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Book Review

BOOK REVIEW

The Lawyer as Moral Paragon

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

Reviewed by Paul Brickner**

David J. Luban, a nonlawyer law professor at the University of Maryland School of Law, has written an important and fascinating study about law, lawyers, justice, and legal ethics. Luban has taught philosophy at Yale University and Kent State University, and currently serves as a resident associate at the Institute for Philosophy and Public Policy at the University of Maryland in College Park, Maryland.

In his book entitled *Lawyers and Justice: An Ethical Study*, Professor Luban expresses deep concern about morality and the law and how the law relates to our democratic institutions and form of government. Although many lawyers will be favorably impressed with Luban's insights, some may find his opinions troublesome. In particular, conservatives will cringe at the strongly activist legal aid and public law programs that are forcefully advocated in the second half of the book.

Professor Luban believes that "[t]he commonest and bitterest

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complaint against the legal profession is that lawyers do not give a damn about justice, or, when they do, it is despite their profession rather than because of it."[1] He explains that "[l]awyers, no matter how high-minded their private concerns and commitments, are professionally concerned with the interests of their clients, not the interests of justice."[2]

Professor Luban begins his book with a meaningful discussion of realism and the moral authority of the law. He then considers the adversary system, which is so fundamental to our Anglo-American legal tradition that it is difficult to think of legal ethics outside its context. After this interesting discussion of the adversary system and its alternatives, Professor Luban concludes that the system should be retained because the alternatives are no better than the current system. The discussion then turns to morality and the law, attorney-client confidences, corporate counsel, confidentiality, and the problems of justice. Included in these discussions is Professor Luban's strong and perhaps controversial pronouncement about the need for legal services and activist public law programs.

Throughout his book, Professor Luban stresses the importance of what Murray L. Schwartz, Professor at UCLA's law school, called "the principle of nonaccountability."[3] Professor Luban's statement of this important principle is that, within the framework of the adversary system, "the lawyer's morality must be distinct from, and not implicated in, the client's."[4] The other important principle that Professor Luban stresses in his study is the principle of partisanship. He tells us that, "When acting as an advocate, a lawyer must, within the established constraints on professional behavior, maximize the likelihood that the client will prevail."[5] He writes of the lawyer's role in the courtroom and in the "less zealous and client-centered . . . roles such as negotiation."[6]

Professor Luban has difficulty, however, justifying either of these two fundamental principles. He agrees with the criticism "that the unabashed instrumentalism prescribed by the principle of partisanship degrades the law and legal argument,"[7] and believes that the

1. D. LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY at xvii (1988).
2. *Id.*
3. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 673 (1978).
4. D. LUBAN, *supra* note 1, at 7.
5. *Id.* at 11.
6. *Id.*
7. *Id.* at 17-18.

"principle of partisanship cannot stand."[8] Professor Luban concludes that the principle of nonaccountability is false and that the principle of partisanship "holds only within the severe limits imposed when lawyers are held morally accountable for the means they use and the ends they pursue."[9]

The late Arthur Leff of the Yale Law School defined the adversary system, in part, as follows:

> The idea is that an adversary system depends upon adversaries, *i.e.*, persons with conflicting stakes in an outcome, to put the system into motion and to bring to the attention of the trier all necessary facts and arguments. It is argued that the partisan participants in an adversary system do not present "the truth," but each side instead presents a one-sided version of what it wishes and has convinced itself is truth in the particular case—albeit all within some significant rules barring the too enthusiastic presentation of actual falsity. From those two "untrue" presentations made by partisan lawyers the trier is supposed to determine what the truth is, and where justice lies. There is always a strong pool of belief that this system is defective, and that truth would more likely be determined by nonpartisan investigation than by symmetrically skewed partisan presentations, but the common law system remains strongly adversary.[10]

Although Professor Luban does not quote Leff's definition, much of Luban's book concerns the same fundamental factors noted by Leff.

Professor Luban provides two definitions of the adversary system. First, he defines it narrowly as "a method of adjudication characterized by three things: an impartial tribunal of defined jurisdiction, formal procedural rules and, . . . [an] assignment to the parties of the responsibility to present their own cases and challenge their opponents."[11] Second, he defines it broadly

> by the structure of the lawyer-client relationship rather than by the structure of adjudication. When lawyers follow the principles of partisanship and nonaccountability in negotiation and counseling as well as courtroom advocacy, and they attribute this to the adversary system, they are speaking of the adversary system in the wide sense.[12]

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8. *Id.* at 18.
9. D. LUBAN, *supra* note 1, at 56.
10. Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 1954 (1985).
11. D. LUBAN, *supra* note 1, at 56-57.
12. *Id.* at 57.

Professor Luban notes the duty of attorneys to represent their clients zealously[13] and the need for attorneys to be able to withdraw from representation when withdrawal would not harm the client.[14] He discusses these conflicting considerations in a number of contexts, including client perjury.

Professor Luban recognizes, however, that criminal cases are different from civil cases, and that public prosecutors are different from privately employed defense counselors. He states that, "to put it crudely, criminal defense lawyer[s] can fight dirtier than anyone else,"[15] but public prosecutors are "held to a standard of candor in dealing with adversaries that is not mirrored in the duties of defense counsels."[16] Luban also stresses the inherent conflict faced by "the prosecutor [who] is directed to restrain her own zeal in the name of justice,"[17] while her adversary operates under no such constraints. Although Professor Luban believes that attorney-client confidences must be kept in criminal cases "in order to show respect for human dignity,"[18] he argues that the attorney-client privilege should not be extended to corporations or other entities.[19]

The professor's strongest feelings are reserved, however, for the public service and public counsel areas, including legal aid societies and public lawyer organizations. He believes that democracy necessarily calls for legal aid to be made available to indigent and needy persons in both civil and criminal cases. Professor Luban states that "the moral authority of the law itself rests on its generality, and generality will seldom result if the democratic process is itself closed to significant segments of society."[20] He raises his position to a constitutional argument by stating that "to deny a person legal assistance is to deny her equality before the law, and that to deny someone equality before the law delegitimizes our form of government."[21] He adds that "[t]he people's lawyer is a friend, not an enemy, of democ-

13. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).
14. D. LUBAN, *supra* note 1, at 396 n.2.
15. D. LUBAN, *supra* note 1, at 156.
16. *Id.* at 61.
17. *Id.* at 62.
18. *Id.* at 193.
19. *Id.* at 217-20, 228-33.
20. D. LUBAN, *supra* note 1, at 240. Also believing that lawyers should aid the indigent, New York Chief Judge Sol Wachter is giving the New York bar until 1992 to volunteer their services to the poor. If the bar does not voluntarily provide free legal services, Judge Wachter will propose a mandatory 20 hours per year pro bono system. *Judge Presses New York Bar to Help Poor*, N.Y. Times, May 2, 1990, at B1, col. 3; *see also Lawyers, Not Slaves, for the Poor*, N.Y. Times, May 5, 1990, at 24, col. 1; *Around the ABA, Pro Bono for the '90s*, A.B.A. J., July 1990, at 92.
21. *Id.* at 251.

racy,"[22] bringing to mind Brandeis' pro bono role.

Professor Luban then utilizes this reasoning in an attempt to justify redistribution of wealth by publicly provided legal counsel through the enactment of judicial legislation. To support his argument, Professor Luban relies on the teachings of Justice Brandeis, his adopted "kind of patron saint."[23] Professor Luban's thinking is attracted by Brandeis' near obsession with "the curse of bigness."[24] It seems to this reviewer, however, that Professor Luban reads into Brandeis a socialistic agenda of redistribution of wealth that is not Brandeisian but "Lubanism" projected onto Brandeis.[25] Although Brandeis opposed big business, big banking, big government, and big law schools, he also opposed socialism.[26] Brandeis believed that the workingman had a right to unionize and that unions should be strong to fight for employee rights and benefits.[27]

Brandeis may be Luban's "kind of patron saint," but this does not mean that Brandeis would have favored Luban's seeming defense of welfare and housing programs as inherently worthy institutions because of their role in redistributing wealth. Brandeis viewed America as a land of workers, not as a people propped up by public assistance with little hope of self-improvement. Brandeis believed that workers needed leisure time not to be indolent, but to enable them to return to work refreshed and able to work harder. He be-

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22. *Id.* at 240.

23. *Id.* at 237.

24. *Id.*

25. Professor Luban's dedication to redistribution of wealth brings to mind the concerns of Robert H. Bork over the "new left" and the prominence of many such thinkers in the present academic establishment. Bork writes in terms of the cultural war, the advocacy of Marxism, and the politicization of the law by academicians, including Georgetown law Professor Mark Tushnet. Former Judge and former Professor Bork is chagrined that Tushnet would declare: "My answer, in brief, is to make an explicitly political judgment: which result is, in the circumstances now existing, likely to advance the cause of socialism? Having decided that, I would write an opinion in some currently favored version of Grand Theory." R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 214, 338-42 (1989).

26. *See* A. MASON, BRANDEIS: A FREE MAN'S LIFE 149 (1946) ("The trade unions also stand . . . as a strong bulwark against the great wave of socialism. They for the most part stand out for individualism as against the great uprising of socialism on the one hand and of the accumulation of great fortunes on the other."). Brandeis wanted to insure responsible behavior by unions by requiring union incorporation so that unions would not be immune to damage suits. *Id.* at 142-43. *See also* M. UROFSKY, LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION 147-51 (1981) noting the opposition of Brandeis to Roscoe Pound's plan to increase the size of Harvard Law School.

27. *Id.* at 141-52. Much of the reverence surrounding the economic thinking of Justice Brandeis has been diminished by several writers including Thomas K. McCraw, a professor at the Harvard Business School, who convincingly argued that Brandeis' economic thinking was wrong because it was muddled by Brandeis' fixation on the curse of bigness. *See* T. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN 99-109, 138-42 (1984).

lieved that leisure time was necessary to enable people to become educated so that they could participate in our democracy. Brandeis stated that

> [t]he citizen should be able to comprehend among other things the great and difficult problems of industry, commerce, and finance, which with us necessarily become political questions. He must learn about men as well as things . . . . Our great beneficent experiment in democracy will fail unless the people, our rulers, are developed in character and intelligence.[28]

Brandeis may have been opposed to big business, but he cannot be used as supporting authority for "distributive justice" programs and redistribution of wealth programs. His means for "redistributing" wealth were a combination of steady employment and fair wages,[29] not judicial legislation through public law programs.

Professor Luban's *Lawyers and Justice: An Ethical Study* is a noteworthy book that will be valuable to all students of legal ethics. His study is tarnished, however, by his apparent desire to prop up his own social agenda by overemphasizing publicly supported legal services programs. While health care, our nation's defense, and the education of our children can be thought of as "the big three" of societal needs, we recognize many other worthy endeavors, programs, and agendas, including the need for legal services in both the civil and criminal arenas. We lack the resources, however, to fully fund every worthy program. Many will object when an attempt is made to elevate legal services to the same level of importance as "the big three." Many will object when an effort is made to force society to fully fund legal services by creating a constitutional right to free legal services in civil law cases.

28. A. MASON, *supra* note 26, at 151-52.
29. *Id.* at 141-52.