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Review Essays

SHOULD A GOOD LAWYER DO THE RIGHT THING? DAVID LUBAN ON THE MORALITY OF ADVERSARY REPRESENTATION

A REVIEW ESSAY BY DAVID WASSERMAN*

INTRODUCTION

*Lawyers and Justice*¹ has three audiences: ordinary citizens, who denounce lawyers as vicious predators when not threatening to unleash them on their neighbors; lawyers themselves, who reserve their piety for an adversary system that allows them to take a cynically instrumental view of everything else; and moral philosophers, who find little interest in role morality unless the professions are paying for moral audits. As a member of all three audiences, I was inspired and chastened. Luban's book offers a devastating critique of the standard rationales for the adversary system, an exposé of existing practice, and an impassioned defense of an alternative model of legal representation.

Luban's goal is not merely to bury existing norms of legal practice, but also to praise the moral and practical opportunities in the law. He attempts to steer a middle course between the "standard conception" of adversary representation, which sees the law as a source of special privileges and immunities for its practitioners, and the legal realism popular in academic circles, for which the law is simply a highly-manipulable instrument of social control. Luban's general thesis is that legal practice has moral responsibilities which constrain it more than its apologists concede and legitimize it more than its critics acknowledge.² In this Review, I will consider his arguments for the moral value of adversary representation.

Luban's defense of conscientious legal practice takes several forms. In chapter three, he argues that citizens have a duty to obey

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1. D. LUBAN, *LAWYERS AND JUSTICE* (1988).

2. See *id.* at xix-xxvi.

generally beneficial laws³ and lawyers a concomitant duty to respect the laws' generality.⁴ In chapter seven, he argues that although lawyers are morally accountable for their actions in a way that the standard conception denies,⁵ a strongly justified adversary criminal defense can license acts that conflict with common morality.⁶ Finally, in chapters eleven and twelve, he argues that the right to legal services has a different, and less controversial, source than the right to more urgent goods like health care,⁷ and that lawyers have a special obligation to make their services available to the poor.⁸ I find these arguments provocative but largely unconvincing. In reviewing them I come to the bleak conclusion that the moral challenges of legal practice are not as singular, nor as interesting, as Luban makes them appear.

I. JUSTIFYING LEGAL INSTITUTIONS AND JUSTIFYING LAWYERS' ACTIONS

I begin with Luban's discussion of role morality because of its importance to his book and its originality as a contribution to legal ethics. Part I of *Lawyers and Justice* is a sustained attack on the lawyer's use of the "adversary system excuse" to cover a multitude of professional sins. Luban argues that this "excuse" fails to justify most objectionable aspects of adversary practice, and concludes that there are only a few settings in which a lawyer justifiably may engage in conduct which ordinary morality condemns.⁹ Unlike many of Luban's critics, I feel he is too generous.

In chapters four and five, Luban challenges virtually all the current rationales for the "standard conception" of the lawyer's role, as defined by two principles: (1) partisanship, which requires the lawyer to do everything within the bounds of the law to maximize her client's likelihood of success,¹⁰ and (2) nonaccountability, which frees her of any moral responsibility in so doing.¹¹ Luban's critique is directed largely against the partisanship principle; in particular, against claims that it maximizes the discovery of truth¹² or the pro-

3. *Id.* at 35-43.

4. *Id.* at 47-49.

5. *Id.* at 128-47.

6. *Id.* at 145-47.

7. *Id.* at 265-66.

8. *Id.* at 240-66.

9. *Id.* at 148-49.

10. *Id.* at 50-92.

11. *Id.*

12. *Id.* at 68-74.

tection of individual rights,¹³ that it is an intrinsic good like friendship or a condition of human dignity,¹⁴ or that it is essential to maintain the existing social fabric.¹⁵ The nonaccountability principle is an indirect casualty of this critique because there is no reason to immunize the lawyer for the excesses required by partisanship, and no need to immunize her against the acts required by a more qualified principle.

Luban finds full partisanship justified solely in the defense of accused criminals and, possibly, in the representation of other poor, oppressed, or vulnerable clients against powerful state-like institutions.¹⁶ In these areas, the single-minded zeal of the attorney helps to maintain the balance in an otherwise lopsided contest by "over-protecting" the rights of the weaker party.¹⁷ Although the representation of guilty criminals often is presented as the hardest case for adversary representation, it is actually one of the easiest (the easiest being the representation of an *innocent* criminal defendant). The partisanship principle derives spurious force from the criminal paradigm when it is extended to other settings in which the exigencies of criminal defense are absent. In ordinary civil settings, the adversary system is justified only "pragmatically" because there is no better way of resolving disputes in a society with our history and values.¹⁸

I find this line of argument compelling, but I think that Luban misconstrues its relevance to the issue he addresses in his next two chapters: the dilemma of conscientious practitioners trying to choose between their professional obligations, and the apparent conflicting demands of common morality.¹⁹ Luban believes that the strength of the policies underlying the role will be reflected in the range of "morally dissonant role acts" it licenses the agent to perform.²⁰ Luban attempts to steer a middle course between a "policy over acts" approach, which "eschew[s] the moral assessment of individual acts"²¹ and exempts the agent from ordinary moral considerations, and an "acts over policies" approach, which fails to take "general rules, policies, and institutions very seriously" and holds

13. *Id.* at 74-78.

14. *Id.* at 81-86.

15. *Id.* at 87-92.

16. *Id.* at 58-66.

17. *Id.*

18. *Id.* at 92-103.

19. *Id.* at 104-47.

20. *Id.* at 145.

21. *Id.* at 138.

the agent fully accountable to common morality.²²

Luban, however, does not argue that the role-agent must give the policies underlying the role greater weight in his decision than common morality would assign them—the position Alan Goldman calls “strong role differentiation.”²³ Nor does he argue that the agent should conform to the role except in circumstances in which the assumptions justifying his deference do not appear to hold—the rule-of-thumb approach. Rather, Luban insists that the agent is required, in every case, to weigh the marginal contribution of his role-act to the “moral goodness” of the institution against the harm and offense it may cause.²⁴

Despite his claim to steer a middle course, Luban’s approach ultimately favors acts over policies. It is really a form of “sophisticated” act consequentialism, taking account of roles, policies, and acts only to the extent that they bear on the consequences of specific acts. Because common morality also takes cognizance of the full range of effects produced by individual acts, Luban’s approach appears to be more of a refinement than an alternative. And if his approach does depart from common morality, it is only in the rare case in which a morally-dissonant role-act makes an important contribution to the moral goodness of the institution.

Luban begins his discussion of role-morality by rejecting the prevailing approach, which, following F.H. Bradley, he calls “my station and its duties.”²⁵ In this approach, which is little more than a philosophical version of the nonaccountability principle, an agent bears no moral responsibility for the acts dictated by a desirable role.²⁶ This conception of role-morality gives obvious and decisive relevance to Luban’s justification of adversary criminal defense: the role of zealous criminal advocate is sufficiently desirable to immunize the agent for otherwise immoral acts, while the role of zealous civil advocate is not.²⁷

Luban’s critique of “my station and its duties” focuses on the claim that the role justification gives the agent an “exclusionary reason”—a reason for refusing to consider any moral objections to individual role-acts.²⁸ He does not argue that an unqualified

22. *Id.*

23. See A. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 2-6 (1980).

24. D. LUBAN, *supra* note 1, at 139-40.

25. *Id.* at 116-27.

26. *Id.* at 117-20.

27. *Id.* at 58-66.

28. *Id.* at 120-23.

exclusionary rule could never be justified, but rather, that only a "moral prig" or moral monster could adhere to it.²⁹ Decent moral agents cannot always blind themselves to the consequences of their acts, however justifiable the rule that so requires them.³⁰

Having denied that the duties attached to a morally desirable station always are decisive in justifying individual role-acts, Luban also wishes to deny that they are irrelevant. In balancing "the moral reasons incorporated in [a] role . . . against the moral reasons for breaking the role expressed in common morality,"³¹ he constructs a form of argument in which the justification for the role-act derives from the good achieved by the institution: "[T]he agent (1) justifies the institution by demonstrating its moral goodness; (2) justifies the role by appealing to the structure of the institution; (3) justifies the role obligations by showing that they are essential to the role; and (4) justifies the role-act by showing that the obligations require it."³²

Luban illustrates this "four-fold root" by applying it to the dilemma of an "Oxfam" logistics officer working for a philanthropic institution "whose sole function is to distribute food to famine-stricken people in impoverished areas of the world," and whose role within that institution imposes the role-obligation of "procuring the means of transporting food[,] " which in turn requires various role-acts to carry out.³³ Luban presents a situation in which one of these role-acts remains silent about an impending murder:

Let us suppose that to get food to a remote village in an underdeveloped country stricken by famine, the logistics officer must obtain several trucks from a powerful local boss named P Imagine further that the logistics officer overhears P dispatching a murderer to kill [a] man that very night; that P discovers that the logistics officer has overheard him; and that P tells her that if the man is warned and escapes, P will withhold the trucks.³⁴

If the logistics officer feels obliged to keep silent, she will justify, or excuse, her act in the following way:

[S]he points out that the role act of complying with P is required by her role obligation, which in turn is necessary to perform the role's institutional task, which (finally) is

29. *Id.* at 121.

30. *Id.* at 120-23.

31. *Id.* at 125.

32. *Id.* at 131.

33. *Id.* at 129-30.

34. *Id.* at 130.

justified by the positive moral good of the institution: the saving of many innocent lives. Taken together, these justifications for the role act outweigh the obligation to P's unfortunate victim.³⁵

Her silence is "required by" her role obligation instrumentally, because it is necessary to discharge it: no silence, no trucks. This illustration makes clear that the four-fold root is intended to provide a consequentialist justification for morally dissonant role-acts, by showing how the disputed act contributes to the moral work of the institution.³⁶

An institution that only is justified pragmatically will not, on this approach, provide the agent with a very strong reason for engaging in immoral conduct. The justification is only as strong as its weakest link, and the first link consists of nothing more than the claim that the institution is no worse, or perhaps slightly better, than the alternatives.³⁷ If a pragmatic justification, however, does not license departures from common morality, it is not clear whether a stronger justification will either. Because "the moral goodness of the institution"—the ultimate source of justification in the four-fold root³⁸—rarely is affected by a single role-act, it is hard to see how it can underwrite that act.³⁹ The problem becomes apparent in the setting in which Luban is most anxious to license departures from common morality—adversary criminal defense.⁴⁰

35. *Id.*

36. The consequentialist character of the approach is reinforced by Luban's contrasting example of an anthropological research team in the same village. Although the researcher's silence is necessary to advance anthropological knowledge, that advance's importance does not outweigh the loss of an innocent life. *Id.* at 133.

37. The moral value in sustaining the institution, however, would still be considerable, if there were high "replacement costs" in distrust, disruption, and public resistance in substituting an equally adequate institution.

38. D. LUBAN, *supra* note 1, at 131.

39. David Ross has argued generally that those who make utilitarian arguments for such practices as promise-keeping, typically overestimate the harm done to the practice by a single breach. D. ROSS, *THE RIGHT AND THE GOOD* 39 (1930).

40. D. LUBAN, *supra* note 1, at 58-66. Luban confuses the issue somewhat by suggesting that the lawyer who helps win the acquittal of a client he believes to be guilty, commits a morally-dissonant role act. *Id.* at 59. If this is true, so does the jury which believes the defendant guilty but acquits him because of a reasonable doubt about his guilt. If the lawyer's belief in his client's guilt arises solely from the evidence and impressions available to the jurors, and not from his client's confidences, he does not, any more than they, need to justify his actions in terms of the distal goal of overprotecting defendants' rights. The claim that it is better to acquit a hundred guilty defendants than convict one innocent person, *id.* at 58, does not prescribe a ratio for "overprotection;" it expresses a sense of comparative evil. We believe that it is inherently wrong to deprive a person of his liberty unless his guilt is nearly certain, and a lawyer's efforts to assure that

In applying the four-fold root to legal representation, Luban claims that “since in the criminal defense paradigm the adversary system has weighty justifications, it can support broad institutional excuses—provided, of course, that the acts being excused are genuine requirements of role obligations that are themselves important to the defense attorney’s job.”⁴¹ This again suggests an instrumental justification for morally offensive role-acts—they are necessary for the institution to accomplish the goals that justify it. The plausibility of this claim, however, seems to rest on a confusion between acts *prescribed by* a role or role-obligation with acts *necessary to* achieve their objectives. While justifiable roles sometimes prescribe morally dissonant acts, those acts may not achieve or maintain the moral work of the role or institution. This equivocation is seen by examining Luban’s discussion of the Lake Pleasant Bodies Case.⁴²

In the Lake Pleasant case, a defendant charged with one murder told his lawyers about two other teenage murder victims, still classified as missing persons.⁴³ His lawyers felt obliged to keep this knowledge secret, although their silence prolonged the anguish of the victims’ families, still hoping to find their children alive.⁴⁴ In justifying the lawyers’ decision, Luban invokes the value of confidentiality in protecting criminal defendants against a powerful, overreaching state:

The lawyers’ role acts (preserving the defendant’s confidences, photographing the bodies but telling nobody) were required by the general duty of confidentiality—the role obligation. This is justified by arguments that confidentiality is required in order to guarantee an adequate criminal defense—the institutional task The next step is to show that zealous criminal defense is required by the adversary system, and this in turn . . . serves the positive moral good of overprotecting individual rights against the encroachments of the state.⁴⁵

It is instructive to note how the structure of this excuse differs from that offered by the Oxfam logistics officer. The officer’s role-act of keeping silent was required instrumentally by her role-obliga-

his client is not convicted without the requisite level of certainty need no extrinsic justification. It may be that this high standard of proof has external, consequentialist origins, but it certainly has become internalized in our culture.

41. *Id.* at 148.

42. *Id.* at 53-54.

43. *Id.* at 53.

44. *Id.*

45. *Id.* at 149.

tion of procuring transport—her silence was necessary to obtain the trucks. In contrast, the lawyers' role-act of preserving the defendant's confidences is prescribed by their duty of confidentiality, "required" only in the trivial sense that keeping silent is required to fulfill the duty to keep silent. The fact that the role-act is required in this sense simply is not relevant to a justification based on the moral good of the institution.

This is apparent in moving up the four-fold root: while procuring the trucks was necessary for the institutional task of transporting food to starving people, and thus for the moral good of saving lives, fulfilling the duty of confidentiality in the Lake Pleasant case is not necessary for the institutional task of "guarantee[ing] an adequate criminal defense,"⁴⁶ or for the moral good of "overprotecting individual rights against the encroachments of the state."⁴⁷ While it may seriously compromise the adequacy of criminal defense if every criminal attorney were to reveal her client's confidences whenever such action appeared likely to produce more benefit than harm, the impact of *this* decision on the "institutional task" of adversary criminal defense most likely would be negligible. The Lake Pleasant lawyers might have tipped off authorities about the bodies without arousing their clients' own suspicions or causing wider erosion of attorney confidentiality or client trust.

If "an adequate criminal defense" is read to mean an adequate defense in *this case*, and assuming that a breach of confidentiality prevents an adequate defense, then the lawyers' silence is required by their role-obligation. This, however, merely shifts the justificatory gap: ensuring an adequate defense is not necessary for the institutional goal of "overprotecting individual rights." A single inadequate defense hardly impairs the vigor of the adversary system or upsets the "balance of advantages" in criminal cases.

What is necessary to guarantee an adequate criminal defense (or so we may assume) is the *practice* of maintaining client confidences, for without it, the trust essential to effective representation does not exist. It makes no sense, however, to claim that the Lake Pleasant lawyers' silence is required by this practice. The practice is a social or legal fact, not a moral duty, and it clearly is a mistake to claim that their silence is necessary to maintain that practice. Luban equivocates between the duty of these lawyers to keep silent and the practice of confidentiality by speaking of a "general duty of confi-

46. *Id.*

47. *Id.*

dentiality."⁴⁸ If this refers to the duty that binds the lawyers, it is not necessary for an adequate criminal defense. If it refers to the practice that is necessary for that institutional task, it requires nothing of these lawyers.⁴⁹

If the Lake Pleasant lawyers had reasoned like the Oxfam logistics officer, they might have felt far less constrained by their role and its duties. Even taking into account not only the indirect consequences of their actions, but their own tendency to underestimate those consequences and overestimate the immediate harm in conforming to their role, they might well have concluded that the harm in satisfying their role obligation far outweighed the harm in violating it. It is unclear how the four-fold root would hinder them in reaching that conclusion. If the concealment in the Lake Pleasant case contributed significantly to the larger good of criminal defense, Luban certainly has not shown it. Accordingly, it is difficult to see how the concealment is justified by that good.

The same difficulty occurs in Luban's explanation of the criminal lawyer's duty of confidentiality in terms of the client's "morally based legal right" to compel his attorney's silence.⁵⁰ Luban argues that "[a] morally based right against self-incrimination will serve just as well as a moral right to establish the lawyer's duty of confidentiality."⁵¹ To the contrary, it does not serve as well. While a moral right would "trump" the considerable gains in utility that fre-

48. *Id.*

49. John Rawls introduced the distinction between "justification of a rule or practice" as a system of rules to be applied and enforced and the "justification of a particular action falling under [these rules]." Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 4 (1955). Rawls illustrates the distinction with the examples of punishment and promise-keeping, justified as practices by their long-term social benefits but unjustified in particular applications by moral duties for which consequences are largely irrelevant. *Id.* at 4-18. He does not explain why practices justified by their consequences should generate or correspond with independent nonconsequential moral duties, and that remains one of the unsolved mysteries of role morality.

Unless there is a fortuitous or providential correspondence between justified practices and moral duties, then either: (1) we will not always have a duty to adhere to practices that justifiably permit no exceptions; or (2) the justification for the practice will generate an unconditional duty of adherence. The former is not acceptable to those who think that the demands of morality must be consistent, but the latter is a difficult claim to defend. Why should we have a duty to conform to a generally beneficial practice when our conformity confers no marginal benefit? It is hard to see why we should be constrained by the possibility that the benefits of the practice would be lost if everyone reasoned as we did, when we know that everyone will not. We can hardly be accused of free-riding if we violate the practice to achieve what is, all things considered, the greater good.

50. D. LUBAN, *supra* note 1, at 192-97.

51. *Id.* at 196.

quently arise from breaking confidences, a morally-based legal right would not, for the reasons discussed above. The moral basis for the legal right arises from the need to resist the threat to individual liberty posed by a powerful state. Unless that threat is increased materially by the contemplated breach, however, it is difficult to see how the breach would be a moral, as opposed to a legal, wrong.⁵² The practice of confidentiality may be necessary to restrain the state, but this act of concealment clearly is not.

The difficulty of invoking a morally-based legal right to license a morally dissonant role-act reflects the broader tension between policies and acts, usually discussed under the rubric of rule-consequentialism.⁵³ There are several reasons why a sound rule or policy may require acts that individually are not necessary to achieve its objectives. Because case-by-case judgments may be fallible, biased, distracting, time-consuming, or impervious to collective effects, the greater good often is achieved by *per se* rules, which require greater conformity, obedience, or zeal than actually may be desired. The role agent faces a moral conflict whenever she believes that the objectives of the rule are not served by compliance. These, however, are simply the circumstances in which the four-fold root does not license a "morally-dissonant role act."

Thus, consider the duty of unqualified zeal in adversary criminal defense, which Luban endorses as a bulwark against state power.⁵⁴ While the goal of "overprotecting" defendants' rights against the state does not require unqualified zeal in every case,⁵⁵ the official requirement helps the attorney resist the pervasive temptation to distrust her client and accommodate the state.⁵⁶ If defense attorneys were permitted explicitly to make exceptions, those exceptions quickly would swallow the rule. Role-breaking by attorneys,

52. This is somewhat analogous to the claim that the admission of highly probative but unconstitutionally obtained evidence against a defendant is justifiable when there would be no marginal deterrence in excluding it, if the sole purpose for its exclusion is to deter police misconduct. A defendant suffers no injustice, because she did not have a right to its exclusion, which is only an incidental benefit derived from a deterrent policy. Of course, the claim that its exclusion has no marginal deterrent value is highly questionable: unlike a single act of role-breaking by an individual attorney, a court's admission of illegally obtained evidence may indeed have a subversive effect on the policy underlying the rule.

53. See, e.g., D. LYONS, *FORMS AND LIMITS OF UTILITARIANISM* 27-29 (1965).

54. D. LUBAN, *supra* note 1, at 62-63.

55. *Id.* at 58 n.17.

56. Luban discusses the interest of the experienced defense attorney "in playing ball with the prosecution and encouraging the client to plea bargain." *Id.* at 60. Thus, Luban implicitly recognizes the temptation to acquiesce to state power.

like nullification by juries, may be desirable only when it is carried out in defiance of the law.⁵⁷

If this is the justification for unqualified zeal, the attorney hardly can invoke it to decide whether to check her zeal in an exceptional case. After she reminds herself that the law prohibits exceptions by recognizing a danger of bias or bad judgment from which she is not exempt, she must still decide how to act.⁵⁸ If the contemplated breach would threaten significantly the protection of the defendant's rights, her decision to comply will be easy. If, more typically, the indirect and long-term effects of her breach appear negligible, the four-fold root will not license her performance of a morally dissonant role-act.⁵⁹

Although Luban insists that the four-fold root may be applied equally well by the individual role agent and the legislator,⁶⁰ it is far more appropriate for the legislator.⁶¹ A strong institutional justification supports a role requiring morally-dissonant acts more readily than it licenses those acts themselves, because the design of the role usually has a much greater impact on the goals of the institution than does the performance of any single act. By recognizing a duty of confidentiality (for example, by exempting the lawyer from civil

57. This justification for unqualified zeal has much the same structure, and the same tension, as the utilitarian justification for per se prohibitions against lying and promise breaking. As Philip Devine explains,

[t]he gist of the argument . . . is that only if the obligation to tell the truth and keep one's promises is given force in excess of that provided by the utility of specific acts of truth telling and promise keeping can the utilities resulting from honesty as a social practice be realized.

Devine, *The Conscious Acceptance of Guilt in the Necessary Murder*, 89 ETHICS 221, 223 (1979). While the reasons for excessive force may be quite different in the case of zealous advocacy, the resulting tension is similar: the conscientious moral agent inevitably will find herself in the position of endorsing the policy while having good, and sometimes compelling, moral reasons for refusing to conform to it. Devine argues that this position ultimately is indefensible, or immoral, *id.* at 224, but recognizes that some variation on it underlies a large number of policies, from nuclear deterrence, *id.* at 228, to civil disobedience. *Id.* at 229-33.

58. See D. LUBAN, *supra* note 1, at 138-39.

59. Luban himself recognizes that a single act of role-breaking rarely has more than a negligible effect on the role and the institution. He comments that the effect of a role violation "cannot amount to much" unless the violation is widespread. *Id.* at 138 n.7.

60. *Id.* at 138-39.

61. This is not surprising because as I have argued, the four-fold root provides a strictly consequentialist justification. As Rawls pointed out 35 years ago, "utilitarian arguments are appropriate with regard to questions about practices . . ." Rawls, *supra* note 49, at 5. Using the example of punishment, Rawls argued that while sentences should be assigned by the judge on retributive or "just-deserts" grounds, the *institution* of punishment is established by the legislature on the basis of deterrent and other utilitarian considerations. *Id.* at 6-8.

or criminal liability for failure to disclose confidences, or by making their disclosures an offense), the legislature may have a substantial impact on the protection of individual rights, an impact it must weigh against the harm that occurs by the practice of confidentiality.

The institutional justification also plays a more constructive role for the legislator than the individual role-agent. As Luban notes, the agent often confronts a stark choice between conformity and disobedience, while the legislator's options are much broader.⁶² Luban argues very effectively in chapter five that some of the less attractive features of the adversary role are not, or have not been shown to be, necessary for the goals of the adversary system.⁶³ As Luban suggests in his discussion of modified adversary advocacy, a legislator might be better able to redesign those roles to achieve the same good at less moral cost.⁶⁴ Once the legislator has done her best, her job is complete. In contrast, the role agent still must decide whether to perform the morally dissonant acts required of her.⁶⁵ The fact that her role was designed to keep such acts to a minimum will not help her decide; all that matters is the good or evil she now achieves by conforming with or breaking that role.⁶⁶

If the Lake Pleasant lawyers were justified in keeping silent, it is because their duties were only partially determined by their role and its justification. If they had induced their client to confide in them by promising confidentiality, they would be obliged to keep silent whether or not the duty of confidentiality was strongly justified.⁶⁷ Our ordinary moral duties to keep promises, fulfill reasonable expectations, and protect the vulnerable, often licenses morally dissonant role-acts that contribute very little to the good of a strongly justified institution, or which only are prescribed by a weakly justified institution.⁶⁸

62. D. LUBAN, *supra* note 1, at 138. While the role-agent "takes the institution, the role, and the role obligations as givens[.]" the legislator looks upon these as vehicles for regulation. *Id.*

63. *Id.* at 72-73.

64. *Id.* at 138-39.

65. *Id.*

66. *Id.*

67. The difference between the Lake Pleasant case and its civil counterpart may be that the strong policy underlying adversary, criminal defense will justify placing role-agents in moral dilemmas that it cannot resolve, while the weak policy underlying adversary civil defense will not. Perhaps civil lawyers should not elicit incriminating confidences; even if having done so, they are obliged to honor them, while criminal lawyers are justified in eliciting such confidences, although the obligation to honor them has the same nonconsequentialist source as for civil lawyers.

68. A general critique of the four-fold root has been developed by Judith Andre, using the issue of obligations to one's children and the institution of the family:

In sum, I believe that the "moral goodness" of the adversary system in criminal cases contributes far less, and less directly, to licensing morally dissonant acts by criminal lawyers than Luban claims. Because the duties of unqualified zeal and strict confidentiality are by their nature overbroad, they cannot justify every act of zeal and concealment. In essence that policy requires greater zeal and concealment than actually is desired, because that is the only way to attain the desired level. On the other hand, many acts of zeal and concealment not licensed by the institution nevertheless may be justified by such ordinary moral considerations as the duties to obey promises, to protect the vulnerable, and to defend against improper tactics by an adversary. Luban's discussion fails to show how lawyers, even those engaged in the most strongly justified forms of adversary practice, are ever exempt from the demands of common morality.

II. THE DUTY TO OBEY THE LAW

Another source of special constraints and prerogatives for lawyers may be the law itself: Even if lawyers rarely are licensed to engage in morally dissonant acts by their role in the adversary system, their obligation to uphold the moral authority of the law significantly may affect their range of permissible conduct.⁶⁹ Ironically, while lawyers usually invoke the adversary system to expand their range of conduct, their obligation towards the law may in fact contract it, requiring them to honor its spirit as well as its letter in serving individual clients.⁷⁰

In chapter three, Luban defends the notion that citizens have a

[O]ne can and should ask about obligations to one's children, say, without also asking whether the institution of the family is morally good. This is a separate and important question; but however one decides, it remains a fact that these children are as a matter of fact—and as a result of a social role which might not be justified—particularly dependent on their parents.

J. Andre, *Role Morality as a Complex Instance of Ordinary Morality* (June 17, 1989) (to be published in *AM. PHIL. Q.*). There is, however, no reason to believe that such ordinary moral obligations always are available to support a role-act with a consequentialist justification. See *supra* note 49.

A related point is that a wide range of deceptive, dilatory, and coercive legal tactics are excused, if not justified, by the fact that they are employed by one's adversary. As Professor Dees has pointed out, the case against "unilateral disarmament" is often powerful, albeit treacherous, and those who rely on that defense may have a moral obligation to reduce the need to use it by working for multilateral disarmament. J. Dees, *I'd Be a Fool Not To!* (May 5, 1989) (unpublished manuscript) (available from author at Harvard University, Graduate School of Business Administration).

69. See D. LUBAN, *supra* note 1, at 48-49.

70. See *id.*

duty to obey generally beneficial laws,⁷¹ and lawyers a concomitant duty to maintain the generality of those laws.⁷² He regards the recognition of these duties as integral to both his critique of the adversary system and his proposals for reforming legal practice.⁷³ If laws simply are the self-serving ukases of a power elite, there is little opprobrium in violating or manipulating them to selfish ends, but also little potential in using them as a vehicle for redressing social injustice.⁷⁴ In claiming that a substantial subset of laws represents the efforts of the community to distribute equitably its benefits and burdens, and as such place a moral claim on the members of that community, Luban argues that lawyers have a duty to uphold the fairness or generality of the law, thus preserving the feature that gives the law its moral authority.⁷⁵

Luban's argument is not as central to his project as he suggests: even if citizens have no duty to obey the law, lawyers would nevertheless do important moral work in promoting and enforcing equitable laws. Still, the claim that lawyers are responsible for preserving the moral authority of the law gives legal practice a unique moral urgency, and its rejection reinforces the realist position that the moral force of the law lies exclusively in its social value.

Luban attempts to steer a middle course between those who argue that there is a presumptive, or "prima facie," duty to obey all laws and those who believe that the moral force of a law can be no greater than that of the conduct or restraint it requires.⁷⁶ The former cannot account for our readiness to ignore manifestly unjust and irrational laws, nor the latter explain our resentment towards those who regard themselves as "above the law." Luban's strategy is to extract from our seemingly conflicting intuitions in this area the recognition of a duty to obey laws that establish generally beneficial cooperative schemes, as a matter of respect for our fellow citizens.⁷⁷

Luban notes that those who defend a duty to obey the law usu-

71. *Id.* at 37.

72. *Id.* at 48-49. Luban defines the "generality requirement" to mean that similar cases should be treated similarly, and that laws should not confer benefits on one group at the expense of another. *Id.* at 43-44.

73. *Id.* at 31-32.

74. *See id.* at 48-49.

75. *Id.* Luban is not concerned directly with the duty of lawyers to obey the law, which might be both stricter and easier to justify than the duty of ordinary citizens. Rather, he is interested in discovering the source of the citizen's duty and to assess its implications for legal practice. *Id.* at 37.

76. *Id.* at 44-45.

77. *Id.* at 38. Luban might have adopted a very different strategy, arguing for a duty to obey democratically enacted laws, however fair their provisions. This "purely proce-

ally argue that fair play conditions obligation on consent: it is wrong to accept the benefits of a social scheme without sharing its burdens.⁷⁸ He, however, argues following Simmons,⁷⁹ that we only can be regarded as accepting benefits if we could deny those benefits without significant cost.⁸⁰ Most benefits conferred by the law fail to satisfy that criterion because we cannot decline them without uprooting ourselves from our communities.

Luban accepts the idea that our duty of fair play rests on the benefits we receive from cooperative schemes, but he seeks to show that these benefits may be binding even if they have not been voluntarily accepted. He argues for a duty of fair play based on reciprocity but not consent: we are bound, out of respect for our fellow citizens, to assume the burdens of a generally beneficial cooperative scheme only if we receive or expect to receive important benefits from it.⁸¹ Thus, a scheme conferring such benefits creates a duty that would otherwise not exist. This approach may appeal to Luban because it gives the law a role in creating duties, rather than merely enforcing duties that already exist.

An approach based on reciprocity, however, construes the duty of fair play too narrowly: we may be obliged to comply with fair cooperative schemes regardless of whether we have received or expect to receive any benefit from them. The *ex ante* balance of burdens and benefits that makes the schemes binding on us, not the benefits they actually confer. In arguing for a reciprocity-based duty of fair play, Luban fails to distinguish free-riding—the unearned enjoyment of nonexcludable collective goods—from unfair dealing, which need not involve unreciprocated benefits. We may act unfairly without free-riding, if we refuse to comply with a fair cooperative scheme that has not benefitted us. Conversely, we may free-ride without acting unfairly, if we have no prior duty to act as the scheme requires and we have not actively sought or accepted the scheme's benefits.

dural" approach would have been consonant with his later emphasis on political legitimacy in a democratic state. *Id.* at 239-40.

78. *Id.* at 37-38. Consistent with Luban, I use "consent" to include acceptance and "acceptance" to include what contract law calls "ratification," for example, drawing water from the well constructed by our neighbors. *Id.* at 36-38. Simmons uses the term "participation" to cover these and other forms of voluntary involvement in a cooperative scheme. A. SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 127-36 (1979).

79. A. SIMMONS, *supra* note 78, at 127-29.

80. D. LUBAN, *supra* note 1, at 39.

81. *Id.* at 41-42.

Luban offers three examples to show how the unaccepted benefits of fair cooperative schemes can bind their recipients.⁸² These examples prove both more and less than he intends: they show that we can be bound without consent or benefit, but do not show how unaccepted benefits alone can bind us.

Case 1: Drunken teen-agers smash fourteen six-packs of Heineken's empties on your street, making it impassible for autos. Your neighbors grab rakes, shovels, and brooms, and clean up the glass; you sit on your front porch (meditatively downing a nice frosty Heineken's) and watch them. As soon as the glass is gone, you climb into your car and drive off into the sunset. . . .

Case 2: On a trip to London, you observe people queuing up at a bus stop. How nice! you think. How unlike Manhattan! Forthwith, you cut into the front of the line. . . .

Case 3: You are driving on a highway, and two lanes must squeeze into one. . . . You see that the cars in the two lanes are taking turns. You know (let us suppose) that this method advances the line of traffic most rapidly. . . . When you come to the head of the line, you . . . skip ahead out of turn.⁸³

Luban contends that in all three examples, the scheme confers a significant benefit—enhanced mobility—on individuals who have had no opportunity to consent.⁸⁴ He argues that in each case we are obliged to comply, because the failure to do so, as evidenced by cutting in front, skipping ahead of turn, or declining to help out, shows disrespect toward our fellow citizens.⁸⁵

Luban's examples do not establish a duty to participate in cooperative schemes based on the benefits they confer.⁸⁶ Luban con-

82. *Id.* at 39-40.

83. *Id.*

84. *Id.* at 40.

85. *Id.* at 41. Luban recognizes that not all schemes which confer significant benefits also impose an obligation to comply: he supports the libertarians in denying that we have a duty to join our neighbors in planting flowers on the median strip in front of our homes. *Id.* at 41-42. He distinguishes his examples by the importance of the benefit they confer: "hassle free transportation" is "more basic to daily life" in our society than neighborhood beautification. *Id.* This difference is in part a matter of convention: "in most urban neighborhoods it is considered presumptuous to demand civic commitment from residents when it goes beyond necessities." *Id.* at 42.

86. While Luban does not claim that cooperative schemes are binding *simply* because of the benefits they confer, he insists that when they are sufficiently important or reasonable, our duty of respect requires us to reciprocate: "The obligation of fair play arises out of an obligation not to exhibit disrespect for ones' moral equals by free-riding." *Id.*

flates two distinct types of situations in which we feel bound by a duty of fair play. In his first two cases, we have strong antecedent beliefs about how the burden or inconvenience should be distributed and confront a scheme that makes distribution feasible. In the third, we lack such strong antecedent beliefs, and any duty we feel arises from the operation of the scheme. It is only in this third case that noncompliance looks like free-riding, and even here, the appearance is deceptive.

If our sense of fairness in the first two cases depends on a balance of benefits and burdens, it is an abstract, hypothetical balance: we may believe that first come, first served, or turn taking, is the fairest arrangement because it tends to equalize the burden of waiting, or because on average, it will yield the shortest waiting time for a passenger or driver. This weighing of benefits and burdens is strictly *ex ante*: the actual or prospective benefits to an individual waiting for the bus or driving towards the roadblock are irrelevant; he is obliged to wait in line, or take his turn, simply because that is the fair arrangement. If he fails to comply with that scheme, he is acting unfairly, but he is not necessarily free-riding; that will depend on the benefits he actually has received or is likely to receive from the scheme.

In analyzing the first two cases, I argue: (1) that the indignation

at 45. Respect is a far more imperfect duty than fair play, rarely requiring us to shoulder burdens proportionate to unaccepted benefits.

Luban is unclear about the relationship between the duty not to disrespect our fellow citizens and the duty to play fairly with them. Towards the end of his discussion, he states:

[T]he obligation to join in the clean-up is an obligation of fair play. The obligation of fair play arises out of an obligation not to exhibit disrespect for one's moral equals by free riding. But noncooperation in extenuating circumstances (such as minding the baby) exhibits no disrespect for one's moral equals. When I am minding the baby, I am playing fair, even though I do not join in the clean-up. So there is no obligation to join in the clean-up.

Id. While the logic of this argument is obscure, it seems clear that disrespect, and not fair play, must wear the pants. While we satisfy the duty to avoid disrespect by playing fairly, we need not satisfy the duty of fair play to avoid disrespect. Luban's claim that we play fairly by minding the baby distorts the usual understanding of fair play, which requires burdens proportionate to benefits *within* a scheme of cooperation. Our performance of tasks external to that scheme, like child-care, may exempt us from the duty of fair play, but it does not satisfy that duty. Had we given our prior consent to the scheme, we might be obliged to compensate the others if child care prevented us from taking part. We *are* free-riding when we mind the baby instead of cleaning up the glass, but we show no disrespect in so doing because of the personal importance of our alternative chore. If Luban wants to define the duty of fair play so that it always is satisfied when we display respect, it will not require us to assume burdens proportionate to the benefits we receive.

we feel toward the person who fails to comply does not depend on his having received, or being likely to receive, any benefits from the scheme, (2) that the role of the cooperative scheme is not to create a duty of fair play, but to make it feasible to satisfy that duty, thereby removing an excuse for its violation, and (3) that we would not even acknowledge a duty to comply unless we thought that the underlying distribution of inconvenience was fair, independent of any scheme for effecting it.

In the bus-queue case, Luban may be correct in claiming that queuing benefits even those who arrive last, by expediting the boarding process and by reducing their average standing-time over the long run.⁸⁷ I, however, do not think that our indignation at the person who cuts in front is aroused by her ingratitude at these fairly slight advantages. We would be equally indignant even if the circumstances denied her any short- or long-term advantage from the queuing arrangement, for example, if she cut ahead of a relatively short queue to board the Heathrow-Gatwick bus on her only passage through England.

Our sense of obligation arises from the fact that the queue allows us to honor our pre-existing duty to defer to those who have arrived first. A rule of "first come, first served" equalizes the burden of waiting in settings in which variations in need are relatively slight and impractical to ascertain: it is appropriate for a bus stop, not for an organ transplant. Most of us would acknowledge a duty to yield to those who have arrived before us, but would feel compelled to honor that duty only if we could do so at reasonable cost.⁸⁸

In the absence of a cooperative scheme, the cost often will be excessive. In the free-for-all of a Manhattan bus stop, we may not even know who came before us, and if we did, our attempt to defer to them might allow dozens of late arrivals to squeeze ahead. There is no practical way of giving our predecessors priority without losing our place to our successors. The London queue provides the answer to the dilemma. We are obliged to respect it because it does not create the obligation and removes a strong defense for breach-

87. *Id.* at 41.

88. Some evidence of the cost we are willing to bear is provided by Dick Larson, a queuing expert interviewed in *The Boston Phoenix*. Gower, *Life in the Slow Line*, *Boston Phoenix*, Aug. 11, 1989, § 2, at 1. He observes that customer satisfaction is reported to be higher at fast food outlets with single rather than multiple queues, although the actual waiting time is twice as great. *Id.* at 5. Larson attributes this effect to "the assurance of equity." *Id.* Admittedly, the preference for single queues also may reflect risk-aversion.

ing it.⁸⁹

The lane-closing case⁹⁰ is somewhat intermediate between the bus queue and the glass clean-up, because a turn-taking rule for a lane obstruction may seem less obviously fair than a first-come, first served rule at the bus-stop: cars side-by-side at the obstruction may have suffered very disparate delays in reaching that point. If, however, we think that a turn-taking rule is the fairest way to distribute the delay from a closed lane, the arrangement Luban describes allows us to do so without unreasonable cost. It would ask too much to require us to let in the car on our right unless we could count on the cars behind it to wait their turn, but the arrangement we observe gives us the assurance that they will.

Luban may assert correctly that a turn-taking arrangement at the blocked lane confers a significant benefit by expediting the flow of traffic.⁹¹ Again, however, I do not think that it is this benefit that obliges us to comply. As in the bus-queue case,⁹² our obligation is not conditioned on having benefited from the scheme, but on the assurance it provides that we can act fairly without too great a burden. If we felt that turn-taking was equitable, we would be obliged to wait our turn *without* a pre-existing arrangement, *e.g.*, if we were among the first to arrive at the obstruction, if our predecessors in the left lane simply had barreled ahead, or if the lead driver in the right lane had been too timid to take his turn. Assuming we could safely yield, it would be inconsiderate not to permit the car to our right to enter, even if we were the first driver to do so.

In both the bus-queue and blocked-lane cases,⁹³ the obligation we feel to comply with the cooperative scheme is contingent upon our acceptance of the priority rule it enforces.⁹⁴ If we reject that rule altogether, we feel little or no obligation to comply. Thus, if we regard highway driving as a lottery in which drivers took the luck of their lane, like customers in separate lines at a bank or a McDon-

89. This implies that if circumstances permit us to defer to earlier arrivals without risk, we are obliged to do so even in the absence of a queuing arrangement. I fully accept this implication. Thus, if we are the last to arrive at a Manhattan bus stop, it would be rude of us to board before the earlier arrivals.

90. D. LUBAN, *supra* note 1, at 40.

91. *Id.* at 40-41.

92. *Id.* at 40.

93. *Id.*

94. Alternatively, we may feel obliged just because we come to accept the consensus expressed in the cooperative scheme about the appropriate priority rule. If our own beliefs about the correct rule are uncertain or inconsistent, it may be reasonable to defer in this way to the "decent opinion" of our fellow citizens. If we do, however, their conduct has caused us to recognize an obligation; it has not created one.

ald's, we would feel no duty to take turns with drivers in an obstructed right lane, and would resent the fact that the drivers ahead of us in the left lane felt so obliged.⁹⁵ While we might regard their deference as part of *our* bad luck, we certainly would feel no later obligation to defer when our turn came up.⁹⁶

Luban's first case, the glass clean-up,⁹⁷ differs from the other two in that it does not involve an antecedent duty of fair play. There are an indefinite number of ways the effected neighbors could divide fairly the burden of cleaning up, and in the absence of a cooperative scheme, fairness would not require them to pick up a single shard of glass. Here, the very existence of a cooperative scheme appears to create a duty where none previously existed; the question is whether it can do so without consent. The actual or prospective benefits conferred by the scheme appear to contribute to the recipient's duty even if he does not accept them voluntarily. The person who receives the benefits of such a scheme without assuming the burdens can be seen as a free-rider. This is the strongest case for Luban's claim that we are sometimes required to take part in cooperative schemes, because our offense in opting out appears to consist in nothing but the fact that we are free-riding on the efforts of our neighbors.⁹⁸ The question, however, is what distinguishes this scheme from others, like the flower-planting,⁹⁹ in which we also seem to be free-riding if we opt out. The answer does not lay in the size of the benefits conferred, nor the ratio of benefits to burdens, because the planting might yield enormous pleasure at very slight cost.¹⁰⁰

95. Luban might respond that, given our "moral baseline," we would receive no benefit on this occasion from the turn-taking arrangement—it certainly would not get us through as fast as a "tough luck" approach. This, however, would relativize the benefits of a scheme to the recipient's preferred alternative: people who were delayed equally by the obstruction would be benefited unequally by the turn-taking scheme, if they favored different alternatives which would have resulted in different delays. It is absurd to claim that the more self-serving the preferred alternative, the less the benefit conferred and the corresponding burden imposed by the turn-taking scheme.

96. An obligation to take turns also might arise from the fact that in so doing, we contribute to the solution of a coordination problem, while we impair the solution in refusing to do so. But, as Regan has noted, this is a strictly consequentialist concern, having nothing to do with a duty of fair play. Regan, *Law's Halo*, 4 Soc. PHIL. & POL'Y 15, 17 (1986).

97. See D. LUBAN, *supra* note 1, at 39-40.

98. See *id.* at 39.

99. See *id.* at 41-42.

100. Luban argues that the obligation to participate in whichever type of cooperative scheme hinges "on the importance, or at any rate the reasonableness, of the cooperative scheme in question." *Id.* at 41.

Rather, I believe that the critical factor only is related contingently to the objective size or social importance of the benefits—it is our willingness to burden ourselves to obtain those benefits in the absence of a cooperative scheme. We exploit our neighbors if, by opting out, we allow their efforts to relieve us of a burden that we would otherwise have shouldered.¹⁰¹

Our hypothetical willingness to burden ourselves differs significantly in the flower-planting and the glass clean-up: the description of those cases suggests that we would not have personally lowered a finger to till the soil, while we would have tried to clear a path for our car in the absence of a group clean-up.¹⁰² By opting out of the clean-up, we exploit our neighbors to avoid labor that we would have undertaken independently.¹⁰³ If we had been willing to plant flowers on our own, our opportunistic withdrawal would be equally

101. This is true even if we would not in fact have been willing to do anything without group assistance, because a solo effort would have been futile. What matters is whether we would have been willing to do as much for ourselves as our "share" of the group effort required, if that would have gotten the job done. I think we take advantage of our neighbors by opting out in circumstances in which we would be willing to put "x" effort into a project which would require greater than "x" to do by ourselves but less than "x" to do with others. While we would not have done the work if the group had not, because the effort would have been excessive, we *would* have done as much for ourselves as the group scheme required of us if that lesser effort sufficed to get the job done. In this sense, we are allowing others do our work for us if we do not participate. This suggests that the strongest case of exploitation will not be the paradigm case of free-riding, in which the individual is always better off doing nothing. This sense of exploitation requires that there be at least some hypothetical circumstances in which the individual would be better off by exerting herself.

102. See D. LUBAN, *supra* note 1, at 39-40, 41-42.

103. I think this sense of exploitation explains the duty to participate that Christie claims to find in a neighborhood campaign to restore basic services cut off by civil war or natural calamity. G. Christie, *On the Moral Obligation to Obey the Law* 15 (Oct. 28, 1988) (unpublished manuscript) (paper given at Columbia University Law School Legal Theory Workshop) (copy on file with *Maryland Law Review*). We can safely assume that virtually anyone would work to restore his own services, and thus that the holdouts are exploiting their neighbors' efforts. Simmons relies on a similar inference from objective importance to individual disposition in an exchange with Klosko. Klosko, *Presumptive Benefit, Fairness, and Political Obligation*, 16 PHIL. & PUB. AFF. 241 (1987); Simmons, *The Anarchist Position: A Reply to Klosko & Senor*, 16 PHIL. & PUB. AFF. 269 (1987). Klosko argues for a duty, not conditioned on consent, to contribute to schemes providing goods that are (1) "presumptively beneficial"—those which, like Rawls' "primary social goods," everyone is presumed to want, Klosko, *supra*, at 246 (citing J. RAWLS, *THEORY OF JUSTICE* 62 (1971)); and (2) worth the cost to the *typical* recipient. *Id.* at 248. Simmons contends that to the extent that such a duty rests on fairness rather than general beneficence, presumptive benefits will be binding only because they can be presumed to elicit participation; in other words, because it can be presumed that almost anyone would want them at the price. Simmons, *supra*, at 273-74. Simmons further contends that schemes providing only "discretionary" goods do not bind just because participation in obtaining them cannot be presumed. *Id.* at 274.

offensive.¹⁰⁴ Conversely, if we were so lazy that, left to our own devices, we would have relied on mass transit until the next good rain, we would not exploit our neighbors by sitting out the clean-up.¹⁰⁵

Luban might respond that I simply argue for the principle of respect for one's fellow citizens; exploitation, after all, is an aggravated form of disrespect.¹⁰⁶ If, however, we have a duty to respect our fellow citizens, it does not require us to assume burdens proportionate to the unaccepted benefits we receive. For example, if we clean up less than "our share" of the broken glass, but as much as we would have independently, we show no disrespect. The individual who only does as much as he would have without the cooperative scheme may lack public spirit, but he does not lack respect. Luban recognizes that respect does not compel us to join our fellow citizens if they "stand immersed up to their necks in the outhouse tank,"¹⁰⁷ but fails to see that it may not compel us to join them in far more beneficent ventures. Thus, I do not think that Luban's examples demonstrate that our duty of respect obliges us to reciprocate the benefits of a cooperative scheme to which we have not consented.

Even if Luban's examples established that some cooperative schemes imposed a duty to participate independent of consent, the law itself would play only an incidental role in creating that duty. In all three of his examples, noncompliance shows disrespect only on the assumption that most other citizens are complying.¹⁰⁸ If not, our compliance may be impractical or supererogatory: impractical if the lack of compliance makes it difficult for us to ascertain how to comply, supererogatory if the general lack of compliance means that others will take costly advantage of our self-restraint.¹⁰⁹ Thus, in

104. But not if we only had decided *after* seeing the results of the planting that it would have been worth the effort to us to take part. In these circumstances, we would not have been exploiting our neighbors at the time of the planting when we sincerely believed that we would not have made the effort independently.

105. The case would be even stronger, but quite different, if we were unwilling to join in because we did not own a car. In that case, we would receive objectively less benefit from the clean-up, and it *might* be unfair to impose the same burden. I believe that a notion of fair play requires an objective measure of benefits and burdens, although I recognize the distinction may be hard to draw. I also think certain reasons for opting out may be inherently disrespectful, *e.g.*, the belief that street-cleaning is "beneath our dignity."

106. See D. LUBAN, *supra* note 1, at 42-43.

107. *Id.* at 44.

108. See *id.* at 49.

109. For someone who regarded duties of fair play as antecedent to any cooperative scheme for enforcing them, the absence of such a scheme would at most excuse non-compliance. For Luban, however, the duty to comply would not even arise, since fair

the free-for-all of a Manhattan bus-stop or traffic-jam, we may have no way of assigning priority, and we risk being delayed by those with lower priority if we defer to those with higher priority.

On the other hand, if most citizens comply with a cooperative scheme, it is their compliance, not the fact that it is undergirded by law, that obliges us to do likewise. For example, it might seem fair to require slow drivers to pull over for the cars behind them, although few slow drivers do so, and few states require them to. If pulling-over became a general practice, Luban would regard those who failed to do so as free-riding, since they would benefit from the compliance of slower drivers without burdening themselves on behalf of faster ones. But the driver who failed to pull over would be no more disrespectful, no more of a free-rider, in states in which the practice was enforced by powerful social norms than in states in which it was established by law.

In those cases in which general compliance with the scheme would not be possible without the coercive force of law, our duty to cooperate is analogous to our duty to stop at red lights at busy intersections. As Donald Regan has argued, what obliges us to stop is not the law requiring us to do so, but the fact that others rely on our compliance, and that we risk considerable harm in violating their expectations.¹¹⁰ Similarly, what obliges us to comply with cooperative schemes is not the laws creating them, but the beneficial conduct those laws elicit from others.

Even if citizens do not have a moral duty to obey the law, however, Luban's objection to the instrumentalist lawyer¹¹¹ has considerable force. The lawyer who twists the letter of the law to serve the narrow interests of a client "undermine[s] the generality of law,"¹¹² and this is a serious offense. Luban, however, cannot claim that the lawyer thereby "abrogate[s] the moral authority of the law . . . reducing it once again to coercion," because he has not demonstrated that the law has any independent moral authority.¹¹³

play is based on reciprocity, and in the absence of an effective scheme there would be no benefits to reciprocate.

110. Regan, *supra* note 96, at 16.

111. Luban implicitly acknowledges this in accepting that the compliance of most citizens is a condition of the obligation to obey the law. D. LUBAN, *supra* note 1, at 38. He, however, fails to recognize that this condition significantly attenuates the connection between fair play and the obligation to obey even a small subset of laws.

112. *Id.*

113. *Id.*

III. THE RIGHT TO LEGAL SERVICES AND THE OBLIGATION TO PROVIDE THEM

Luban finds a third source of moral constraints on legal practice in its relationship to the state. He argues that a right to legal services is implicit in our basic form of government, because professionally-assisted access to the courts is necessary for government's legitimacy.¹¹⁴ He contends that lawyers have a special obligation to make their services available to the poor because the legal profession is a creature of the state and subject to its ends.¹¹⁵ These arguments are best considered in the context of the contemporary debate on the distribution of legal services.

Two distinct claims recently have been made concerning the distribution of legal services: (1) that the case for redistributing legal services is stronger than, or at least distinct from, the case for redistributing other professional services, and (2) that lawyers have a special obligation to make their services available to those who cannot afford to pay for them. These claims may be independent: arguments for redistribution may say nothing about who should bear its cost, while arguments for pro bono service may be based on the obligation of lawyers to the system at large, not on the rights of the poor to legal services.

The independence of the two claims has been recognized by writers with strong positions on both sides. Charles Fried claims that forcing lawyers to represent the poor is incompatible with the lawyers basic role; however, he does not object to subsidizing the representation of poor people through the general revenues.¹¹⁶ Alan Wertheimer has argued that justice requires the equalization of legal resources in specific conflicts, but he takes no position as to whether equality is best achieved by providing legal services for the "have nots" or by limiting the legal resources of the "haves."¹¹⁷ Luban, in contrast, argues for both the right of the poor to free legal services¹¹⁸ and the obligation of lawyers to provide them.¹¹⁹

114. *Id.* at 255.

115. *Id.* at 256.

116. See Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060, 1077-80 (1976).

117. See Wertheimer, *The Equalization of Legal Resources*, 17 *PHIL. & PUB. AFF.* 303, 304-05 (1988).

118. D. LUBAN, *supra* note 1, at 237-64.

119. *Id.* at 282-88.

A. The Right to Legal Services

Although Luban and Wertheimer propose different standards for an acceptable distribution of legal services, their arguments for redistribution have interesting parallels. Luban argues for universal access to minimally competent legal services,¹²⁰ Wertheimer for parity in the legal resources devoted to specific disputes.¹²¹ Luban's notion is wider, but thinner than Wertheimer's: wider because the right to access is not triggered by a specific dispute and thinner because minimally competent services may leave indigents severely disadvantaged in disputes with wealthier adversaries.¹²²

While their proposed distributional standards differ, Luban and Wertheimer both attempt to make a case for redistribution that is independent of the seemingly intractable controversy over such "welfare rights" as secure housing and adequate health care. Both argue that the need for redistribution arises not from a moral right to legal services, but from the constraints imposed by the larger social system in which those services are embedded—for Wertheimer, the adversary system,¹²³ and for Luban, the American form of government.¹²⁴ Wertheimer contends that equal resources are necessary to achieve the adversary system's basic goal of maximizing correct results in legal disputes.¹²⁵ Luban argues that universal access is necessary to legitimate a government based on equality

120. *Id.* at 240-41. Luban concedes that access to equal legal services would be a "better interpretation of the meaning of equal access," but feels that it would be a prohibitively expensive, politically impossible goal. *Id.*

121. Wertheimer, *supra* note 117, at 320-21. Wertheimer believes that universal access would be harder to defend against a libertarian objection than would "negative" equalization, because it is less restrictive of liberty to prohibit a rich litigant from overspending on legal services than to require a third party to pay for a poor litigant's access to those services. *Id.* I doubt that many libertarians would find it more objectionable to take money from someone by taxation than to prohibit that person from spending it on protecting what she believed to be her entitlements. To appeal to libertarians, the distinction would have to rely on the acceptance of the judicial system as a legitimate function of the minimal state, allowed to impose spending limits on disputing parties. But if people can be taxed to set up the court, why can they not be taxed to subsidize access to it?

122. These two forms of redistribution have complementary deficiencies. Equalization is impracticable if it is limited to specific disputes, while access is ineffective unless it is more than minimal. Because private attorneys structure their clients' transactions to avoid disputes and to ensure success when they occur, equalization in specific disputes is difficult to achieve without massive handicapping of the more privileged party. Because the legal problems of the poor often require considerable skill and perseverance, minimal access barely will scratch the surface.

123. Wertheimer, *supra* note 117, at 304.

124. D. LUBAN, *supra* note 1, at 243-44.

125. Wertheimer, *supra* note 117, at 304.

before the law.¹²⁶ In permitting an inadequate distribution of legal services, the system undermines its own justification.

Both arguments have an appealing parsimony, as they derive distributional claims from the system's self-justification. Because these distributional claims arise from within the system, however, their moral force depends on the justice of that system and on the very issues concerning distributive justice that Wertheimer and Luban attempt to sidestep. These strengths and limitations become apparent in considering their arguments in greater detail.

Wertheimer argues that because an adversary system requires evenly-matched disputants for accurate results, equality of resources is not merely desirable as a matter of distributive justice but necessary to achieve the system's own ends:

Let us assume that the adversary system is the best (or at least a satisfactory) mechanism for achieving just results. . . . Yet once the argument for the adversary system is put in these terms, it seems reasonable to suppose that the equalization of legal resources, broadly construed, will result in a higher probability of just results than the present laissez-faire system It is arguably inconsistent and self-defeating to allow the use of grossly disparate resources. . . .¹²⁷

Thus, a system which permits great disparities in legal resources violates the conditions necessary to maximize just results.

Luban argues that (1) access to minimally competent legal services is necessary for access to the legal system,¹²⁸ (2) access to the legal system is necessary for equality under the law,¹²⁹ and (3) equality before the law is a "legitimation principle" of American government.¹³⁰ Luban argues quite persuasively, in light of *Gideon v. Wainwright*¹³¹ and the complexities of modern procedural law, that meaningful access to the legal system is impossible without a lawyer.¹³² The further claim that equality under law requires access to the legal system is necessarily true, because Luban defines equality under law to mean access to the courts to enforce one's legal rights.¹³³

126. D. LUBAN, *supra* note 1, at 244.

127. Wertheimer, *supra* note 117, at 310-11.

128. D. LUBAN, *supra* note 1, at 264.

129. *Id.*

130. *Id.*

131. 372 U.S. 335 (1963) (establishing right to counsel in felony cases).

132. D. LUBAN, *supra* note 1, at 243-48.

133. *Id.* at 252-54.

The critical step in Luban's argument is the third, in which he claims that equality before the law, or equality of legal rights, is a "legitimation principle" for our form of government.¹³⁴ Luban defines a legitimation principle as "an account of legitimacy offered by a government to its citizens," under which its citizens consent to be governed.¹³⁵ A government which defies a legitimation principle undermines its own authority: "[It] would be like the pope declaring *ex cathedra* that God does not exist! If there is no God, the pope cannot make *ex cathedra* utterances."¹³⁶

Luban also makes an historical argument for equality under law as a legitimation principle. He notes that it has been embraced by most Americans over the past two centuries, despite their sharp disagreements about distributive justice.¹³⁷ He further observes that access to the courts traditionally has been the first incident of membership in our political community: the right to sue was granted to women, blacks, and now to aliens, before the right to vote.¹³⁸

The strength of Luban's and Wertheimer's arguments is also a limitation. Both offer what Luban calls an "immanent critique," which does not depend on the system's satisfaction of independent criteria of justice.¹³⁹ The moral force of the critique, however, depends heavily on the extent to which those criteria are satisfied. If the laws enforced by the system essentially are unjust, greater justice may well be achieved by disparate legal resources or unequal access.

This limitation is more obvious for Wertheimer. If the goal of adjudication is to maximize *just* results, as Wertheimer assumes,¹⁴⁰ and equal legal resources maximize *legally correct* results, which is all that defenders of the adversary system can plausibly claim, then equalization maximizes the former only to the extent that they correspond with legally correct results.¹⁴¹ To achieve justice in a basically unjust system, it often is necessary to produce legally incorrect

134. *Id.* at 244.

135. *Id.* at 251.

136. *Id.* at 252.

137. *Id.* at 252-53.

138. *Id.* at 253.

139. *Id.* at 265.

140. Wertheimer, *supra* note 117, at 304.

141. Wertheimer implicitly concedes this point in placing his equalization proposal under the rubric of "partial compliance theory," which he understands to deal with unjust departures from "the criteria of a just society." *Id.* at 314-15. He obscures the gap between just and legally correct outcomes by *defining* equalization of legal resources as the allocation of resources which maximizes just outcomes. *Id.* at 304-05.

results, which may require that the weaker party receive far greater legal resources than a powerful adversary.

A similar qualification applies to Luban's argument. Even if equal access to the courts is required for the legitimacy of the American government, *differential* access may serve as a corrective to the injustices produced by that government. Thus, it has been suggested that a moral equilibrium has been achieved in tort law between access barriers favoring defendants and rules of liability favoring plaintiffs.¹⁴² Removing access barriers might well destroy this equilibrium and increase substantive injustice. To achieve justice in an unjust political order, it may sometimes be necessary to violate its legitimation principles.

Wertheimer and Luban also suggest another reason why the state is obliged to provide legal services to those who cannot afford them. If the government declines to do so, it does not merely fail to help the poor, but harms them in a way different than denying them adequate health care or housing.¹⁴³ Thus, Luban argues:

[T]he selective exclusion of the poor from the legal system does not simply fail to confer an advantage on them—it actively injures them. For a legal system does more than protect people from each other: it enormously expands our field of action. . . . [A] network of practices—of power and privilege—is set up from which those who have no access to the system are excluded; and this exclusion itself intensifies the pariah status of the poor. . . . The state has not been an innocent bystander observing the regrettable spectacle of economic inequality and poverty: it shares primary responsibility with the legal profession . . . for the fact that the poor have no meaningful access to justice and are made worse off by that fact.¹⁴⁴

Wertheimer draws a specific contrast to medicine:

Although the distribution of medical resources may be somewhat competitive, it is not directly *adversarial*. By contrast, an improvement in the legal resources available to one party has a direct negative effect on the interests of another. For these reasons, the *distribution* of legal resources—as opposed to the absolute level—is arguably

142. Cf. Krier & Gillette, *The Un-easy Case for Technological Optimism*, 84 MICH. L. REV. 405 (1985).

143. D. LUBAN, *supra* note 1, at 265-66; Wertheimer, *supra* note 117, at 322. Only Wertheimer takes his argument to imply the priority of the right to legal services over the right to health care. *Id.* at 305.

144. D. LUBAN, *supra* note 1, at 247-48.

more important than the distribution of medical resources

. . . .¹⁴⁵

Although both arguments reinforce the case for a more equal distribution of legal services, neither establishes the priority of those services over more urgent, and controversial, welfare rights—a priority that Wertheimer, but not Luban, appears to endorse.¹⁴⁶ Norman Daniel's argument that health care is necessary for the fair equality of opportunity¹⁴⁷ may be precisely cast in the same terms: health care greatly expands our opportunities for economic success and personal fulfillment, and its uneven distribution puts those who cannot afford it at a competitive disadvantage to those who can. Accordingly, because of this disadvantage, an improvement in the medical resources available to one person may have "a direct negative effect on the interests" of others.¹⁴⁸

The government may play a more extensive and visible role in excluding the poor from the legal rather than the medical system, but it certainly is complicit in the latter. The state enforces the medical monopoly over various forms of health care, severely limits the availability of drugs and other treatments, and imposes high standards for licensing hospitals and other health-care facilities. While health care may be a less integral and exclusive function of the state than providing "a locus for the accurate and impartial adjudication of civil disputes," as Wertheimer argues,¹⁴⁹ our own state is involved extensively in regulating both services, and its involvement gives it a responsibility for their distribution.

Even if the case could be made that the state more actively in-

145. Wertheimer, *supra* note 117, at 314 (emphasis in original).

146. *Id.* at 313-16.

147. N. DANIELS, *JUST HEALTH CARE* 45-48 (1985).

148. Wertheimer, *supra* note 117, at 314. Wertheimer fails to explain how a competition among several claimants for a single organ is less adversarial than a lawsuit, *i.e.*, how the donation of the organ to one patient has a less directly negative effect on the other than the loss of the lawsuit. He might argue that starkly noncorrespondent outcomes are more common in law than health care, but that is simply a matter of circumstance and degree. Alternatively, he might contend that the end of medicine is to cure, while the end of law is to adjudicate justly rival claims. Thus, the medical good of healing would be accomplished whomever got the organ, while the legal good of justice only would be accomplished if the party with the stronger entitlement prevailed. This, however, merely would restate the justice-maximizing argument discussed above without giving an independent explanation of why the rejected transplant patients are harmed less directly in losing the organ than the disputant in losing the lawsuit. The harm to the other needy patients is *more* direct, because an under-represented litigant may still win the lawsuit. In either case, the distribution of scarce resources may deny claimants what they are entitled to on the correct distributional theory.

149. *Id.*

juries the poor in denying them legal than medical services, that would not settle the issue of priority. While it may be worse, *ceteris paribus*, for a government or an individual to harm than to fail to help, the magnitude of the injury also must be considered. The stakes in health care may be, in general, much higher than in law: it may be far worse for the government passively to allow illness and debility to go untreated than actively to prevent the vindication of most legal rights. If we believe in the rights to adequate health care, secure housing or meaningful employment, we may well regard those rights as more urgent than the right to legal services.

B. *The Obligation to Provide Legal Services*

As long as people have a right to more legal services than they can afford, those services will have to be provided out of general state revenues or lawyers' pockets. While Luban strongly supports government funding for legal services, he also argues that lawyers are obliged to provide free services.¹⁵⁰ He contrasts lawyers with grocers, who do not have a special duty to feed the poor:

[T]he lawyer's lucrative monopoly would not exist without the community and its state; the monopoly and indeed the product it monopolizes is an artifact of the community The community, as a consequence, has the right to condition its handiwork on the recipients of the monopoly fulfilling the monopoly's legitimate purpose.¹⁵¹

There are two distinctions in this comparison. The first is simply that lawyers, unlike grocers, owe their substantial earnings to government intervention (but what about agricultural and commercial policies that enable grocers to charge higher than the market price?). This may distinguish lawyers from grocers, but not from doctors, engineers, teachers, and others whose earnings receive some boost from state certification or licensing requirements.

The second distinction is more helpful: law, unlike grocery or medicine, is a creature of the state, a vocation that only can exist in a civil society and whose activities play an integral role in the operation of the state. ("Integral role" alone might not distinguish lawyers from engineers or teachers without some debatable notion of "essential" government functions.) Whereas the state created the legal system for a specific end (which is, remember, equality under law), it can regulate the profession in any way that serves that end.

150. D. LUBAN, *supra* note 1, at 282-88.

151. *Id.* at 286.

Requiring lawyers to volunteer a few hours a week to the poor or the public interest is hardly a major imposition; the state would be entitled to demand much more if it would advance equal justice. I find this distinction persuasive in explaining why we do not need an argument from distributive justice, or even from monopoly status, to impose substantial pro bono requirements on the practice of law.¹⁵²

CONCLUSION

Luban makes a powerful but incomplete case against the moral prerogatives claimed by the legal profession. Although he rejects the standard conception of adversary representation, he exaggerates the moral importance of legal practice in several areas: in serving long-term institutional goals, in upholding the moral authority of the law, and in maintaining the legitimacy of our government. Even the most strongly justified forms of legal practice rarely will, if ever, license conduct that is not justified by ordinary moral considerations. While lawyers may enhance or impair the community's efforts to distribute equitably its benefits and burdens, they do not thereby uphold or subvert the moral authority of the law. Finally, although lawyers may have a greater obligation than other professionals to make their services available to the poor, those services are no more important to a just social order.

In challenging Luban on these points, I intend to praise him with faint damnation. Even if his claims for the moral significance of legal practice are wrong or overstated, he has raised the level of

152. Less persuasive, and also unnecessary, is Luban's fallback argument, that law, unlike grocery retailing, is not "a victimless pastime." *Id.* Luban suggests that the adversarial nature of legal practice creates some sort of compensatory obligation on the part of those who practice it. *Id.* at 286-87. Initially, this argument from direct harming might seem to have more force against lawyers than the government, because lawyers harm the disadvantaged more directly in representing the advantaged than the government does in allowing them to do so. The individual lawyer, however, hardly can redress this harm by representing the actual victims—to the extent they were identifiable, it would present a conflict of interest for her to represent them. Moreover, it seems odd to demand redress for an injury while not requiring the lawyer to avoid it in the first place, by assuming a less adversarial role.

If the lawyer owes no specific compensatory duty to those actually injured by her actions, it is unclear why she should have a more general obligation to make her services available to those belonging to the same class as her victims, though something like this appears to have been the moral logic of robber-barons turned philanthropists. While the harm of adversary representation may require subsidies for the injured class, it does not require that those subsidies come out of lawyers' pockets. If lawyers should pay, it is only because the state's role in creating the legal profession permits it to structure that profession as it sees fit.

debate tremendously by making them. *Lawyers and Justice* forces legal ethics to concern itself with difficult moral issues about obedience to the law, role-morality, and distributive justice. In placing professional ethics within the jurisdiction of moral philosophy, it upgrades the former and enriches the latter.