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Lawyer's Justice

William A. Edmundson
University of Mississippi School of Law

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*William A. Edmundson**

LAWYERS AND JUSTICE: AN ETHICAL STUDY. By *David Luban.* Princeton: Princeton University Press. 1988. Pp. xxix, 440. Cloth, $55; paper, $12.95.

THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES. By *Philip B. Heymann* and *Lance Liebman.* Westbury, N.Y.: Foundation Press 1988. Pp. xxvii, 354. Paper, $16.

David Luban's[1] thoroughgoing philosophical examination of legal ethics may well come to define many of the terms of debate on the subject, much as John Rawls' *A Theory of Justice* has defined the terms of debate in political theory in the years since its publication. The premise of the book — and certainly a correct one — is that "our nation is so dependent on its lawyers that their ethical problems transform themselves into public difficulties" (p. xviii). Luban's effort to bring lawyers' ethics "before the 'tribunal of reason' itself" will no doubt add considerable impetus to the growing public conversation about law, lawyers, and justice.

Luban focuses upon what he terms the "standard conception" of the lawyer's role. The standard conception is defined by two principles: a "principle of partisanship," which commits the lawyer to an "extreme partisan zeal on behalf of the client"; and a "principle of non-accountability," according to which "the lawyer bears no responsibility for the client's goals or the means used to attain them" (p. xx). The book has two broad aims. The first is to show that in civil matters the standard conception, and particularly its principle of nonaccountability, is untenable from the viewpoint of "secular ethical thought" (p. xxvi). The second aim is to show that, with respect to civil as well as criminal matters, relatively powerless individuals have an implicit right under our principles of government to at least a minimal level of legal services, underwritten by the state. The two aims could be summarized by saying that the first is to strip the powerful of overzealous advocacy in the civil arena, and the second is to guarantee zealous advocacy there to the powerless.

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* Assistant Professor, The University of Mississippi School of Law. B.A. 1972, Antioch College; Ph.D. (Philosophy) 1982, University of California, Berkeley; J.D. 1985, Duke University. — Ed. I am indebted to Michael Hoffheimer, Monroe Freedman, Tim Hall, Ray Patterson, and Tom Morgan, for their helpful comments on an early draft of this review.

1. David Luban is a Research Scholar at the Institute for Philosophy and Public Policy, and Professor of Law at the University of Maryland.

Part I of the book presents Luban's challenge to the theoretical structure in which the standard conception is embedded. This structure forms what Luban terms the "dominant picture" of legal ethics, which consists of three elements: a theory of role morality akin to F.H. Bradley's ethical system; the "adversary system excuse" for following role morality rather than "common" morality where the two conflict; and the standard conception itself, which defines the lawyer's role (pp. xix-xx). Luban's challenge is motivated by the (widely shared) belief that the standard conception creates a professional role whose duties are often intolerably far removed from those of common morality. Luban's examples include these:

— a lawyer "bends her talents and ingenuity toward getting a guilty, violent criminal back on the street" (p. xx);

— a lawyer assists "a man convicted of incest to regain custody of his children" (p. xxii);

— *Annesley v. Anglesey,*[2] in which a lawyer privately prosecutes a man at the bidding of a client, whose sole interest is that he stands to gain financially by the man's conviction (pp. 3-9, 14-15, 49-52);

— *Zabella v. Pakel,*[3] in which a lawyer enables a "wealthy man . . . to evade a five thousand dollar debt to an 'old friend, countryman and former employee' by pleading the statute of limitations" (pp. 9-10, 47-53, 82);

— a lawyer presents perjured testimony on behalf of a criminal defendant and brutally discredits truthful opposing witnesses (p. xxi);

— The "Lake Pleasant Bodies Case,"[4] in which lawyers acting on their client's information locate and photograph the bodies of two murder victims, but do not disclose this information until much later (pp. 53-54, 149-53, 179, 185-86);

— *Spaulding v. Zimmerman,*[5] in which a lawyer defending a personal injury suit learns that the plaintiff has a life-threatening aneurysm, of which the plaintiff is unaware, and does not inform him (pp. 149-53, 179, 203).

In most of these examples, not only does the dominant picture put the lawyer at odds with ordinary morality, it also makes the lawyer an enemy of the law itself. Luban passionately, but cogently, rejects the realist suggestion that zealous advocacy shows law all the respect it is due (pp. 11-49), and cites the following as instances of lawyers working to frustrate the law by seeing to it that the party that legally should prevail does not:

— lawyers for the D.C. Metro arguing that personal injury suits

2. Annesley v. Anglesey, 17 How. St. Trials 1139 (1743).

3. 242 F.2d 452 (7th Cir. 1957).

4. People v. Belge, 83 Misc. 2d 186, 372 N.Y.S.2d 798 (1975), *aff'd.*, 50 A.D.2d 1088, 376 N.Y.S.2d 771, *aff'd.*, 41 N.Y.2d 60, 390 N.Y.S.2d 867, 359 N.E.2d 377 (1976).

5. 263 Minn. 346, 116 N.W.2d 704 (1962).

against the subway system could not proceed in a court created after the Metro's chartering, and that filing there did not toll the statute of limitations (pp. 13, 18, 49);

— lawyers challenging Immigration and Naturalization Service detentions on the ground that the detention centers had been built without necessary environmental approvals (pp. 13-14);

— forum-shopping (p. 14);

— taking inconsistent positions (pp. 14-15).

Luban diagnoses these symptoms as products of "instrumentalism run amok" (p. 13) and traces this condition to the prevailing client-service ethic of the profession, derived from the standard conception. He argues that the standard conception and its client-centered ethic ought to be replaced with an ethic of "moral activism" (pp. xxii, 160-61). The morally activist lawyer shares responsibility for the aims of the representation, challenges aims that are morally unworthy, and cares about means beyond their mere legality. When in disagreement with the client, Luban's lawyer "does not simply terminate the relationship, but tries to influence the client for the better" (p. 160), and even may — from the client's viewpoint — betray the client.

Luban painstakingly exhibits the manner in which the standard conception relies for its justification upon appeals to the adversary system and the roles it requires — this is the "adversary system excuse."[6] The adversary system excuse is but an instance of a general pattern of justification for role-motivated departures from common morality, which Luban somewhat infelicitously calls "the fourfold root of sufficient reason" (pp. xxii, 129-39). Within the "fourfold root" pattern, the validity of an excuse is determined by how strongly the institution appealed to is itself justified.

Before measuring the strength of the many justifications that have been offered for the adversary system, Luban distinguishes between a "civil paradigm" of adversary justice and a "criminal paradigm" (pp. 58-66). For reasons that I will explore in some detail, he concentrates upon the possible justifications of the civil — rather than the criminal — paradigm of adversary justice. After analyzing a range of defenses of the morality of the (civil) adversary system — including consequentialist arguments as well as a "human dignity" argument advanced by philosopher Alan Donagan[7] — Luban concludes that it is at best weakly justified. Therefore, he argues, the civil adversary system, as an institution, cannot justify "any but the most insignificant deviations from common morality" (pp. 67-93, 154). Luban concludes that the

6. Pp. xix-xx, 148-56. Luban's discussion here develops earlier thoughts that appeared in Luban, *The Adversary System Excuse,* in THE GOOD LAWYER: LAWYERS' ROLE AND LAWYERS' ETHICS 83 (D. Luban ed. 1983) [hereinafter THE GOOD LAWYER].

7. Pp. 85-87 (*citing* Donagan, *Justifying Legal Practice in the Adversary System,* in THE GOOD LAWYER, *supra* note 6, at 128-33).

principle of nonaccountability is untenable in the civil arena, and that the principle of partisanship is thus seriously constrained, "for accountable lawyers can optimize client outcomes only within the limits of common moral obligations."[8]

Thus, the principal result of the book's first part is a split-level standard of zeal — old-fashioned, standard zeal for criminal defense attorneys and attorneys for the little guy in "quasi-criminal" civil matters, and a "limited zeal" standard for lawyers for the state and for powerful institutions.[9] But the overall argument itself depends upon the claim that the standard role of criminal defense attorneys is justified in a fashion that is inapplicable to the adversary system generally. To understand the structure of the argument, it is important to explore in detail Luban's reliance upon the distinction between civil and criminal representation.

Luban's key claim is that while the "final cause" of the civil paradigm is "legal justice," that of the "criminal defense paradigm" is "not legal justice but the protection of accused individuals against the state or, more generally, the preservation of the proper relation between powerful institutions and those over whom they are able to exercise their power" (p. 66). Therefore — and this is a crucial turn in Luban's overall argument — the evaluation of the adversary system *as a system of justice* must be focused upon the civil paradigm to the exclusion of the criminal paradigm, for it is only within the civil paradigm that the adversary system functions primarily as a system of justice, *i.e.*, as a system primarily concerned with truth and desert. Luban distinguishes the "criminal" and "civil" paradigms this way:

> The criminal defense paradigm includes any litigation context in which zealous advocacy is justified by virtue of the fact that we have political reasons to aim at prophylactic protection from the state, even at the expense of justice. In the same way we can speak of a "civil suit paradigm": this involves any litigation context in which, because we are confronted with a dispute between relatively evenly matched 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]

8. P. 155. Luban embarks upon a "desperate and tedious safari," p. 145, to preserve a role for "role" morality, *see* pp. 128-47, and he even embraces the preservation of a role for roles as a criterion of his project's success, *see* p. 125; but in the end his view accords *lawyers'* role-bound considerations a vanishingly small weight. *Compare* pp. 146-47 (roles *generally* create "new possibilities of human acknowledgment," so that role-directed conduct — despite its variance from common moral demands — satisfies common morality's central demand that one act so as to acknowledge the humanity of others) *with* pp. 154-55 (the merely pragmatic justification for civil-paradigm adversary system means that "when [legal] professional and moral obligations conflict, the moral obligation takes precedence").

9. Pp. 58-66, 156-58. A relaxed standard of zeal in civil litigation is similarly urged by Murray L. Schwartz. *See* Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. BAR FOUND. RES. J. 543, 553-54; *see also* Zimmerman, *Professional Standards Versus Personal Ethics: The Lawyer's Dilemma*, 1989 UTAH L. REV. 1, 5.

What supplies these "political reasons"? Luban identifies the source as "classical liberalism":

> a complex involving . . . the ideas that the state exists primarily to protect its citizens in the pursuit of their own goals and not to pursue goals of its own; that individuals have rights, natural or otherwise, against the state; and that the greatest danger to citizens is the state itself. [p. 63]

Luban adverts that the first of these ideas holds "little appeal" while the second and third have been made plausible by "[t]he terrifying advent of totalitarian regimes in our century" (p. 63). Luban finds the political theory of classical liberalism "incomplete, if . . . not actually false," however, for "[i]t neglects the fact that the state is not the only concentration of enormous power in modern society" (p. 63). To correct this deficiency, Luban recharacterizes the "criminal defense paradigm" as

> any litigation context in which zealous advocacy on behalf of relatively weak clients is justified by the fact that we have political reasons to aim at prophylactic, or preemptive, overprotection of the individual from powerful institutions (including the state, but also including private institutions), even at the expense of justice. [p. 65]

The "political reasons" underpinning the paradigm so redescribed are characterized as drawn from a "progressive correction of classical liberalism" (p. 65).

At this point I will interpose some worries about Luban's procedure. His distinction of the two paradigms is overdrawn. It is an exaggeration to suggest that justice is an only tangential purpose of criminal justice. It is of course true that criminal defendants enjoy special constitutional protections; but the constitutional right to counsel does not obviously amount to an endorsement of the standard conception of defense counsel's role.[10] And, while it is true that legal justice is a chief aim of the civil justice system, it is untrue to say that that is its only aim, or that it does not serve other important values as well. Civil suits avert civil warfare, and do a better job of that than of bringing heavenly justice to earth. To serve this peacekeeping function, each litigant must feel that her side was heard and that her champion was able to fight as fiercely to achieve her vindication as she would have fought herself, had she the training and inclination. If the civil justice system as we find it is — to use Luban's phrase — prophylactically overprotective of each individual's rights against each other, it is at least arguably justified in being so because of "political reasons" drawn from — where else? — classical liberalism.

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10. In Nix v. Whiteside, 475 U.S. 157 (1986), the Court opined that the sixth amendment right to "reasonably effective" assistance of counsel in a criminal defense is not automatically violated by a breach of an ethical standard. *See* 475 U.S. at 165. The Court distanced itself from approaches that would "narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct." 475 U.S. at 165; *cf.* Cuyler v. Sullivan, 446 U.S. 335 (1980) (criminal defendant assumed to have sixth amendment right to counsel free of actual conflicts of interest).

Luban's rendering of classical (and progressively corrected classical) liberalism is incomplete. In it, the Hobbesian war of all against all is all but forgotten; but liberalism was born of suspicion of others and only with the passage of time has come to be (mis)understood as solely a doctrine of opposition to what Luban terms that "gaseous invertebrate," the state (pp. 31, 37). Liberals believe we have rights not only against the state, but also against others, and not only against strong others, but against *all* others. If — as Luban himself argues — there is a conceptual barrier to the existence of duties toward gaseous invertebrates, then there is a conceptual barrier to the existence of rights against them as well. Thus, a properly tended liberal ontology will include rights against others, but no rights — except in a derivative and eliminable sense — against the state and institutions.

A corrected understanding of the multiplicity of aims of the civil justice paradigm, and of their roots in classical liberalism, undermines Luban's overall argumentative strategy. The standard conception in both criminal and civil paradigms could, on classical liberal principles, be defended directly by appeal to "political reasons" rather than by the exacting route of weighing up the pros and cons of the adversary system, as the "fourfold root" would require. By invoking "political reasons," Luban in effect allows the criminal adversary system to sidestep the "fourfold root" and cut ahead in line, but he does not show why the civil paradigm does not deserve the benefit of these same political reasons (even less does he ask whether they are ethically sound).

For purposes of removing the moral excesses of the system, Luban is aware that the standard conception could be trimmed all the way around the edges rather than cut into the two pieces represented by the split-level standard of limited civil zeal and fully zealous criminal defense. But he evidently believes that the most plausible view will not only be reformist but will also guarantee a "scorched earth defense" (p. 203) to the accused criminal. Of course, if the "split-level" standard of zeal is confirmed by its applications, then the strategy of treating the criminal and civil paradigms differently with regard to their respective justifications will seem more defensible. I will assess this possibility below.

Although Luban does not put the criminal adversary paradigm to the "fourfold root" test, he does provide a rigorous defense of one aspect of the standard conception of criminal advocacy — the lawyer's duty to preserve confidences. Part II of the book (pp. 177-234) is a discussion of the duty and privilege of confidentiality, and here too Luban advocates a split-level ethical standard. Rejecting the possibility of a utilitarian defense,[11] Luban argues that the evidentiary privilege for client confidences is, in the criminal defense context, justified

11. Pp. 189-92. Luban is persuaded that there is no good utilitarian answer to the

by human dignity concerns.[12] Human dignity requires that the criminally accused enjoy a privilege against self-incrimination, for without it the guilty would be cruelly tempted to commit perjury to escape punishment.[13] Respect for the human dignity of the accused also requires a right to the effective assistance of counsel. And unless the accused can confide in counsel without fear of unwanted disclosure, she may be forced to trade away one right in order to exercise the other. Therefore, a decent regard for human dignity requires that the criminally accused be able to exercise the attorney/client privilege. The broader *duty* of confidentiality is justified, Luban argues, in order further to encourage the client's communication with counsel and to enable counsel to prepare, unhindered by any concern that what she learns might be turned against her client (pp. 201-02).

Luban then turns to the question: Doesn't this or a similar rationale justify the duty of confidentiality within the civil paradigm? His answer is no (pp. 202-04). He notes that there is discovery in civil cases, in which each party may be required to testify under oath as to all matters that might lead to evidence relevant to the dispute. In a criminal case, the fifth amendment privilege against self-incrimination bars the state from engaging in any discovery of the defendant. This difference is not conclusive, as Luban points out, unless the moral grounds of the privilege against self-incrimination do not justify a civil counterpart (for which he suggests the term "privilege against self-immolation" (p. 203)). Luban argues that they do not:

> The difference is this: the purpose of a criminal conviction is to punish wrongdoing, while the purpose of a civil action is to provide remedy [sic] to a victim . . . . The existence of the injured party expands our concern for human dignity from one person (the criminal defendant) to two (the defendant and the aggrieved plaintiff). And it is absurd, I believe, to argue that forcing the civil defendant to choose between lying and revealing facts that indicate that she indeed owes compensation affronts her human dignity more than permitting her to preserve her honor by eluding a just judgment affronts the human dignity of her victim. For this is tantamount to saying that the victim's injury is less important than the injurer's honor. Similarly, to force upon the plaintiff the choice

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Benthamite argument that "[t]he privilege can do a guilty defendant no legitimate good, and abolishing it can do an innocent defendant no illegitimate harm . . . ." P. 190.

12. Pp. 192-97. Luban's argument draws inspiration from M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 4-5 (1975).

13. Luban elsewhere considers Donagan's argument that a concern for human dignity requires a presumption that the defendant has a good-faith defense, and that therefore an advocate must be made available to the defendant to present that defense effectively. But, Luban claims, this requirement would be satisfied by an inquisitorial system, and therefore Donagan's concerns do not support the standard conception of the lawyer's role. Pp. 85-87, 193. A distinct concern to avoid exposing the defendant to the cruel temptation to perjure herself is what, for Luban, underlies the privilege against self-incrimination, and this concern evidently goes more deeply to the core. Donagan, in fact, does not agree that human dignity concerns require the privilege against self-incrimination, as Luban acknowledges. P. 195.

between lying and admitting facts that would show no compensation is owed her is scarcely the "form of torture more cruel than physical torture" that Memmius accused the oath *de veritate dicenda* of inflicting on accused heretics.[14]

Luban falls here, I think, into several errors. I leave aside the oversimplification of assigning a single, punitive purpose to criminal justice and a single, compensatory purpose to civil justice; but it is an egregious error to suggest that no victim exists in criminal cases. Typically, there is a victim. Therefore, the inquiry in both the civil and the criminal case ought to be the same, whatever it is. If Luban has correctly identified the proper inquiry as that of deciding whose dignity would suffer more, the wrongdoer's (should he be forced to testify) or the victim's (should she unjustly fail to be vindicated), answering seems to call for some sort of comparison of the dignitary losses involved.

In a criminal case — say, a rape — the wrongdoer has a stake in avoiding the dignitary injury that a "Memmian choice" would occasion.[15] What the victim has at stake is her sense of personal worth, her peace of mind, and, often, her reputation as well. I think it is false to suggest — as Luban does — that "no one's life is made materially worse off by an acquittal as such" (p. 59), unless the adverb is meant quite literally. I think most of us would have to swallow very hard to accept the suggestion implicit in Luban's analysis, that in upholding the privilege against self-incrimination we are judging that the victim's injury is less important than the rapist's honor.

The implication about balancing the dignitary injuries is one that Luban has now disavowed.[16] But it would not do to leave the victim out of it and rest upon the point that lying to avoid losing one's liberty is more tempting — and thus occasions a deeper torment and a greater dignitary affront to the accused — than lying to avoid losing money. Elsewhere in the book Luban casts doubt on such a reading, as he also

14. Pp. 203-04. Luban continues: "In matters of distributive justice between private parties, moreover, the Memmian dilemma does not signal the utter subordination of self to state: it signals only the momentary 'subordination' of injurer to victim for purposes of making the victim whole." P. 204. Luban skates here over a number of stubborn facts. The victim is the party that typically is the first and least "momentarily" subordinated in civil discovery. Moreover, a civil litigant's "subordination" occurs within a framework created and maintained by the state, and is ultimately backed by the threat of state-enforced sanctions, which may include incarceration for contempt. And so on. I think this passage illustrates Luban's tendency to engage in state-bashing whenever the split-level standard runs into a jam. Casting the state as "the Great Satan," *cf.* p. 225, is not an adequate substitute for argument.

15. Luban elsewhere suggests that rape cases belong in the civil suit paradigm. *See* p. 151. He argues that therefore a defense lawyer is constrained from using the full range of zealous tactics to impeach the victim's testimony; but he does not go so far as to suggest that the rape defendant ought not to enjoy the privilege against self-incrimination and the attorney/client privilege. My example does not depend, I think, on the nature of the offense; aggravated assault of one male upon another would present the same essential features.

16. Letter from David Luban to William A. Edmundson (Sept. 21, 1989) (on file with author).

undercuts the possibility of founding the civil/criminal distinction upon the threat that criminal prosecution uniquely presents to physical liberty:

> To be sure, physical liberty is of great importance to us; but so are other things. We should not forget that the loss of physical liberty can be slight as well as great; when it is slight, other things can outweigh it. . . . I would rather do thirty days in jail than be fined twenty thousand dollars . . . . Wouldn't you?[17]

Given this, Luban cannot maintain that the rapist's temptation to perjure himself at his criminal trial is inherently greater than that in the battery suit he will have to defend later. Moreover, what can Luban say to any civil litigant who stands to lose $20,000 and wants to have the same zealous advocacy she could have in a criminal proceeding?

The nonexistence of a civil privilege against self-immolation,[18] and the fact that few would be willing to plump for the creation of one, does represent a sharp discontinuity between our relative levels of solicitude for those having reason to be anxious about criminal liability and all others. Perhaps this discontinuity reveals deeper pressures that, if identified, would make compelling the idea of a lesser duty of confidentiality in civil cases. But there is no such sharp discontinuity in our levels of concern in the *Spaulding*[19] (civil) and "Lake Pleasant Bodies"[20] (criminal) cases.

Endorsing the lawyers' failure to disclose the whereabouts of the murder victims in the Lake Pleasant case is not made easier by the fact the client faces prosecution — it is made easier by the fact that the client has a lot to lose. Independently, the fact that the client's opponent is the state (rather than a private prosecutor, as in *Annesley*)[21] seems to count for very little. The lawyer's nondisclosure in *Spaulding v. Zimmerman* might be less troubling if it were a criminal negligence prosecution;[22] but not by much if in the civil version the client were

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17. P. 262. Here, it is impossible not to be reminded of the well-traveled quip about the number of zeros that need to be put to the left of the decimal to make an example compelling to a legal audience.

18. "Nonsurvival" might be more apt. At common law, "a party could claim a privilege of not being called to testify in behalf of an adversary (on the ground that it might be self-incriminatory *or expose the witness to disgrace*)." C. WOLFRAM, MODERN LEGAL ETHICS § 6.1.2, at 243 (1986) (emphasis added).

19. Spaulding v. Zimmerman, 263 Minn. 346, 116 N.W.2d 704 (1962); *see supra* note 5 and accompanying text.

20. People v. Belge, 83 Misc. 2d 186, 372 N.Y.S.2d 798 (1975), *affd.*, 50 A.D.2d 1088, 376 N.Y.S.2d 771, *affd.*, 41 N.Y.2d 60, 390 N.Y.S.2d 867, 359 N.E.2d 377 (1976); *see supra* note 4 and accompanying text.

21. Craig v. Anglesey, 17 How. St. Trials 1139 (1743); *see supra* note 2 and accompanying text.

22. Of course, *Spaulding* presents a host of possible criminal law counterparts. Suppose, for example, that jeopardy has attached, and that therefore *nothing* the lawyer discloses can affect the client's criminal exposure. Or suppose that jeopardy has not attached, that the complainant's discovery of the aneurysm would probably lead to the filing of more serious charges, and that the aneurysm is unlikely to burst before jeopardy attaches, but is almost certain to burst when the

without fault, uninsured, and exposed to the full extent of his assets. And nondisclosure in the criminal version would not be any less troubling if it were a prosecution for driving under the influence of alcohol. Shifting from one field of law to another confronts us with an altered array of consequences, but not a sharp discontinuity in our responses. And our responses do not seem to register the relative power of the players to anything like the degree we would expect if civil and criminal paradigms mattered the way Luban would have them.

Luban's discussion in Part II includes a more surefooted — and, I think, devastating — critique of the U.S. Supreme Court's opinion in *Upjohn v. United States,*[23] which upheld an evidentiary privilege for corporate attorney-client confidences (pp. 220-33). In this Part, Luban also advances a vigorous (if problematic) defense of the view that the duty of confidentiality does not require criminal defense lawyers to conceal client perjury (pp. 197-201). Although this position is widely held, it does not seem to square with Luban's earlier appeal to a dimensionless "prophylactic overprotection" of the accused criminal at the expense of truth.

Apart from the structural weaknesses in Luban's argument in Parts I and II, there are difficulties inherent in the programmatic reforms he proposes. Luban argues that the current codes of legal ethics have things reversed (pp. 159-60). Under current codes, the lawyer is free to ignore the client's wishes with respect to tactical matters, but must yield to the client's contrary wishes with respect to the client's ultimate aims and means of achieving them, or resign if she can.[24] Luban argues that respect for the client's human dignity requires that the client call the tactical shots, while the lawyer's accountability on the moral activist model requires her to insist on her view of what the client should want and how the client may get it.

Luban acknowledges that current professional standards, as com-

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complainant undergoes the stress of trial (including the brutal cross-examination you have planned). Or suppose the same facts, but that the aneurysm is likely to burst before jeopardy attaches, that that in itself will cause manslaughter charges to be filed, but the client will not consent to disclosure. In each of these instances one might inquire, in the manner of casebook authors, what result?

23. 449 U.S. 383 (1981); *see also* Sexton, *A Post-*Upjohn *Consideration of the Corporate Attorney-Client Privilege,* 57 N.Y.U. L. REV. 443 (1982).

24. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1), EC 7-7, EC 7-8 (1980). As many commentators have noted, there are difficulties inherent in any attempt to divide the respective spheres of client and lawyer control by appeal to dichotomies such as "tactics/ends" or "means/objectives." *See, e.g.,* C. WOLFRAM, *supra* note 18, § 4.3, at 156. "Reversing" spheres of authority so questionably defined, as Luban does, is unlikely to be ultimately satisfactory. It is distressing that, in practice, the degree of authority assumed by the lawyer seems inversely related to the client's ability to pay. *Compare* J. HEINZ & E. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982) *with* D. ROSENTHAL, ATTORNEY AND CLIENT: WHO'S IN CHARGE? (1974).

monly interpreted, permit a lawyer to seek to withdraw from a morally repugnant representation even at a cost to the client.[25] Luban takes this as exhibiting the current professional standards' endorsement of the standard conception. But it is unclear what alternative (besides acquiescence and withdrawal) a move to the moral activist ethic would open. Luban floats the suggestion that "the rules be redrafted to allow lawyers to forgo immoral tactics or the pursuit of unjust ends without withdrawing, *even if their clients insist* that they use these tactics or pursue these ends" (p. 159; emphasis added). It is difficult to envisage how a lawyer might convey such a decision to the client (as surely she must) other than in terms that would naturally be understood either as a threat to withdraw or as a threat to act — as the client's attorney — in a manner contrary to the client's announced wishes. The former sort of threat is already allowed under current professional standards. The latter is apt to seem presumptuous (and even preposterous) unless the lawyer can support it by appeal to some law or mandatory ethical standard. Luban expressly declines to decide whether to endorse a mandatory or an aspirational standard of forgoing immoral tactics (and, presumably, of eschewing immoral ends), and therefore the reform proposal he does offer seems shapeless (*see* p. 158).

The other end of Luban's proposed reversal is problematic as well. Because the question whether to forgo "nonfrivolous [but moral] legal positions" is, for Luban, a *tactical* one; it is one that the client must make (p. 160). Presumably, it is the lawyer's duty to inform the client that such positions exist, for this is surely entailed, on Luban's view, by the necessity of respecting the client's human dignity. It is not clear, however, how this transfer of tactical authority to the client could fail to hinder the efficiency of the justice system and to curtail the lawyer's capacity to negotiate, mediate, and compromise — to say nothing of the impact such a transfer would have upon the quality of professional existence.[26]

Another weakness in Luban's generally astute discussion pertains to the issue of the moral complications of representing unworthy clients in order to vindicate not the client's interests but an abstract principle. The ACLU's advocacy of the Nazis' right to demonstrate in predominantly Jewish Skokie, Illinois, is defended by Luban by appealing to the doctrine of "double effect" — according to which "it is

25. *See* pp. 396-97 & n.2; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A)(2), DR 7-101(A)(3) (1980).

26. Luban elsewhere notes a corporate lawyer's description of his work as "picking fly shit out of the pepper." P. 401. Each movement of the tweezers arguably would represent a tactical decision to pursue or forgo a nonfrivolous legal position ("this is relevant, this is privileged, this is work product, this is outside the scope of their request," etc.). Those who have actually done this sort of thing will appreciate how irksome it would be truly to involve an unsophisticated client in each of these decisions.

permissible to perform an act likely to have evil indirect consequences . . . only if its direct effect . . . is morally acceptable and the intention of the actor aims only at the acceptable effect, the evil effect not being one of her ends" (p. 162). Luban suggests that the doctrine "fits" the ACLU position and "more generally, any lawyer who represents scum to vindicate principles" (p. 162). So long as we can "hang onto" the doctrine, Luban says, the ACLU lawyer can be defended without appeal to the principle of nonaccountability, and thus without undercutting the attack on the standard conception.[27]

But presumably the "double effect" excuse is not one that Luban wants to be made generally available, for it would excuse much of the lawyerly conduct that he wants to condemn. Lord Anglesey's lawyer does not seek James Annesley's destruction; he rather seeks, by forestalling Annesley's claim, to protect his client's property — so described, a morally acceptable end and one more directly furthered than that of Annesley's destruction. Although certainly Luban would object to such an application of the doctrine of double effect, it is unclear how he can consistently do so while relying upon the "double effect" doctrine to reconcile the moral accountability of criminal defense lawyers with their violation of the common moral duty not to "get[ ] a guilty, violent criminal back out on the street."[28]

A final source of unease with Parts I and II of the book has to do with the treatment of examples. Those intended to illustrate lawyers at odds with common morality happen preponderantly to be drawn from the criminal defense paradigm, and under *general* application of Luban's split-level approach the common moral obligation involved would still be ignored. Because of the state's special role as protector of the young, Luban presumably would place the child-custody case in the civil rather than the quasi-criminal paradigm, and therefore the lawyer may not zealously advocate the incestuous parent's cause (p. 65). This, and Luban's suggestion that rape cases belong in the civil paradigm,[29] indicates that the civil/criminal/quasi-criminal framework is not self-defining. Although the framework is not so devoid of content as to be totally ad hoc, there are indications aplenty that it is no substitute for analysis. William Simon proposes an approach that would have the lawyer measure her ethical responses to the likelihood that other actors in the legal system will correct wrongs that her zeal-

27. P. 162. Luban's image of "hanging on to" the doctrine of double effect is apt. Philippa Foot has cogently argued that the examples from which the doctrine draws what plausibility it has can be handled as well — or better — by distinguishing positive duties (to render aid) from negative duties (to avoid harming). *See* P. FOOT, *The Problem of Abortion and the Doctrine of Double Effect,* in VIRTUES AND VICES 19-32 (1978).

28. P. xx. Luban concedes that even in the criminal paradigm the principle of nonaccountability "holds only approximately" because "powerful countervailing reasons will apply in some instances." P. 156 n.6. What these reasons are and when and how they might prevail is not even suggested.

29. *See supra* note 15.

ous conduct might cause.[30] Such an approach dispenses altogether with Luban's categories, and has much to recommend it.

In the clearly civil instances, the lawyer's conduct on the moral activist model would be tempered, but Luban seems insufficiently concerned with showing that common morality would in fact be violated by what the standard conception would have the lawyer do. In the *Zabella*[31] case, for example, it is not obvious that a moral obligation to repay a monetary debt does not tend to decay with the "mere efflux of time" (p. 10) — for time never merely passes: expectations change, debtors come to rely on their creditors' forbearance, and so forth. Common morality is not as monolithic or as straightforward as Luban frequently suggests; nor does it exist in airtight isolation from law.[32] Especially where what morality requires is unclear, law's alembic frequently serves to distill its content. Therefore, some care needs to be taken to distinguish our unhappiness with the ethics of laws from our unhappiness with the ethics of lawyers.

Also troubling is the fact that none of Luban's abstract discussion furthers an understanding of some of the "lawyers against the law" examples. Luban never explains why forum-shopping and taking inconsistent positions are inherently disrespectful of the law. And Luban never explains how a professional duty to follow the spirit of the law can stand, without policing, as a more effective curb against lawyerly disrespect for law than the "good faith" requirement embodied in current professional standards.[33]

Part III of the book (pp. 237-89) is devoted to establishing that the

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30. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988). I should note that Simon bites off considerably less than Luban, and that may be why he is able to chew without categorial assistance. Simon, for example, applies his analysis only to civil practice; although he suggests that it "has relevance" to criminal practice, its defense requires "qualifications and elaborations" that he has not yet put into print. *See id.* at 1084. Moreover, Simon's analysis does not apply to conflicts between "legal and nonlegal moral commitments." *Id.* at 1114. A commitment is "legal" for Simon if it is "grounded in important legal values." *Id.* Although this is not clear from Simon's discussion, presumably his approach has no application to Spaulding v. Zimmerman, 263 Minn. 346, 116 N.W.2d 704 (1962), for in the absence of consent, or some special relationship, a positive duty to render aid does not appear to be grounded in any important legal value. *See, e.g.*, Yania v. Bigan, 397 Pa. 316, 155 A.2d 343 (1959). Therefore, the defense lawyer's dilemma in *Spaulding* is presumably defined by his legal commitment to keep the confidence and a merely moral commitment to render aid, and is a dilemma Simon's analysis is not intended to cover.

31. Zabella v. Pakel, 242 F.2d 452 (7th Cir. 1957); *see supra* text accompanying note 3.

32. Anthropologist Clifford Geertz has pointed out that "law, rather than a mere technical add-on to a morally (or immorally) finished society, is, along of course with a whole range of other cultural realities from the symbolics of faith to the means of production, an active part of it." C. GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 218 (1983). For another view of what Geertz might call the "imminglement" of law and morality, see Edmundson, *Are Law and Morality Distinct?*, 4 B.Y.U. J. PUB. L. 33 (1990).

33. *See* FED. R. CIV. P. 11; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983). Luban offers a spirited argument designed to show that a "good faith" standard is ineffectual in a world ruled by the standard conception. Pp. 16-17.

poor have a right to at least minimally competent legal assistance in civil as well as criminal matters. Luban argues that a right to civil counsel is implicit in the principles that legitimate our form of government, and in doing so paradoxically argues that the Supreme Court, in refusing to extend the *Gideon v. Wainwright*[34] line of cases to civil matters, has overvalued the civil/criminal distinction (pp. 261-62). He advocates the deregulation of routine legal services and a mandatory pro bono requirement to guarantee the remainder. Although his discussion of deregulation seems insensitive to some of the difficulties of isolating what legal services are truly routine, empirical patterns of lawyer-to-layperson delegation are sufficient to show that the profession itself has reached a tacit consensus that certain legal services — particularly in the real estate area — fall on the routine side of the line, however it is drawn.

In what I think is the most powerful section of the book, Luban defends the concept of mandatory pro bono against a range of popular but specious objections (pp. 277-89). Luban's discussion on this point should be required reading for everyone seriously interested in the profession. In Part IV (pp. 293-391), he ably defends the concept of state-funded morally activist representation against charges that it is antidemocratic and a betrayal of the poor. My suspicion, though, is that decently funded, politically unhamstrung legal services programs will be a long time coming (back).[35] Mandatory pro bono and limited deregulation, on the other hand, are ideas whose time is already arriving.[36] As these ideas are implemented they may at least help to fill ordinary peoples' legal needs, which go unmet in staggering numbers.[37] The legal profession's indifference to these needs, much more

34. 372 U.S. 335 (1963).

35. *See Under Bush, a Band of Reaganites Continues Fight to Slash Funds for Legal Aid to the Poor,* Wall St. J., Aug. 19, 1989, at A18, col. 1; Lewis, *Legal Services: Political Test Looms for Bush,* N.Y. Times, Sept. 8, 1989, at B5, col. 3; *Internecine Battles at the Legal Services Corp. Continue Unabated,* Wall St. J., Dec. 18, 1989, at B4, col. 6; Lewis, *Bush Replaces Leadership of Legal Services for Poor,* N.Y. Times, Jan. 24, 1990, at A14, col. 1.

36. *See e.g., At Issue: Mandatory Pro Bono,* A.B.A. J., Oct. 1989, at 52; Margolick, *Panel Urges Lawyers Be Required to Work 20 Hours a Year for Poor,* N.Y. Times, July 11, 1989, at A1, col. 1; Miskiewicz, *Mandatory Pro Bono Won't Disappear,* Natl. L.J., Mar. 23, 1987, at 1, col. 1. Luban's proposal for mandatory pro bono includes a "buy out" option, *see* pp. 279-80, which would not only be economically desirable — since the price many lawyers are willing to pay to be excused from an hour of pro bono exceeds the value they could deliver in that hour — it would also make the plan politically more feasible.

37. Luban calculates that more than 20 million hours of necessary legal services are not provided to the poor in the United States annually. P. 241. Even in the supposedly big-exposure/deep-pocket area of medical malpractice, one ABA committee's study found that only about one of every six instances of malpractice gives rise to a *claim,* much less a recovery. *See also Malpractice Study Finds 7,000 Died in New York in 1984 Due to Negligence,* Wall St. J., Mar. 1, 1990, at B4, col. 6 ("Only 2% of the patients that suffered a negligent injury actually filed a claim . . . .") Contrary to the popular myth that ours is an excessively litigious society, Americans are "slow to perceive injury . . . reluctant to make claims . . . and . . . fearful of . . . litigating." Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . . ,* 15 LAW. & SOCY. REV. 631, 652 (1981); *see also* Galanter, *Reading the*

than its excesses of zeal in pursuing the interests it does serve, seems to me to epitomize the failure of lawyers to do justice.

The virtue of mandatory pro bono lies not exclusively, or perhaps even primarily, in its direct distributive consequences. As has been pointed out, a powerful determinant of a lawyer's social attitudes is the nature of the interests she represents.[38] To the extent that mandatory pro bono will compel lawyers to identify themselves with interests unlike their own and unlike those they typically represent, it will have the salutary effect of enabling them to regain something of the detachment and evenhandedness that were once thought specially to qualify lawyers to guide public policy.[39]

As Luban points out, the massive concentrations of private wealth in America operate to defeat popularly desired distributive reforms (pp. 358-68). This reality is a complete answer to any suggestion that our concerns about justice in the distribution of legal services should be confined to taxing and spending legislation. Still, it is not evident, at first blush anyway, why reform is likely to fare any better in the ABA and the state bar associations than in the legislatures. One reason to think that the profession may be better able to advance redistributive reform is that the bar has for so long and so insistently espoused an ideal of public service, that mere consistency requires it to address a condition it so deplores and is best able to correct.[40] Also, so long as the maldistribution of legal services remains unaddressed, the autonomy of the profession (a matter of some concern to the organized bar) will to that extent be less secure. As to the question, "Why, and at what level, should the bar rather than the public at large fund costly redistributive measures?," one answer is that the monopoly rents the bar commands supply both a justification and a measure of what the

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Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4 (1983). To paraphrase a welfare-rights lawyer Luban cites, the poor are "constantly bumping into sharp legal things" and not complaining — at least not to anyone prepared to represent them. P.241 (citing Wexler, *Practicing Law for Poor People,* 79 YALE L.J. 1049, 1050 (1970)).

38. *See* Chemerinsky, *Protecting Lawyers from Their Profession: Redefining the Lawyer's Role,* 5 J. LEGAL PROF. 31, 32-34 (1980); *see generally* L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957).

39. *See* L. BRANDEIS, *The Opportunity in the Law,* in BUSINESS: A PROFESSION 313 (1913); Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870-1910,* in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 52 (G. Gawalt ed. 1984); Nelson, *Practice and Privilege: Social Change and the Structure of Large Law Firms,* 1981 AM. B. FOUND. RES. J. 95, 118.

40. *See, e.g.,* ASSN. OF THE BAR OF THE CITY OF NEW YORK SPECIAL COMM. ON THE LAWYER'S PRO BONO OBLIGATIONS, TOWARD A MANDATORY CONTRIBUTION OF PUBLIC SERVICE PRACTICE BY EVERY LAWYER (1979); *cf. Professional Responsibility: Report of the Joint Conference,* 44 A.B.A. J. 1159, 1216 (1958); Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes,* 59 TEXAS L. REV. 689, 697-701 (1981) (pointing out the ABA's "narcissistic concern" with promoting an image of public-spiritedness, and recounting the demise of the Kutak Commission's mandatory pro bono proposal).

bar should be expected to contribute.[41]

Philip B. Heymann's and Lance Liebman's *The Social Responsibilities of Lawyers*[42] is as important a pedagogic contribution as *Lawyers and Justice* is a theoretical one. The authors have collected and loosely organized thirteen "case studies," which are self-consciously modeled upon materials used in schools of business and of public policy. The studies are intended to describe "events, institutions, choices, and outcomes" (p. xxi) with a richness of detail that stands in contrast to the skeletal and tendentious narration that typifies appellate opinions, whose further skeletalized edited versions form the stuff of the standard law school casebook. The authors suggest that viewing the issues of professional responsibility through the prism of appellate decisions obscures "what . . . lawyers do, and how . . . the profession [is] structured" and unduly highlights " 'the law': rules, doctrines, policies". (p. xxi). The book is an effort to present the legal, social, and ethical issues that confront lawyers in a "credible context," and to avoid circumscribing that context in any way that might make ethical problems seem merely individual and occasional rather than as they are, common and systemic.

The stories (this is as good a name as any for the narrative portions of the studies) average just under twenty pages in length, and so are much longer than the problems and hypotheticals found in most teaching materials.[43] The stories focus on individual lawyers who, collectively, well represent the vast diversity of the bar: legal services attorneys, public defenders, plaintiffs' workers' compensation lawyers, storefront legal clinicians, prosecutors, corporate lawyers, corporate

41. Deborah Rhode has decried the "vacuous ring" of redistributivist rhetoric. *See* Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274, 281-83 (1986). Any "meaningful effort to equalize access" would, given (among other things) the "elasticity of legal needs," require "massive public subsidies [and] the prohibition of private markets." *Id.* at 282. Moreover, "[m]ore modest calls to enhance, if not fully equalize, access still leave all the sticky points unaddressed." *Id.* Rhode's first (extreme) alternative is not so very different from the manner in which we pursue the ideal of equal political access: we massively subsidize government services and prohibit a market in votes. As to Rhode's point about the more modest calls, the sticky points no doubt have to be addressed, but there is no reason to think they are unaddressable. Rhode elsewhere has argued that a 40-hour-per-year mandatory pro bono requirement would not "materially affect a problem of such [perceived] dimensions." *See* Rhode, *supra* note 41, at 701. I think Rhode is too despairing. Three million, two hundred thousand hours of legal work per annum (40 hours times 800,000 lawyers) is better than the proverbial poke in the eye with a sharp stick; and these hours may have an impact far beyond what their numbers suggest if they are spent, as Luban urges (pp. 341-57), seeking class-wide remedies to the most urgent problems of the underrepresented.

42. The authors are professors at Harvard Law School.

43. Other authors have tried to include more extensive fact patterns than those typically excerpted from appellate opinions, but none have approached Heymann and Leibman in the degree of prolixity. *Cf.* S. GILLERS & N. DORSEN, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 356-60, 584-88, 613-15, 665-69, 728-32, 828-35 (2d ed. 1989) (seven "simulated case histories," averaging about four pages each); N. REDLICH, PROFESSIONAL RESPONSIBILITY: A PROBLEM APPROACH (2d ed. 1983) (17 problems, using narratives that average three pages).

litigators, mergers and acquisitions specialists, legislators, lobbyists for the personal injury bar, associates, elder statespersons, and so forth. Their educational backgrounds are stereotypically outstanding — Harvard, Yale, Stanford, Georgetown — except where "credible context" demands otherwise: *e.g.*, a legal clinic associate is identified as a graduate of "Illiana Law School" (p. 58). In the course of their stories, some of these lawyers serve a single client, or none at all; others deal with dozens or scores. In almost all of the stories, the lawyers are presented as dealing not with a single decision but with a network of decisions, and not as deciding in isolation, but in conjunction with clients, colleagues, supervisors, associates, professional acquaintances, and friends. Judges rarely appear, and when they do their role is the perfunctory one of ratifying bargains struck elsewhere.

Preserving "credible context" sometimes involves an eclecticism worthy of a bowerbird. In addition to narrative and — occasionally — excerpted statutes and ABA rules, many of the studies include such things as casts of characters, chronologies, historical sketches, appendices, lists, breakdowns, statistics, tables, memoranda, drafts, and charts. The reader is drawn — much as the lawyer would be — into complex micro-worlds, and in the process learns a good deal about such things as caffeine, asbestos, and "blue sky" securities laws. The stories themselves elide nothing. Names forgettable — Jason Smith, Martha Solinger, Rosemary Pryor — brush against names well-known — Cesar Chavez, Joseph Flom, Gary Hart. In one of the cases, a certain Trevor King is introduced (p. 241). An accountant, his sole performance is to instruct that an audit be done and to report its results to higher-ups. Such devices may sound annoying, as occasionally they are, but they are also surprisingly effective in conveying something of the flavor of practice; and, particularly in the first-person narratives, they make the stories more compelling reading.

The stories have various sources. Some are based upon events reported in appellate opinions; others give us a fuller account of events that were contemporaneously publicized — the *volte-face* of the Justice Department in the *Bob Jones University*[44] case (pp. 136-82); the battle to acquire Conoco (pp. 106-35); the OPM Leasing Services scandal (pp. 184-215); the defeat of the Hart-Magnuson federal "no-fault" automobile insurance bill (pp. 309-35). Other stories are based upon events that would be anonymous even apart from the authors' use of fictitious names: "Gladys' " struggle for custody of her granddaughter, "Rita" (pp. 2-20); "David Keith's" defense against murder charges (pp. 69-105); an unnamed woman's settlement of her workers' compensation claim (pp. 258-94). Research and drafts of the stories were done by a squad of student research assistants. One of the stories

44. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

is, in fact, a business school case study.[45]

As a concession to the traditional casebook format, each study is followed (one is interrupted) by rhetorical questions and a modicum of discussion. Often the questions and discussion identify issues pertaining to the Code and Model Rules, but not all of the technical issues present in the cases are identified. The first story, for example, "Rita's Case," so involves Gladys' lawyer with the everyday lives of Gladys and Rita that she becomes privy to unprivileged knowledge unhelpful to Gladys. The authors' discussion questions the propriety of her involvement, but it does not flag the potential applicability of the "lawyer/witness" rule.[46]

Another example: in "Food for Thought" (pp. 216-34), an associate drafts a memorandum for a client whose powdered chocolate milk mix contains an ingredient, caffeine, that is not listed on its label. She concludes that the omission is a violation of law but, at the end of a meeting with her supervising partner and the client corporation's president, she is directed to produce an opinion letter taking the opposite position. After the meeting breaks up the lawyer leaves the office to keep a lunch date with a friend, who she hopes can help her sort through her dilemma. The discussion and questions following the story raise a number of issues, including whether the lawyer may or must go to the Food and Drug Administration to blow the whistle on the client — but they do not raise the issue of the lawyer's duty or permission to approach the client's board of directors,[47] nor do they question the propriety of her seeking her friend's guidance.[48]

These oversights (if that is what they are) may in fact be pedagogically useful. First, they are an almost unavoidable product of the wealth of detail and ambiguous shading that the authors have tried to build into the stories. Second, the latency of so many issues conveys (whether or not by indirection) the fact that practice is saturated with ethical significance at every level of choice — whether the decision is as momentous as choosing, say, between working for a blue-chip firm and working for the Environmental Protection Agency, or as mundane as choosing what social distance (if any) to keep between oneself and a client.

Many of the discussions — for example, that of the OPM Leasing story (pp. 184-97) — focus with considerable penetration upon technical issues of how to apply the Code or Model Rules. The studies also

45. Pp. 49-68 ("The Law Offices of Lewin and Associates").

46. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B), 5-102 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1983).

47. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (b) (1983).

48. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

raise a fair cross-section of the standard "hard" questions: impeaching the truthful witness, telling the client how likely arguably illegal future conduct is to be detected, and so on. One of the chief virtues of both the stories and the discussions, however, is that the authors have kept their aim upon the issues of how best to lead one's life, how best to serve others (including one's clients), and how best to serve justice, rather than upon the often merely prudential, technical questions of how to avoid discipline and liability. In the discussion of "Rita's Case" the authors brilliantly pose and explore the issues of client autonomy, and of the propriety of zealous devotion to the client's interests where a genuine adversarial contest is not to occur (*see* pp. 2-20). Allotting equal time in the discussion to every conceivable technical issue would, I think, have conveyed the message that no distinction need be made between large and small considerations. Ethical concern is like every other resource, scarce; and so to the extent that one is trained to attend to technical propriety, one is trained to ignore larger questions.

Many of the stories end with an epilogue following the discussion questions. The epilogues typically add yet another level of ambiguity — even irony — to what has come before. Admirably, none of the epilogues provide any sort of resolution or Aristotelian unity. Gladys gets custody of Rita, who continues to have difficulties; Gladys' lawyer loses contact with them. Further epidemiological studies make the hazards of caffeine less certain, which affects in subtle ways the legality of failing to list it as an ingredient. The "once-in-a-lifetime" thrill of thwarting Seagram's bid for Conoco settles into memory as Conoco is swallowed by DuPont. Life goes on; and the crisp, zero-sum denouement that appellate decisions lead us to expect simply never comes.

While Luban typifies the quest for a meta-principle to palliate the excesses of adversary ethics, Heymann and Liebman suggest a more nominalistic approach to the entire subject, an approach that has affinities to recent trends in philosophy and legal scholarship. It has become almost a commonplace to observe that ethics arise in and draw substance from some shared form of life, some community of purpose and meaning, some group ethos, tradition, or *Lebenswelt* — and not from mere nature, or from reason itself, or from any supernatural stipulation.[49] Philosopher Bernard Williams, for example, has argued that ethical knowledge can exist only within a matrix of "thick description," by which he means an evaluative discourse that partakes of the richness and particularity of routine factual description.[50] Thick

49. *See, e.g.*, G. HARMAN, THE NATURE OF MORALITY (1977); A. MACINTYRE, AFTER VIRTUE (1981); J. MACKIE, ETHICS: INVENTING RIGHT AND WRONG (1977).

50. *See* B. WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 128-30, 142-50, 167-73 (1985).

description employs "thick concepts," such as *coward, lie, brutality,* and *gratitude.* Such concepts are "world-guided," in that they possess an ineliminable descriptive content, and are at the same time inherently "action guiding," in that their application supplies reasons for action.

Ethical knowledge, Williams argues, is born of particularity and dies of abstraction. We are drawn to abstraction because of our desire to make one thing of many, and to make what is local universal. But in abstracting we tear ethics loose from the only soil in which it can grow. Williams concludes that ethical knowledge is lost if reflection upon cross-cultural differences draws local discourse into a universalistic ethical vocabulary.[51] If Williams is right, then Luban's project, of reconciling distinctively professional "trade idioms" (pp. 4, 104) with a presumably universalistic "commonsense" morality, must fail.[52] But even if this project fails, the trade idioms of the law may very well support ethical knowledge. If the trade idioms of legal practice possess the descriptive richness of thick concepts, then legal ethical knowledge is possible — perhaps even codifiable.

Whether or not this is right, it suggests precisely the approach Heymann, Liebman, and associates have taken. The stories show us the soil, and they illustrate how ethical worries typically enter consciousness not via "rules, doctrines, policies" but because something "out there" in the world strikes us as fishy, out-of-whack, or because we catch ourselves rationalizing a choice a second or third time. In the Conoco takeover story, a first-year associate finds a legal theory to delay the advances of a hostile "suitor." "It was sort of a bizarre claim . . . ," she muses after the fact (p. 112). As to another, similarly tenuous claim, she feels "vindicated about it everyday," because the suitor later went broke (p. 113). The capacity to respond in this way to a situation — apart from any aptitude for "issue spotting" or rule-mongering — is the equipment by which much of ethical life is led.

But ethical knowledge requires more than happy intuition. On Williams' view, meaningful legal ethical discourse presupposes a quasi-descriptive vocabulary: *e.g.,* this tactic was "lawyerly," this con-

51. According to Williams, if one prizes knowledge but has no confidence in reflection as a means to it, "the idea that reflection can destroy knowledge will turn against reflection and express itself in the kind of conservatism, or worse, that praises rootedness, unspoken grasp, and traditional understandings." *Id.* at 168. Williams adds that "[t]here is certainly more to be said for these things than much progressive thought has allowed . . . ." *Id.* For an encomium to "unspoken grasp," see Carrington, *Of Law and the River,* 34 J. LEGAL EDUC. 222 (1984).

52. In Williams, *Professional Morality and Its Dispositions,* in THE GOOD LAWYER, *supra* note 6, at 259, Williams warns against casting the divergence of professional and common morality as a matter of casuistical, rather than dispositional, conflict. *Id.* at 263. From the latter perspective, the important problem is one of avoiding "a mystifying conception of the dignity of the profession," *id.* at 266, which Williams suggests is to be solved by cultivating professional dispositions that incorporate a psychologically sustainable degree of reflectiveness. Williams had no occasion, in this essay, to address the issue of what might be an *epistemologically* sustainable degree of professional reflectiveness.

tact was "unprofessional," that disclosure was "unethical." Yet the Heymann and Liebman book unsettles any such presupposition. In story after story, conduct that is permissible (if at all) only at the margins of the professional role as defined by the Code and Rules, is represented as an integral and even central part of lawyers' work. The public defender: "To represent a client properly, you have to be able to develop an enormous amount of empathy . . . . If the jury senses that you do not like your client, that you just do not care if he goes down the drain, sure as anything they will flush him."[53] Litigators for Conoco: "People who run companies [facing hostile takeover bids] will pay anything to anyone who can give them hope . . . . [A]nything with even the most remote chance of success is done . . . . [It] is not a game of high percentage arguments . . . . You can't bring frivolous lawsuits, but . . . ."[54] Dissonance abounds: a plaintiffs' workers' compensation lawyer deplores lawyer advertising, but spends tens of thousands of dollars for it annually: "[I]f they are going to allow it, then I'm going to do more than anybody else. But I think it is terrible to have" (p. 270).

The restoration of "credible context" facilitates the study of legal ethics from other perspectives. Anthropologist Clifford Geertz has insisted that an understanding of legal practices is possible only to the extent that we resist the urge to "draw pure structure from its culture-specific accretions."[55] This perspective calls into question the assumption of homogenized membership, which has been thought to be a defining feature of the professions.[56] Although the passing of what may have once been a more nearly homogenous and monolithic bar has been widely noted,[57] this is a fact that legal education is supposed to mitigate, and for that reason, tends to deny.

The chief virtue of the Heymann and Liebman book is that it provides credible descriptions of the various cultures that make up the American legal profession. Here, in the story of the lobbying of Congress during long-running debates over federal no-fault automobile in-

53. P. 79; *cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-17, 7-24, DR 7-106(C)(4) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(e) (1983); Morris v. Slappy, 461 U.S. 1, 12-14 (1983) (holding that a criminal defendant has no sixth amendment right to a lawyer with whom she has good rapport).

54. Pp. 112, 122; *cf.* FED. R. CIV. P. 11; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1),(2) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.1, 3.4, 4.4 (1983).

55. C. GEERTZ, *supra* note 32, at 182 (quoting M. BARKUN, LAW WITHOUT SANCTIONS 33 (1968)).

56. *See* E. DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS 3-13 (1957); M. LARSON, THE RISE OF PROFESSIONALISM 12-15 (1977).

57. *See* Berle, *Legal Profession and Legal Education,* in 9 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 340-45 (E. Seligman & A. Johnson eds. 1933). The rapidly growing heterogeneity of the rapidly growing bar is a recurring theme of Richard Abel's recent study, R. ABEL, AMERICAN LAWYERS (1989).

surance legislation, we find the very survival of one settled faction of the bar threatened by the activity of others.[58] The stories also illustrate how lawyers' roles overlap with nonlawyer roles: social worker, business person, psychologist, friend, comrade, lobbyist, and so on. This, and the diversity of roles within the profession, raise the question whether the effort to impose a univocal and usefully determinate "ethic" on the nearly 800,000 lawyers in the United States (double the number in 1970) can proceed from any assumed underlying trade idiom. Cumulatively, the stories suggest that Williams' "thick descriptions" are absent, and that the pursuit of a unique and universal professional ethic presents a task of "compass[ing] dissensus,"[59] in Geertz' phrase — rather than of distilling an essence.

There has been a "call to context" in recent American legal scholarship[60] and, in consequence, "[e]veryone has been writing stories these days."[61] Recent writing on the narrative dimension of law has emphasized the possibilities of storytelling to advance "outsider jurisprudence."[62] These accounts tend to assume that because lawyers occupy a privileged relationship to law, lawyers' stories are reflected in, and dominate, the law itself.[63] But, as the stories collected by Heymann and Liebman show, legal materials — opinions, casebooks, and so forth — do a very poor job of presenting the stories that lawyers have to tell. The lawyer's voice is one among "the multiplicity of voices that the law generally quiets."[64] The prime reason for this is that lawyers present themselves as tellers not of their own stories, but of stories composed to further what is thought to be the best outcome for their clients. Some of the best stories in this collection are those

58. Pp. 317-20, 326. A similar point can be drawn from Luban's account of "A Shoot-out in the ABA" (pp. 180-85) over the Kutak Commission's proposed confidentiality rule. The most conspicuous faction in both struggles was the trial lawyers. *See also* R. ABEL, *supra* note 57, at 11 (noting the growth of "unofficial professional associations divided by race, gender, religion, age, politics, clientele, function, and role"). There is no peace even within specialties not divided along plaintiffs' bar/defense bar lines. *See, e.g., Matrimonial Lawyers Trade Barbs at Annual Convention in Chicago,* Wall St. J., Nov. 8, 1989, at B8, col. 1.

59. C. GEERTZ, *supra* note 32, at 219. It is no coincidence that "the soul-searching visible in the constant writing and rewriting of ethical rules" comes at a time when "[t]he increasing heterogeneity of the profession and differentiation of the roles lawyers perform and the structures within which they practice have greatly complicated their efforts to engage in collective action." R. ABEL, *supra* note 57, at 5, 13. Williams suggests that following special rules is a worthwhile professional disposition, so long as the rules "are acknowledged to be conventions that can be changed by agreement." Williams, *supra* note 52, at 267.

60. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?,* 87 MICH L. REV. 2099, 2099 (1989). *See generally Legal Storytelling Symposium,* 87 MICH. L. REV. 2073 (1989).

61. Delgado, *Legal Storytelling for Oppositionists and Others: A Plea for Narrative,* 87 MICH. L. REV. 2411, 2411 (1989).

62. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story,* 87 MICH. L. REV. 2320, 2323-26 (1989).

63. Scheppele, *Foreword: Telling Stories,* 87 MICH. L. REV. 2073, 2083-84 (1989)

64. *Id.* at 2084.

that are told in the first person — particularly Randy Bellows' account of life as a public defender (pp. 69-105) — or are suffused with the personality of an individual lawyer — such as the account of Raul Lovett, the kitsch-encrusted, Mickey Mouse-loving plaintiffs' workers' compensation lawyer in Providence, Rhode Island (pp. 258-94).

Narrative "may evoke our empathic distress response more readily than abstract theory."[65] And while questions of entitlement cannot be decided on the basis of empathy alone, the personal decision — what sort of life shall I lead — is not simply a matter of deciding what sort of life has the strongest claim to be led; therefore, imaginatively gauging one's "empathic distress response" to a legal practice or lifestyle may indeed be the best single — if not the only — basis upon which to make such a choice. The Heymann and Liebman book may be most useful to those trying to decide whether to pursue a legal career or where within the variegated profession to try to fit themselves. The stories faithfully convey, without bathos, many of the stresses inherent in lawyers' roles. The unrelenting challenge of making a practice succeed as a business is squarely conveyed in "The Law Offices of Lewin & Associates" — the one true B-school study (pp. 49-68). The uneven course of what Luban would call "political love" between California Rural Legal Assistance lawyers and their Chicano clients is the main theme of the story that recounts a battle in the legal war for migrant farmworker rights. Randy Bellows' story of his defense of a confessed serial murderer begins: "This is the story of David Keith and a marriage that was almost broken" (p. 69). Although the marriage he speaks of is, of course, his own, it somehow seems less vivid to the teller than the career that threatens it — which (perhaps inadvertently) reveals the root of the problem.

Bellows' and other stories portray how lawyers often must learn to manage a gnawing sense of living in bad faith; Bellows, for example, tries "not to think about victims too much . . . . It makes a difficult job nearly impossible. . . . Occasionally . . . it does become impossible. . . ." (p. 79-80). He then recounts a case he pulled out of "[a]t the first opportunity" (p. 80). Without romanticizing either, the stories convey a sense of the rewards of practice as well as its burdens. The happiest lawyers are those like Raul Lovett, who can choose and have chosen a style of practice that is close to their principles and personalities. The lawyers who seem least at ease are those who sense that their professional roles leave something out of account, whether at the level of principle, personal bent, or both. Small concessions to individuality sometimes have to stretch a long way: the first-year associate caught up in the Conoco takeover fight works until midnight over the Fourth of July weekend, but "g[ets] to wear jeans" while doing so (p. 120).

Although the virtue of the book lies, in a sense, in its excesses, not

65. Massaro, *supra* note 60, at 2105.

all of its excesses are to the purpose. The OPM Leasing scandal story (pp. 184-97) is repeatedly interrupted by discussion questions. The questions are just fine as far as they go, but their interjection needlessly takes away from the reader the edifying task of discerning where in the course of events these very questions arise. The discussion questions are evidently intended to send the reader to an appendix (pp. 198-215), which purports to summarize the rules governing professional responsibility. In fact, the section consists mostly of excerpts from the Code, the Model Rules, and Model Rules discussion drafts pertaining to confidences and withdrawal. If intended for law students, this section needlessly duplicates material that is more usefully collected in the rules supplements that students will have bought anyway. If intended for prospective law students, the section is both opaque and misleadingly incomplete in its omission, for example, of the Model Rules provisions requiring candor toward the tribunal.[66]

Although not to diminish the importance of what Heymann and Liebman have done, I will mention a few more misgivings. I would have been interested to see more stories and fewer or none of the stock discussion questions. None of the stories included conveys, for example, what it is like to be in-house corporate counsel and to face the ethical dilemmas peculiarly faced by them.[67] The special professional obstacles facing minorities, women, and parents are not highlighted in any of the stories. Heymann and Liebman embark in the spirit of restoring "credible context," but the pesky casebook rhetoricals that make up the discussion sections are as tendentious and skeletonizing in their way as the traditional sources the authors have eschewed. Not only does this sort of discussion undermine the verisimilitude the authors have striven to attain, its presence encourages students to expect their ethical ways in the world to be signposted for them. Subsequent editions of the book, I venture to hope, will carry the editors' worthy insights all the way through.

Each of the books reviewed here seeks to bring us closer to reality than the "miles away from life"[68] to which Llewellyn found appellate opinions — and the casebooks they populate — to be removed.

66. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983).

67. For example, corporations often retain outside counsel to handle novel and interesting matters, presumably with the advice and concurrence of in-house counsel. At the same time, the corporate attorney-client privilege creates incentives to "launder" routine corporate decisions through counsel, simply to prepare barriers to discovery when litigation (almost inevitably) arises. There is a price in terms of monotony and diminished prestige that must be paid by in-house counsel for their relatively more secure and predictable practices. But the security of in-house practice may be largely illusory if, as it appears, professional standards forbid attorneys from negotiating contracts that limit their employers' right to discharge them "at will." *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(3) (1983) and Comment; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(B)(4) (1980); Herbster v. North Am. Co. for Life & Health Ins., 150 Ill. App. 3d 21, 501 N.E.2d 343 (1986), *appeal denied,* 114 Ill. 2d 545, 508 N.E.2d 728, *cert. denied,* 464 U.S. 850 (1987).

68. K. LLEWELLYN, THE BRAMBLE BUSH 38 (1951).

Luban's insistence on the facts of pervasive economic inequality unseats the comfortable assumption that legal ethics exist in isolation from issues of distributive justice. Heymann and Liebman insist on the factual richness of practice contexts, and in so doing they counteract the tendency to approach legal ethics as a subject amenable to merely technical responses. In the epochal reexamination of our legal culture that is now well under way, these books are destined to have a marked impact upon the teaching, practice and ethics of law.