readily when they are uncertain of the best course of action (p. 350), virtually *every* intervention will rest on uncertain premises.

These considerations suggest that Luban's grant of substantial discretion for lawyers to intervene on behalf of future generations is inconsistent with the authority we generally give to the members of the present generation. "Best world representation" is thus a substantial departure from standard notions of attorney-client relations; it is also a deviation from the premises of electoral representation.¹⁵⁴ I do not

152. This formal point is of great political and legal importance. See generally *Roe v. Wade*, 410 U.S. 113 (1973).

153. See *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) (termination of parental rights requires clear and convincing evidence); but cf. *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 33-34 (1981) (parents not automatically entitled to appointment of counsel in termination case).

154. Luban maintains that existing representational democracy may entail best-world representation of the unborn as well. He comments that "institutional changes that affect future generations cannot be representative in any . . . [other] sense—they are at best best-world representation" (p. 352). If elected officials make such best-world decisions, however, they do so subject to the risk of defeat at the polls, and perhaps on

mean to suggest on this basis that we should prohibit lawyers from pressing class claims unless those claims command the support of most present class members; I think the possibility of misjudgment by the present class members is too great for such a rule. We may not need the "best-world representation" theory to provide the basis for such work, however, so long as we agree that lawyers are entitled to bring such claims when a portion of the current class supports them.¹⁵⁵ If we acknowledge that such claims do not necessarily embody the views of the entire class, it becomes all the more important to insure the representation of other class members' views—but we will not have blocked the assertion of any claim so long as it enjoys the support of some members of the plaintiff class.

It remains chilling to realize that the class action, so essential to giving genuine protection to the rights of the poor and the unorganized in our society, also confers on individual lawyers a broad prerogative to embody their personal politics in "representation." There is inevitably a danger that even when lawyers exercise this authority carefully and in good faith—to say nothing of lawyers who fall short of these standards of practice—people's lives will be shaped by the accident that their class lawyer held a particular, perhaps idiosyncratic, set of beliefs.

Yet this potential must be weighed against two other considerations. The first is necessity. The people's lawyer represents people who have little access to justice.¹⁵⁶ A pragmatic assessment of how much representation is possible may lead to the conclusion that the people's lawyer should be granted more power to weigh, or even to choose among, the interests of those she represents than normal conflict of interest or representation principles might permit.¹⁵⁷ Such an assessment would reflect that when members of a class of poor people disagree, it is unlikely that the various subclasses will be able to find separate representation. A lawyer who represents any particular sentiment within the class may well be obliged to facilitate the voicing of dissident views, but the position that that lawyer chooses to advocate herself will probably be the only view forcefully urged on behalf of the

the basis of an implied authorization from their current constituents. Neither feature is evident in lawyers' best-world decision making.

155. See *supra* notes 144–146 and accompanying text.

156. For a cogent analysis of the impact of scarcity on a range of legal services lawyers' allocations of resources among their clients, see Tremblay, *Toward a Community-Based Ethic for Legal Services Practice* (Aug. 10, 1989) (unpublished manuscript).

157. See *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 *Harv. L. Rev.* 1244, 1461–69 (1981) (suggesting a relaxation of the fiduciary duties of test case litigators to their individual plaintiffs); see also Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 *Colum. L. Rev.* 669, 726 (1986) (arguing that plaintiff class action attorneys are "different from other attorneys, both in terms of the extent of the conflict [between attorney and client interests] and the potential for opportunism.")

class. If the lawyer has chosen to represent a minority view, it is that view rather than the perspective of the class majority that will be put effectively to the court.

This result is not consistent with the principle of majority rule—and yet I believe it should be tolerated. Lawyers cannot effectively advocate multiple, contradictory positions, and therefore they must either choose one position or, in a sense, choose none. Faced with the obligation of choice, the people's lawyers should, I suggest, be allowed to decide to represent the sentiments of that portion of the class whose views—in the lawyer's judgment—best serve the needs of the class as a whole. In light of the possibility that contrary majority views are ill-considered or wrong, and in light of the critical need to use scarce legal resources to assist the class as well as possible, I would suggest that such paternalistic decisionmaking by lawyers is justifiable.

Second, it may be that the risk of nonrepresentativeness is not as acute in the practice of the people's lawyer as it is in theory. The legal campaign for desegregation may not have had unanimous support from the black community, but it was hardly idiosyncratic. As Luban writes, "[t]he NAACP has been pursuing a legal strategy on behalf of school desegregation for fifty years This strategy was pursued in the face of unimaginable adversity, in the face of skepticism on the part of many blacks, in the face of factionalism and unclarity: and yet, the practice of law has seldom yielded such noble fruits" (p. 343).

The NAACP and the NAACP Legal Defense Fund were able to pursue this strategy because, despite dissent and opposition, their strategy drew on a powerful chord in black and white American thought. Other litigation campaigns also draw strength from, or find weakness in, their ability to attract monetary, intellectual, moral, and political support from the country. This reality is no guarantee of perfect representation for the client class, especially if that class is dependent on others to finance efforts on its behalf. There is also no guarantee that a campaign that wins wide support will not later prove to have been profoundly misguided. Nonetheless, the fact that the strength of a law reform campaign is linked to its command of adherence from some or many Americans is a genuine check on the risk of true arbitrariness.

Perhaps paradoxically, invoking the political process as a check on the risk of arbitrary advocacy generates a further issue of representativeness. Luban urges—and I agree with him—that lawyers have a role to play in lobbying and in organizing pressure groups, as well as in litigation. Lobbying *can* be done on behalf of clients. Lawyers can also lobby, however, without directly representing any clients at all. An Association of Poverty Lawyers, say, could hire a lobbyist and send her off to work in Washington. What duty of representation, if any, would such independent lawyer-lobbyists have?

The meaning of representation in the context of community organizing may be even less clear. There is no reason why a community

group, or political party, should be barred from advocating positions that a majority of its community or electorate reject. The very point of such advocacy would be to persuade those who disagree with the group to change their minds. This means that activists are not bound to represent current opinion. Lawyers as advocates, on the other hand, are under a substantial duty to represent their clients' wishes. Are lawyers under any obligation to be representative in their work as organizers?

Luban discusses the lawyer's role in community groups briefly and helpfully, but he does not speak primarily in terms of the hierarchy of representational duties he develops earlier (pp. 387-90). He correctly notes the risk that lawyers and legal strategies will unduly dominate a group's development, and so he urges that "the lawyer must stay out of the way at first, and . . . throughout the group's existence, the lawyer must maintain a subordinate role" (p. 389). These instructions do not insure that the lawyer is somehow representative of the community as a whole, nor are they meant to. They do seek to safeguard the group's internal freedom from the risk of lawyers' domination. Whether these instructions are easy for lawyers to obey, and whether lawyers' obeying them would in practice weaken the growth of community groups, are questions that need further exploration.

Luban does offer one qualification on his instructions to lawyers in community groups. They should maintain a subordinate role, he says, "at least when this is consistent with responsible representation" (p. 389). This is an important and perhaps far-reaching qualification. To take just one of its implications, this proviso might suggest that lawyers who see their duty to future generations as compelling them to take a more prominent role in the community group should do so. Perhaps lawyers who feel that the group of activists is imperfectly representative of the present community are also entitled to take a less deferential role in light of their own responsibilities to the community as a whole. Such possibilities as these attest to the potential tension between lawyers' representation of communities and their assistance to community groups, and suggest the need for further development of the criteria for democratic legal practice in explicitly political arenas.

CONCLUSION

This review has explored some—but not all—of the issues Luban raises. I have argued that Luban has not made a convincing case for a broad revision of legal ethics so as to take account of common morality. His argument for mandatory *pro bono* work is also problematic, though I am inclined to agree with his conclusion that such a program would be morally justifiable. Finally, although there is a great deal to agree with in Luban's discussion of public interest practice, in certain respects the norms of this practice that he would endorse would undercut the principle of client control. These issues are important, and this review is intended to contribute to the debate over them. However, it needs to

be said that Luban's book has already contributed a great deal. Again and again, Luban identifies important questions, recognizes arguments contrary to his own and puts them strongly to the reader, and then proceeds carefully and vividly to develop his own position. His book is at once engaging and provocative, and is a welcome and valuable contribution to thinking about legal ethics.