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Lawyers and Justice: An Ethical Study—A 60s Vision of Lawyering

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Lawyers and Justice: An Ethical Study—A 60s Vision of Lawyering

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I. INTRODUCTION

David Luban's book, *Lawyers and Justice: An Ethical Study*, supports a vision of lawyering that attempts to alleviate the inequities of wealth and power in American society. Luban makes three principal points. First, he argues for a professional ethic of moral activism, in which the lawyer persuades her client to pursue only moral ends with moral means. If this persuasion fails, the lawyer should resign, or, if she continues to represent the client, as she often must, she should do so only with moral methods. More generally, moral activism exhorts the lawyer to restrain herself in assisting the rich and empowers her to fight dirtier to help the poor. Second, he establishes the moral legitimacy of legal aid, and he calls for the deregulation of routine legal services and for mandatory pro bono work. Third, he writes a defense, consistent with democratic theory, of progressive public interest lawyers.

The political sentiments of the book reflect a 60s vision of society and lawyers. There are inequities in America and in the face of these, the lawyer's role is not to be neutral. The lawyer should play an active role in making society better. This book, however, is not a political and moral tract. It is a carefully constructed philosophic argument. Even if it does not persuade the reader, it will help her see objectively the political and moral assumptions which constitute the lawyer's role.

Luban takes care to challenge and to defend his assumptions. He frankly concedes weak points in his argument. He writes well, and he

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regularly reminds the reader of the argument's structure. This careful approach is helpful to the reader unfamiliar with philosophic argument. Moreover, Luban is familiar with the legal profession's need for specific examples, and he regularly supplies concreteness to anchor his argument.

His principal focus is his claim for moral activism. I will review this argument. The argument leads to a lawyer's role which Luban believes will promote the public good. He arrives at this conclusion by focusing on the individual lawyer. Can each lawyer, as an autonomous person, morally justify what she does in law practice? In answering this question, Luban concludes that moral activism is an appropriate role conception. Not only does it respect each lawyer's personal autonomy, but it also enhances the public welfare.

II. SOME EXAMPLES

To make my description of Luban's argument clearer, I will use four of Luban's brief and familiar case descriptions, and then discuss his argument in the context of these cases. Each of these cases focuses on whether the lawyer, while continuing to represent her client, ought to disclose a client's secret.

Case 1: Robert Garrow, who was accused of murdering a student camping near Lake Pleasant, New York, told his lawyer of two other murders he had committed. The lawyer found and photographed the bodies. Later the father of one of the missing girls asked the lawyer if he knew anything about his daughter. Should Garrow's lawyer tell the father what he knows?¹

Case 2: Plaintiff Spaulding had been badly injured in an automobile accident. He sued the defendant. The defendant's lawyer had a doctor examine Spaulding; the doctor discovered a life-threatening aortic aneurism, apparently caused by the accident, that Spaulding's doctor had not found. Should the defendant's lawyer tell Spaulding about the aneurism?²

Case 3: In a Ford Pinto case, the lawyers in Ford's legal department, who reviewed the cost-benefit and crash-test documents related to the Pinto, knew that the car was unsafe. Should Ford's lawyers reveal this information to anyone outside the company hierarchy?³

Case 4: Assume that in one of the early suits against Ford for Pinto-related damages, plaintiff Grimshaw told his attorney that he had been careless at the time of the accident. Assume further that

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1. D. LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 53-54, 149-50 (1988). I will cite the pages in Luban's book, rather than the cases, for I am concerned with his use of the examples rather than the accuracy of his report.
 2. *Id.* at 149-50.
 3. *Id.* at 210 n.9.

Ford's attorneys did not discover the information. Should Grimshaw's lawyer disclose this information to the Ford negotiators during the settlement negotiations, or should she keep the secret in an effort to extract a higher settlement?⁴

III. THE ARGUMENT

Luban's argument begins by discussing a concept of ordinary morality which focuses on particular acts of specific persons. What would an ordinary person do with the information in these four cases? Competing considerations, such as the wish to keep a secret, to help a person, to avoid an injury, to remain loyal to superiors, or to see justice done, would inform each person. In each case, the individual must decide if the particular act is a moral one. Luban apparently posits that in each of these examples the person of ordinary morality would disclose the information to the father, to Spaulding, to the public, and to the Ford negotiators, respectively.⁵

Would lawyers act in the same way? Luban claims that they would not. Each will keep her secret. Moreover, none of these lawyers will believe that it is wrong to keep the secret. The role of lawyer requires that secrets be kept. Lawyers believe they are morally justified in playing this role as the role is reflected in the professional folkways and the codified professional norms. Adherence to the role provides social regularity, promotes efficiency in moral work, and dispenses with a dubious metaphysics of self.⁶

Luban describes this accepted and partisan role as the standard conception. It dictates that although the lawyer can try and persuade her client to disclose the information, if the client wishes the information kept secret, the lawyer must either resign⁷ or assist the client without disclosing the information.⁸ The standard conception of lawyering requires each lawyer (who does not or cannot resign) to engage in conduct (i.e., not disclosing the information while assisting the client) which would be immoral under common morality standards. The lawyer's moral justification does not focus on the common morality of the particular act. Instead, the reasoning focuses on the policies defining the role, e.g., the standard conception, and then expects the lawyer

4. *Id.* at 206. I have elaborated this case to make certain points.

5. Luban explicitly addresses Cases 1, 2, and 3. Since he does not explicitly address Case 4, I have extrapolated from his argument what he would have decided.

6. D. LUBAN, *supra* note 1, at 121.

7. See my discussion of this point in Part IV, below.

8. Luban does not thoroughly discuss the issue of whether the lawyer should keep a secret after resignation. His tone suggests that in many instances he believes the lawyer would act morally in disclosing the information. However, there is ambiguity in his answer. What does seem clear is that he believes a lawyer should not be required (in the situations in which resignation is unavailable) both (1) to assist a client and (2) immorally to keep a secret. D. LUBAN, *supra* note 1, at 202-05.

to behave consistently with this role. In other words, since the standard role requires such partisan behavior, each lawyer is morally nonculpable and nonaccountable for engaging in it.

Luban does not recommend either the approach dictated by common morality or that dictated by the standard conception. He develops a scheme of moral justification, the Fourfold Root of Sufficient Reasoning, which merges the two approaches. Its claimed novelty rests in its rejection of the centrality of the question: whether to focus on the particular act or the policies constituting the role.⁹

By using this approach, Luban concludes that Garrow's and Grimshaw's lawyers (Cases 1 and 4) should continue to represent their clients without disclosing their secrets and that the defense attorney in Spaulding's case and Ford's lawyers should have either resigned or, if this were not feasible, should have continued to represent their clients *and* disclosed their secrets (Cases 2 and 3). How does he get to this result?

The Fourfold Root is a complicated system. It appears objective and mathematical, but it truly requires constant critical judgment and the balancing of competing values and interests. Luban argues that if the act required by the role (i.e., keeping the secret) is justified, it is so because the system of which the role is a part is also justified. Conversely, an act required by a role which is part of an unjust system is not morally justified. For example, an SS trooper could not justify his brutal behavior by reference to a role which was part of the unjust institution of Jewish genocide.

In the context of lawyering, the chain of moral justification is as follows: (1) is the adversary system (i.e., the institution) justified; (2) if so, is the concept of partisan lawyer (i.e., the role) justified by the adversary system; (3) if so, is the nondisclosure of information (i.e., the role obligation) justified by the role; (4) and finally, if so, is the actual nondisclosure justified by the obligation.

Luban begins his analysis with an examination of the adversary system. He argues that there is at least some justification for the system which will support, in many instances, the standard and partisan

9. Luban states:

"Which is the logical subject of evaluation: the act or the rule (the policy)?" . . . pos[es] a false dichotomy. Unlike a policies over acts approach—rule-utilitarianism, for example—the fourfold root does not eschew the moral assessment of individual acts because it concludes by weighing the arguments favoring the performance of this particular role act against the objections to this particular role act arising from common morality. Unlike an acts over policies approach—act-utilitarianism, for example—the fourfold root takes the moral assessment of general rules, policies, and institutions very seriously, for all these must be brought to bear on the question of whether a morally dissonant role act might nevertheless be required by us.

Id. at 138.

conception of lawyering. The force of the justification, however, varies in different circumstances. On the one hand, in the ordinary civil arena, Luban criticizes common arguments for the adversary system. He argues that the system does not ferret out the truth, it does not defend litigants's legal rights, and it does not safeguard against excesses. He also argues that it is not intrinsically valuable, it does not honor human dignity, and is not so deeply woven into the fabric of American society that it would be unjust to tinker with it. Nevertheless, the adversary system is justified because it is no worse than any other available system for resolving disputes. Luban calls this a weak pragmatic justification.

On the other hand, the adversary system is strongly justified in the criminal law context. Luban finds that proper respect for individuals and a political bias which favors the individual against the powerful state (i.e., the classical liberal argument) strongly justify the system.

Luban examines the moral justification of the first three steps in the Fourfold Root in a similar vein. The standard role conception (and its features of partisanship and nonaccountability) is thereby justified, at least initially, for all lawyers. Luban argues, however, that when the role dictates behavior in conflict with ordinary morality, the lawyer must apply a Cumulative Weight Test in order to justify the actual act in question (Step 4 in the Fourfold Root). This is a complicated concept, but it is the heart of Luban's position. If one can proceed through Steps 1, 2, and 3 with only weak justifications (as in the civil law paradigm), then this weakness must be taken into account in justifying the final act. The end result is that when the individual lawyer finally justifies the role act, "[a]ll of the components of our deliberation [(the cumulative weight of all the steps)] are collapsed into one weighting that bears equally on each role act required by the role obligation or rule."¹⁰

By applying the Cumulative Weight Test to the role act, Luban concludes that Garrow's lawyer, in Case 1, properly adopted the partisan standard conception of lawyering. Since it was a criminal law case, the adversary system and its concomitant roles have such strong justifications that they outweigh all competing moral considerations. Garrow's lawyer could therefore continue to represent Garrow and keep the secret.

In civil cases, the Cumulative Weight Test mandates that principles of ordinary morality displace the standard conception and its principles of partisanship and nonaccountability. The adversary system is only weakly and pragmatically justified, and therefore an appeal to its requirements is of little consequence when weighed against the elements of ordinary morality. Luban therefore concludes that the de-

10. *Id.* at 137.

fense lawyer in Case 2 and Ford's lawyers in Case 3 should either have resigned or, if they continued the representation, they should have disclosed what they knew.

What about Case 4? Luban suggests that the criminal law paradigm is applicable to more than the pure criminal law case in what he calls the progressive correction of classical liberalism. This correction notes that individuals need protection not only from the state, but also from other powerful private persons. The large private corporation can injure the small person as readily as the public state. Thus, Luban includes in the criminal law paradigm "the preservation of the proper relation between powerful institutions and those over whom they are able to exercise their power."¹¹ In these circumstances, as in the criminal law paradigm, the Cumulative Weight Test allows the standard conception automatically to govern the lawyer's acts. Grimshaw's lawyer acts appropriately in continuing her representation while not disclosing the secret.

Luban concedes that his approach leads to two shocking conclusions. First, it describes a vision of lawyering very different from the standard conception. It is a concept of moral activism. The lawyer does not unthinkingly pursue her client's interests as the client sees them. The lawyer discusses with the client the rightness or wrongness of the client's projects. The lawyer may persuade the client, the client may persuade the lawyer, or they may reach some agreeable accommodation. If, however, there is no common ground, the lawyer's resignation is not the only answer. The moral activist conception "allow[s] lawyers to forego immoral tactics or the pursuit of unjust ends without withdrawing, even if their clients insist that they use these tactics or pursue these ends."¹² Luban does not flinch from the implications of this recommendation. He frankly concedes that the moral activist lawyer will betray his client's projects.¹³

Second, an implication of Luban's view is that the lawyer for the little guy can borrow his justification for partisan advocacy from the strong criminal law paradigm, while other lawyers may only justify their actions by an appeal to common morality. Luban states that "lawyers representing individuals in confrontations with powerful organizations can fight dirtier than their adversaries' lawyers can fight back."¹⁴

11. *Id.* at 66.

12. *Id.* at 159.

13. There may be a "betrayal by the lawyer of a client's projects." *Id.* at 174. The lawyer "may find herself compelled to initiate action that the client will view as betrayal." *Id.* at xxii. Although some might believe that Luban wants the lawyer to engage in acts without disclosing what she is doing, I believe that Luban does not recommend such duplicity.

14. *Id.* at 156-57.

IV. SOME CRITICISMS

First, I will briefly examine (1) the Fourfold Root of Sufficient Reasoning, as a method which claims to focus on both the morality of the particular act and the general policy of the role and (2) the belief that a lawyer's resignation will not solve the lawyer's moral problem when her client insists on immoral means or ends. Second, I will suggest that Luban raises very fundamental questions about the rule of law and each lawyer's role in upholding it. His vision of moral activism leads him to recommend either civil disobedience or a new code of professional ethics which is, in my opinion, unduly indulgent of the lawyer's common morality.

First, Luban suggests that his approach, the Fourfold Root of Sufficient Reasoning, fairly focuses on both the particular act and the policies supporting the role. How his approach does this is, however, confusing. One interpretation of his methodology leaves us with little more than a method for focusing on the morality of the particular act. Luban recognizes that the concept of the Cumulative Weight Test is only a metaphor.¹⁵ How and what the lawyer will weigh is uncertain and indefinite. From another perspective, Luban's method suggests that in many instances there will be no need for the lawyer to balance the morality of the act against the role requirements. He argues that the standard partisan conception should *always* prevail except when both of the following conditions are met: (1) the case falls within the civil law paradigm and (2) the lawyer's common morality dictates that she not engage in the immoral behavior. If these two conditions are met, the moral activist conception should *always* prevail. In other words, Luban does not develop a system which in each case delicately balances the appeal to role and the force of common morality. Instead, he simply divides the legal world into two spheres, the criminal and the civil. If the case falls in the former, the standard conception always prevails. If the case falls in the latter, common morality should inform the lawyer's judgment exactly as it would if she were not a lawyer.

Luban is, moreover, unwilling to concede that a lawyer's resignation¹⁶ can solve the problem. He argues in Appendix I that in many instances the standard conception does not permit resignation. He also believes that, because of the economics of law practice, "it is too much to expect that lawyers will often withdraw instead of caving in to their clients in such cases."¹⁷

There are two troublesome features of this argument. He admits that his argument that resignation is frequently unavailable "is not

15. *Id.* at 134-35.

16. This is the standard conception's solution to each lawyer's moral dilemma.

17. D. LUBAN, *supra* note 1, at 397.

widely accepted.”¹⁸ If he is wrong on this point, then there is rarely a need for a lawyer ever to betray a client. She can simply resign. Luban is also unduly understanding of the lawyer who “won’t” resign. It would be possible to insist that the lawyer who does not choose to assist a client by using immoral methods bear the costs (e.g., loss of revenue, malpractice, even disbarment) of her principled refusal. Luban, however, believes this asks too much of the lawyer. He wants the lawyer to have the best of both worlds—the freedom to continue her representation and the freedom to use only moral means on her client’s behalf. Luban hopes that if lawyers had this freedom and power, they would coerce their clients to act more justly.

Second, if the standard conception of lawyering is an accurate description of the present role, Luban’s insistence that lawyers should nevertheless follow the dictates of common morality is civil disobedience. Although Luban suggests that conflicts between the standard conception and common morality will not occur that often, when they do, he admits that “the lawyer must become a civil disobedient.”¹⁹ This is a dangerous conclusion.

I believe, as Luban does, that law is, and ought to be, a moral force in American society. There ought to be a presumption in favor of law-abiding. Of course, there will be a time for civil disobedience, but these times should be limited exceptions to the rule. I also believe that lawyers, as representatives of the legal system, have a special obligation to be exemplars of law-abiding citizens. This is not to say that they can never exercise civil disobedience. It only means that they should be reluctant to find exceptions to the rule of law. Lawyers, of course, will recognize that laws may be unfair or unjust, but they should use lawful processes to remedy these situations. This may encourage others to evince a proper respect for our legal institutions.

If this is true, it follows that lawyers ought to be equally law-abiding in their professional roles. They ought to be reluctant to reject in particular cases the dictates of the standard conception role. If this standard conception needs change, then lawyers ought to use lawful processes to change it.

Luban recognizes the problem of civil disobedience. He suggests that the professional code of ethics ought to incorporate the moral activist conception. He suggests “rules be redrafted to allow lawyers to forego immoral tactics or the pursuit of unjust ends without withdrawing, even if their clients insist that they use these tactics or pursue these ends.”²⁰ No doubt this will preserve the lawyer’s autonomy. Moreover, by noncooperation, she may be able to convince (or coerce) some clients to accept her vision of morality. Luban states “the law-

18. *Id.* at 397 n.2.

19. *Id.* at 156.

20. *Id.* at 159.

yer's autonomy allows the lawyer to exercise the 'Lysistratian prerogative'—to withhold services from those of whose projects she disapproves, to decide not to go to bed with clients who want to inflict damage on others."²¹

If only the lawyer's soul were at stake, I might endorse this view. Luban and I agree that whatever the profession and the public define as the proper role concept, it ought to contribute to a fairer and more just society. Luban apparently believes that the concept of moral activism, and the freedom it gives lawyers to dominate and betray clients, will achieve this result. I am less certain. Who gave lawyers such moral insight? Moreover, moral activism may result in a worse world. For every lawyer who will fight harder for the powerless individual, I fear that there are many who will perceive society's problems in traditional ways. For example, one lawyer may see her client, the indigent tenant, as a disadvantaged person in need of the basic human right of decent housing. Many more may perceive this client as a person infringing on a landowner's legitimate property rights. From this latter perspective, the morally active lawyer may be tempted to betray the tenant.

I am ambivalent about this. I was educated and began law practice in the 60s. I share Luban's political values. Certainly lawyers deserve freedom and autonomy, and certainly some lawyers, if granted this freedom and power, will use it wisely. If Luban's moral activism becomes the lawyers' accepted role, I too would hope that lawyers would use their power to make society conform to my vision of a just society.

In conclusion, even if we reluctantly reject Luban's vision of moral activism, he nevertheless demonstrates the power of clear thinking and rational exposition. In rejecting moral activism, we at least have come to understand the standard conception better.

21. *Id.* at 169.