A Rejoinder to Professors Kaufman and Luban

Stephen L. Pepper

Before beginning my response to specific points, I would like to restate the primary intention of my essay.[1] My purpose in writing was to delineate the underlying ethical relation between lawyer and client, and in doing so to provide a persuasive, reasoned, moral justification to support the traditional amoral role of the lawyer. As part of this effort, I also wanted to address some of the current unease with that role by (1) identifying a significant source of that unease in the combination of the lawyer's amoral role with the dominant contemporary lawyer understanding of law ("legal realism"), and (2) suggesting where, within the ethical relation of lawyer and client, there is room for the exercise of a lawyer's individual morality. The comments of Professors Kaufman[2] and Luban[3] are helpful in relation to this project and often cogent. Frequently they clarify and elaborate in useful ways, and on many matters we agree. Where we disagree, however, I remain for the most part unconvinced, and this rejoinder will be an effort to explain why. Our dialogue should, at the least, demonstrate that in this area little is obvious; much is arguable; and persons of good will, genuinely concerned about ethical professional conduct, can disagree about even the most fundamental and basic questions.

I. Why a Model?

The question that initially must be confronted is that implied by Professor Kaufman: Why must we have a model at all?[4] He suggests that the issues and their contexts are so varied and complex, as are the considerations and personalities which will be involved in any particular situation, that any model oversimplifies and reduces reality too much to be useful.[5] And he may be right. But the absence of a model poses other and, I believe,

1. Pepper, The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities, 1986 A.B.F. Res. J. 613.
2. Kaufman, A Commentary on Pepper's "The Lawyer's Amoral Ethical Role," 1986 A.B.F. Res. J. 651.
3. Luban, The Lysistratian Prerogative: A Response to Stephen Pepper, 1986 A.B.F. Res. J. 637.
4. Kaufman at 651–52.
5. *Id., passim.*

© 1987 American Bar Foundation

HeinOnline -- 1986 Am. B. Found. Res. J. 657 1986

greater dangers. The world is full of complexity; any phenomenon can be observed from innumerable angles. Any ordering, any scientific hypothesis, any rule of law, is an "oversimplification" in some sense. The important questions are: Does it help in the task at hand? Is it useful for our purposes? Lawyers need a stance, a perspective, from which to approach and order the complexity described by Professor Kaufman. Lawyers need some firm ground upon which to stand in order to see that complexity and chart their own courses through it. I think it fair to characterize the contingent, variable, and uncertain moral world of the lawyer described by Professor Kaufman as a mush, and far too many lawyers are more likely to sink in that mush than to comprehend and appreciate the alternatives for ordering it.

Very few lawyers have any background in moral philosophy; usually none is provided in law school; and few are likely to have the time or inclination to educate themselves in the subject. Clients put their lives in the hands of professionals who will inevitably encounter difficult moral choices, frequently choices involving conflicts between the best results for the client, the professional, third parties, and society at large. In that complex, uncertain mush of the real world, it is all too easy to choose conduct that is in the professional's interest, or is the safest conduct (often that which serves "society's" interest as defined by public opinion), rather than to serve the client's interests. It is all too easy to define the client's interest for her in a way which avoids the difficult choices, and all too easy to find something in the mush that appears to justify one's conduct. A perception of mush tends to lead to rationalization and/or inarticulate decision making. My experience teaching law students and counseling lawyers suggests that it is essential that professionals have a coherent structure to apply to the ethical problems they confront if their choices are to be educated and thought through. Rejection of the structure is a possibility that ought to be placed explicitly before both audiences. But even if rejected, the model provides a relatively firm place to stand to survey the other possibilities; what is rejected often defines what is accepted. To consciously reject one model implies the need to construct or articulate an alternative guide, and the first model provides a basis, at least by contrast, for its replacement. And even if no replacement guide is articulated, when the time for decision is at hand, the model should at least give pause for reflection, should at least make conscious the understanding that one ethical approach is being rejected and another is needed. Clients—all clients—deserve at least that.

A second, closely related reason for having a model is that the absence of a guide or structure leads too easily to the reinforcement of a common view of professional ethics: the issues are those of character, which is formed long before one becomes a lawyer or doctor or engineer; questions of right and wrong are answered by an inarticulate knowledge acquired long before graduate school, a knowledge not subject to reasoned analysis. While there

HeinOnline -- 1986 Am. B. Found. Res. J. 658 1986

are elements of truth in that perspective,[6] it also often leads to rationalization or to inarticulate decision making.

With much of this I believe Professor Kaufman agrees, as demonstrated both by his exceptionally thoughtful course book[7] and by use of the essay above in his professional responsibility courses.[8] A model at least provides a coherent place to begin.

II. Enforceable Rules or Lawyer Discretion?

A background assumption accompanying the first-class citizenship model is that it can support an enforceable professional ethic, that it can be embodied in legal rules. But there is a great distance between the first-class citizenship model as "a coherent place to begin" and as enforceable rules. We are brought, then, to what for me is the most difficult criticism raised by Professor Kaufman: his unease with the use of "conscientious objection" terminology, with the implication of such terminology that the model presented should be legally binding, and with my argument that exceptions to the model—exercises of conscientious objection—ought to be relatively few ("limited to extreme cases").[9] Unfortunately, I have no definitive answer or response. My purpose was to suggest the correct underlying ethical relation between lawyer and client, to articulate and justify the basic ethical obligation of lawyers. There is a great distance between that project—on the "metalevel of theory," as Professor Kaufman phrases it[10]—and specific enforceable rules. To translate from one to the other is a very large undertaking involving many complex factors that I have not attempted, and I am consequently unsure of the results such an effort would yield.

For example, Professor Kaufman is entirely correct that it is worse for a lawyer to deceive a client as to the nature of a legal constraint than to openly refuse to assist a client in conduct the lawyer admits is lawful.[11] I treat them "as equivalent"—Professor Kaufman's characterization—only from the perspective of the underlying ethical obligation of lawyer to client: in both situations the lawyer's conduct prevents client access to the law, and thus the conduct is wrong from the perspective of the first-class citizenship model. But how this underlying professional obligation should be translated into enforceable professional rules is a very complex question. It is quite possible that only the deception should be punishable and not the open refusal, but I have not thought that question through.

It is true that both the structure of my argument and its tone lead to the conclusion that it is, in Professor Kaufman's terms, "wrong for lawyers . . .

6. See e.g., Hampshire, Public and Private Morality, *in* S. Hampshire, ed., Public and Private Morality (1978); Shaffer, The Gentleman in Professional Ethics, 10 Queen's L.J. 1 (1984).
7. A. Kaufman, Problems in Professional Responsibility (2d ed. 1984).
8. Kaufman at 651.
9. *Id.* at 652–53.
10. *Id.* at 655.
11. *Id.* at 654–55

HeinOnline -- 1986 Am. B. Found. Res. J. 659 1986

to refuse to help their clients to achieve lawful ends."[12] The thrust of my argument would indeed seem to lead to prohibiting this wrong through enforceable professional rules. As Professor Kaufman recognizes, the existence of such an obligation is linked inextricably to the problem of "the last lawyer in town."[13] That problem involves the question of whether providing access to the law for lawful purposes is an obligation of each lawyer separately for each actual or potential client, or only an obligation of the profession as a whole.[14] If it is the latter only, then it might well follow that the last lawyer in town has an entirely different and greater ethical obligation to a client or potential client than do all other lawyers. Professor Murray Schwartz has constructed an elaborate "last lawyer in town analysis."[15] I think that analysis, and most others which rely on the last lawyer in town distinction, quite wrong. For most clients, finding one lawyer is hard enough, and if that lawyer says "no," the effort to find another may well be too great. Changing lawyers is costly psychologically as well as financially. The "last lawyer in town" approach may be useful for elite lawyers whose clients have the money and sophistication to find another lawyer, but for all lawyers and clients it conjures some difficult questions. When would a client be "entitled" to a lawyer? On the fifth try? The eighth? How many clients will stick it out to the last lawyer in Denver or Chicago? This line of thought leads me to reject the last lawyer in town approach for practical rather than theoretical reasons, and to tentatively suggest that the *presumption* ought to be that each lawyer has the (enforceable) obligations of the last lawyer in town. This would be my starting point, but a full working through of these issues awaits another day.

It is clear that at least some parts of the basic ethical obligation of lawyers ought to be legally binding. The underlying professional ethic of service, of putting the client's or patient's interest before the professional's, must be enforced at some points. Given the gross disparity in power and opportunity within the relationship, created in part by professional monopoly rules enforced by law, it would be manifestly wrong not to legally prohibit the professional from taking advantage of the vulnerability of her client. One example where the current legally binding codes of lawyers' ethics do and ought to so protect the client is in the area of financial conflict of interest (aside from the fee for service) between lawyer and client. The danger is too patent, the temptation too strong and recurring, and the self-protection ability of the client too small to do otherwise. Confidentiality is another area where client vulnerability and lawyer temptation are too great

12. Kaufman at 652 (emphasis omitted).

13. Kaufman at 653.

14. Or the obligation might be that of society in general rather than the profession's or the individual lawyer's.

15. Schwartz, The Zeal of the Civil Advocate, 1983 A.B.F. Res. J. 543, 555–63. See also Wolfram, A Lawyer's Duty to Represent Clients, Repugnant and Otherwise, *in* D. Luban, ed., The Good Lawyer 214 (1984).

HeinOnline -- 1986 Am. B. Found. Res. J. 660 1986

not to have a binding rule. (The boundaries of that rule are controversial,[16] not the existence of a rule.) An interesting example of the need for an enforceable rule, highlighted by the inadequacy of the current rule, is provided by one aspect of the intersection of client confidences with lawyer financial self-interest. As noted above,[17] much of the code of lawyers' ethics reflects and enforces the underlying professional obligation, and much of it, to the contrary, is guild legislation designed solely to further the financial well-being of the profession.[18] The general protection of client confidences in the Code of Professional Responsibility does the former, and one shameful exception does the latter. Disciplinary Rule 4-101(C) of the Code of Professional Responsibility currently in force in most states reads: "A lawyer *may reveal*: (4) confidences or secrets *necessary to establish or collect his fee* or to defend himself or his employees or associates against the accusation of wrongful conduct" (emphasis added). The version of the rule in the new ABA Model Rules is an improvement,[19] but the American Trial Lawyers (ATLA) proposed code provides the best of the three alternatives as judged by the client-oriented, first-class citizenship model:

> A lawyer may reveal a client's confidence to the extent necessary to defend the lawyer against charges of criminal, civil, or professional misconduct asserted by the client, or against formally instituted charges of such conduct in which the client is implicated.[20]

Here it seems clear to me that clients ought to be protected by a legally binding rule similar to the one put forward by the ATLA, one in which lawyers are prohibited from revealing client confidences in order to collect fees. Situations in which superior moral values will suggest ethically correct conduct contrary to that mandated by the ATLA rule are sufficiently rare, the victim in such cases is highly likely to be the professional himself or herself, and the strong pressure and temptation of self-interest and consequent self-deception sufficiently likely, that an "aspirational" ethical guideline—law-

16. The confidentiality provision of the new ABA Model Rules has been the most controversial, both in the adoption of the Rules by the ABA, and in the debate over adoption by the states. Several states that have adopted the Rules have significantly changed this provision. Law review commentary has been voluminous, far more than on any other single issue in professional ethics.

17. Pepper at 616.

18. It is true that lawyers must be able to make a living from their trade if the profession is to survive. That appears to be the justification for the guild provisions provided in the ABA's Code of Professional Responsibility. Ethical Consideration 2-16 states in part: "The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them" (footnote omitted). This recognition is, however, merely one of the base premises for the underlying conflict of interest between professional and client which creates the need for a professional ethic in the first place. Pepper at 615–16.

19. ABA Model Rules of Professional Conduct Rule 1.6(b): "A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client."

20. Roscoe Pound–American Trial Lawyers Foundation, The American's Lawyers Code of Conduct, Rule 1.5.

HeinOnline -- 1986 Am. B. Found. Res. J. 661 1986

yer discretion—appears inadequate and unjustifiable. In other aspects of the professional relationship more flexibility—more room for individual lawyer discretion—may be appropriate. To fully respond to Professor Kaufman's concern would require the drafting of a code along these lines, and that I am not prepared to do.

The tension between binding rules and discretion in questions of moral behavior is reflected in an interesting way in another part of the confidentiality provisions of the new codes, one of the parts that has been most controversial. The drafters of both the ABA and the ATLA codes have incorporated something like the "conscientious objection" alternative, but have done so in a way that Professor Kaufman would seem to prefer, by incorporating it within the rules so the lawyer need not violate them. The result appears to be a return to a natural law, *mala in se/mala prohibita* distinction:

> A lawyer may reveal [client confidences] to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.[21]

Role morality is required, this provision seems to be saying, to the point where something "really bad" is going to happen; but once that point is reached, the lawyer is allowed (but not required) to revert to normal morality. Perhaps such efforts to incorporate within the rules exceptions where "conscientious objection" would be appropriate can succeed in this way, but I remain skeptical.[22]

III. AUTONOMY, DIVERSITY AND THE FORMAL/INFORMAL LINE

The pivotal difference between Professor Luban's views and those expressed in my essay concern the value of individual autonomy[23] and its rela-

21. ABA Model Rules of Professional Conduct Rule 1.6(b).

22. See Freedman & Goldman, Lawyer-Client Confidentiality: An Exchange 3 Criminal Justice Ethics 3, 8–16 (1984).

Note that Professor Freedman's natural law line (rejected by the ATLA but included as an alternative in its proposed code) is different from the ABA's. Unlike the ABA, he would exclude "substantial bodily harm" as a sufficiently bad outcome to justify revealing a client's confidence; but, again unlike the ABA, he would allow the lawyer to betray confidences regardless of whether the threat to life comes from criminal or lawful conduct and whether it comes from the client or not: "A lawyer may reveal a client's confidence when and to the extent that the lawyer reasonably believes that divulgence is necessary to prevent imminent danger to human life. The lawyer shall use all reasonable means to protect the client's interests that are consistent with preventing loss of life." The American Lawyer's Code of Conduct Rule 1.6. Professor Freedman was reporter for this code. His personal view is that disclosure in such circumstances should be *mandatory*, not discretionary. Freedman & Goldman, Lawyer-Client Confidentiality: An Exchange, 3 Criminal Justice Ethics 3 (1984).

23. The justification of the amoral role in my essay rests on two primary values: autonomy and equality. The equality aspect of the argument is to some extent dependent on the autonomy aspect, for if autonomy (in the guise of access to the law) is not important, then inequality of persons in relation to such access consequently would be of less significance. It is for that reason that I refer to differences on the issue of autonomy as "pivotal."

HeinOnline -- 1986 Am. B. Found. Res. J. 662 1986

tion to the proper ethical role for lawyers, issues on which we differ in at least two ways worth noting.[24]

First, we differ on the importance of autonomy to each individual's life, or to rephrase in the aggregate, on the overall value of individual autonomy to society, as against other possible values, such as order. It is beyond the scope of my ambitions here to explore and elaborate on the special place of autonomy in our scheme of values.[25] I will only note that autonomy is of singular significance in both personal and political terms. In terms of each individual's life, a sense or understanding of a substantial degree of control over one's own life is essential to well-being and essential to a meaningful life. The perception by each individual of a field of action in which there is freedom to make meaningful choices, to select and construct values, and to exercise values and choices in the building of one's life, is essential to an understanding of oneself as a responsible person and as an individual.[26] In addition, our political system is built on the premise of individual autonomy, a premise expressed not only through bills of rights[27] and the franchise, but also through a distrust of the majority's or government's decisions, including decisions as to what is morally right.

Professor Luban admits that "[o]ther things being equal," increasing individual autonomy is morally good.[28] His further discussion clarifies, however, that in his opinion the "other things" should be weighed against

24. A third difference is addressed in the text accompanying note 37 *infra*.

25. I elaborate briefly on the value of autonomy as a premise for the justification of the amoral role in my essay, Pepper at 616–17. Definition 1.b of "autonomy" in the *Oxford English Dictionary* is: "liberty to follow one's will, personal freedom." The "liberty, freedom, autonomy" cluster of terms is sufficient, I believe, to delineate the value relied on in my essay and in this rejoinder. Professor Luban's comments and the correspondence of a few others suggest that further exploration is appropriate in the future. It has been asserted, for example, that "autonomy" has *no* moral value. D'Amato & Eberle, Three Models of Legal Ethics, 27 St. Louis U.L.J. 761, 773, 794 (1983). An exploration of autonomy as a primary value leads, interestingly, to connections with the other primary value underlying the lawyer's amoral ethical role, equality. See, e.g., D. Richards, Toleration and the Constitution 133 (1986); Dworkin, Liberalism, *in* S. Hampshire, *supra* note 6 (reprinted in R. Dworkin, A Matter of Principle 181–204 (1985); Richards, Rights and Autonomy, 92 Ethics 3 (1981).

26. The emphasis in my essay on autonomy has led some to perceive my justification as based upon a view of man as essentially alone and unconnected. In the tension between individual and community, the word "autonomy" may be more suggestive of the individual, but it is essential to realize that an individual's autonomy involves his or her relations to various communities. An individual expresses autonomy at least in part through the extent and nature of his or her allegiances to those communities. Being autonomous is not inconsistent with being committed or connected. A lawyer's respect for and service to the client's autonomy ought not to assume an isolated client; to the contrary, the lawyer in serving the client has to be concerned about the client's commitments. In fact, "the client" often *is* a community of some sort. These issues are raised in an excellent forthcoming article by Professor Thomas Shaffer, The Legal Ethics of Radical Individualism, 65 Tex. L. Rev. 401 (1987). I agree with most, but not all, of the views expressed there by Professor Shaffer, and believe that the first-class citizenship model and the amoral professional role are compatible with those views. Elaboration of that compatibility awaits another occasion.

27. It is only through nonscreening lawyers that a citizen can have full access to rights such as those granted in bills of rights. These rights have often been emphasized as justifying the lawyer's amoral role. See, e.g., the work of Professor Freedman. But these rights are only a small subclass of "the law" to which all citizens ought to have access. The first-class citizenship model thus encompasses a "rights"-based justification, but is much more broadly based.

28. Luban at 639 (emphasis omitted).

HeinOnline -- 1986 Am. B. Found. Res. J. 663 1986

individual freedom on a case-by-case basis. In other words, his view seems to be that autonomy is not of special or systemic value in such a way that there is a thumb on the scale (or bias weight) in favor of automony when it is balanced against other "good" things. This reflects both an undervaluation of individual liberty, autonomy, and freedom[29] and a misunderstanding of our society's commitment to them. Note that in his list of possible reasons for not making immoral conduct illegal,[30] Professor Luban does not include that it is better to be free than bound, even if one might behave better when bound. Contrast this with the contemporary public distress and resentment over a perceived drift toward an overlegalized society. If there are too many rules and too much control, not enough room is left for individualism and liberty (autonomy), for the creation of one's own life. And this is true even if each rule and each control results in "good" conduct.

Imagine an authoritarian and totalitarian regime sufficiently successful at control that every person behaved in the morally correct way. I think it a fair reading of Professor Luban's argument to say that it represents a preference for such a result, were it possible: if the government could effectively prohibit all morally wrongful conduct and effectively require all morally correct conduct, it should do so.[31] Luban's comments suggest that impracticalities prevent us from legislating morally correct behavior in every case; not underlying countervailing principle. But such a view is fundamentally wrong. Our society rightly prefers the freedom to be ourselves, and to be wrong; and we prefer diversity. One root distinction between Professor Luban's position and my own is that he appears to place a rather low value on individual autonomy, and I (along with our society and legal system) place a rather high value on it.

But this is not our most significant disagreement, for it is a disagreement as to degree only, and we both recognize that freedom often must be constrained. It is our disagreement over the kind of restraint on freedom that lawyers ought to exercise or engage in that is most consequential for lawyers' ethics. Professor Luban and I agree that there are both formal and informal restraints on autonomy. Law and law enforcement are formal limits on liberty; friends, family, and community opinion are informal restraints. My essay asserts that lawyers ought to be considered part of the formal system and it provides a reasoned justification for constructing a lawyers' professional ethic on that basis. Professor Luban's response, in essence, asserts that lawyers ought to behave as part of the informal system. Thus our respective efforts are circular; we do not really meet.

29. See note 25 *supra*.

30. Luban at 640.

31. *Id.* at 638–40, but see *id.* at 642–43. He recognizes the general value of autonomy, but in a way consistent with the characterization of his argument in the text. He recognizes that "the generality of [moral] decisions are left in the private realm" but appears to believe that this is due not to an independent high value attributed to freedom, but rather to the difficulties of legal delineation and enforcement.

HeinOnline -- 1986 Am. B. Found. Res. J. 664 1986

This is seen most clearly in two of his examples. The first is his use of my analogy of the lawyer role to that of the automobile mechanic, suggesting the obvious wrong of the mechanic knowingly repairing a vehicle about to be used in an armed robbery.[32] But this example is inapposite because armed robbery is both criminal and morally wrong. The primary limit on the amoral role is a prohibition of lawyer assistance in client unlawful conduct. The law prohibits the robbery and also the assistance in the robbery, whether it be by mechanic or lawyer. And if one changes the example away from clearly wrongful criminal conduct, it loses its power. The auto mechanic who repairs trucks which deliver cigarettes or pornography, or who repairs the philanderer's car, doesn't call up quite the same moral condemnation. But this is a minor point. The second, and more telling, of Professor Luban's examples is the analogy of the lawyer to a wife (or friend) who has no general obligation to enhance the husband's (or friend's) autonomy.[33] This example also has no power, however, for it assumes that lawyers' ethical obligations are the same as spouses', and that is the primary issue on which we differ.

In regard to this second example, Professor Luban suggests that I am troubled by informal filters on free choice and he is not.[34] Quite the contrary is true. I agree with him that relationships with wives, friends, colleagues, and community observers are both appropriate and essential as informal restraints on individual behavior. The informal limits provided by these relationships are probably far more important to having a decent and good society than are law and law enforcement. Thus I concur with him regarding the propriety of a wife or friend refusing to assist in immoral but lawful conduct. While being a spouse or a friend may entail some role-specific morality or valuations, it certainly does not include an obligation to the husband's or wife's or friend's autonomy above one's own or the community's morality. Where Professor Luban and I disagree is in his suggestion that a wife's refusal to assist her husband's immoral conduct is the proper analogy for lawyer conduct. The lawyer, unlike the spouse or friend, is part of the *formal* system of law *imposed* by the community (through its government), and therefore has different obligations from those of the spouse or friend.[35] (And the same distinction applies to the auto mechanic, who also is not part of an imposed, formal governmental system.) Professor Luban *assumes* that lawyers' ethics ought to be no different than spouses' or friends', *assumes* that "it is no more of an affront to the client's autonomy for the lawyer to refuse to assist in the scheme than for the client's wife to threaten to move out," but appears to miss the crucial

32. Luban at 639.
33. *Id.* at 642.
34. *Id.* at 641.
35. The fundamental error in Charles Fried's well-known article, The Lawyer as Friend: The Moral Foundation of the Lawyer-Client Relation, 86 Yale L.J. 573 (1977), may have been his failure to appreciate this difference. Fried's position was based, at least in part, on the values of autonomy and equality, *id.* at 1073, but this was obscured by the misleading analogy of the lawyer's obligation to that of a friend.

HeinOnline -- 1986 Am. B. Found. Res. J. 665 1986

question: *Ought* lawyers to be considered part of the formal or the informal system of community restraint on individual autonomy?

A brief review of parts of my argument is thus in order.[36] Law limits, channels, and empowers. It is a formal creation of society; unlike the help of a spouse or a friend, it is by its nature intended to be available to all. In a highly legalized society, access to this formal public good greatly affects one's capacity to act effectively (one's "autonomy"). And most significant to the issue at hand, access to the law can be had *only with the help of a lawyer*. The system of law is in form available to all, but the lawyer is the only instrument for access to the system, the only instrument through which law becomes actually accessible. Lawyers are therefore more appropriately thought of as part of the formal legal system than as part of the informal social web surrounding each of us. To see lawyers as being on the informal side of the line—like spouses or friends, free to assist or not assist on the basis of their total personalities, their idiosyncratic personal convictions and their whims—is to put law itself on that same side of the line, and to determine access to the law on the same unequal, highly contingent, often whimsical basis. To do that is to informalize and subjectify law. It is wrong. Both autonomy and equality are served in our society by lawyers acting on the basis of a role-specific ethic which creates a kind (and perhaps degree) of formal obligation quite different from the informal ethical roles of spouse or friend.

Professor Luban counters that limits on the exercise of an individual's autonomy imposed by a lawyer do not constitute a significant harm because they are only "occasional" and people's lives are otherwise "by and large autonomous."[37] He fails to appreciate (1) the significance of our highly legalized society, where law impinges on vast areas of conduct, (2) that some exercises of autonomy are of much greater significance and value to an individual than are others, and (3) that access to legal assistance is necessary for many of these more significant exercises of autonomy. Who receives one's property (the accumulated fruits of one's labor) after death is probably more significant to an individual than choosing what to pack in the lunchbox (or where to go to lunch) tomorrow; the ability to start one's own business (frequently dependent on the formation of a corporate entity and entering into contracts) is probably more significant than choosing whether to go for a walk or read a book this evening; and knowing whether your boss is paying you the overtime to which you are legally entitled is at least as important as access to tonight's listing of TV offerings. Episodic interference with autonomy may be trivial or extremely important, depending on the significance to the individual of the episode. Professor Luban and I apparently disagree about the probable significance an individual will attribute to the episodes involving a perceived need for access to the law.

36. What follows is a summary of Pepper, *supra* note 1, pt. I.
37. Luban at 643.

HeinOnline -- 1986 Am. B. Found. Res. J. 666 1986

It may seem anomalous to place lawyers on the formal side of the line because they are, after all, private actors. It is important to note in that regard that at least some of the rhetoric deployed on "Law Day" and similar occasions is probably true: it is part of "the genius" of our system that lawyers (1) are private parties who owe their allegiance to their private clients; (2) are not governmental employees beholden to the government; yet (3) carry the power of the law with them to aid their clients. As a result, "the law" is available to all who can obtain a lawyer, and power is thus significantly diffused through society. Access to a lawyer means access to the law; access to the law significantly equalizes power between the government and the citizenry and between the powerful and the weak within the citizenry. (If one needs an example, consider how frequently large government and private projects have been delayed or stopped entirely in the recent past by private-party law suits.) Lawyers available as part of the formal system, but defining their role as service to the client, are remarkably effective at diffusing power.

IV. EQUALITY: EXECUTIVE-CLASS CITIZENSHIP AND FIRST-CLASS CITIZENSHIP

The justification of the amoral ethical role in my essay is based upon the values of autonomy and equality in the context of a highly legalized society. To the extent that the basis for the model is equality, Professor Luban is correct that first-class citizenship is a "comparative good."[38] His point is that if (1) that to which the comparison is made disappears, then (2) the inequality disappears, and if there is no inequality, then (3) the value of equality cannot be used to justify the model. He suggests that my concept of first-class citizenship—unfiltered access to "the law" through the assistance of a lawyer following the amoral ethical role—is a bad thing and we ought to do away with it, analogizing it to his imaginary construct, executive-class citizenship.[39] If we succeed in this project, the equality aspect of the justification will then have evaporated. There are two problems with this line of thought.

First, the charge that first-class citizenship is itself a bad thing essentially circles us back to our dispute about the value of autonomy and the importance of a person's access to law as an element of autonomy. I submit that first-class citizenship is a good thing. Law is fundamentally enabling and empowering; the law *ought* to be a public good. Individual autonomy and diversity are good; pluralism in values and individual responsibility for moral choice are good; and, the converse, centralized or totalitarian choice (or lawyer-imposed paternalism) as to "the good" or "the moral" is not good. But the inequality of access to law through lawyers is a substantial evil. Is it substantial enough to lead us to conclude that no one should have

38. *Id.* at 643.
39. *Id.* at 643–44.

HeinOnline -- 1986 Am. B. Found. Res. J. 667 1986

such access? I think the current distribution of legal services is not sufficiently similar to Luban's image of executive-class citizenship to support that conclusion. Even if it did, however, I continue to think that the *better* solution is to improve the distribution of legal services, not to transform lawyers into police, judges, or deceivers.[40]

Not only is this the better solution, it is really the only one available. The second and more obvious problem with Professor Luban's analysis is that we simply cannot make first-class citizenship—unfiltered access to the law—disappear. Some persons are sufficiently well educated, literate, and able that they will be able to determine for themselves what the law is. A second group (perhaps a subgroup of the first) will have legal educations, and thus access to the law. Third, there is good reason to believe that the moral perceptions of lawyers will frequently be the same as their clients, and those clients will then have access to the law under Professor Luban's ethic. Fourth, there is good reason to predict that some lawyers will be willing to provide access to the law if the price is sufficient, regardless of their moral evaluation of the client's proposed behavior. Unfiltered access to the law, then, will remain available to a not insignificant portion of the citizenry, even under the "moral veto" model. Thus element (1) in Luban's argument restated two paragraphs above is not the case and has no prospect of becoming the case, and therefore the succeeding elements in the proposed sequence do not follow. The comparative element of the justification for the amoral role, the argument based on the value of equality, therefore remains cogent.

V. The Problem of Legal Realism

Professor Kaufman and I have no disagreement here, so far as I can discern. He allows that "[a]s law teachers, we are all realists," but because we are caught up in "frontier questions," we may perceive more "chaos and manipulability" in the law than practicing lawyers see.[41] True. As I suggested, there are "variations in the extent to which legal realism will be encountered in a lawyer's office,"[42] and it is certainly true that a good realist lawyer knows that determined legal rules are major factors in many legal decisions.[43] None of that is in conflict with understanding legal realism[44] as an important factor in the way 20th-century lawyers work.

Professor Luban's commentary on the legal realism problem I find quite puzzling. Instead of responding to the complex phenomenon described in

40. Part of the reason it is better is because the lawyer-client moral dialogue *adds* a moral dimension, a second moral voice, to decision making. *See* Pepper at pt. IV.D.

41. Kaufman at 654.

42. Pepper at 26.

43. "The lawyer who tells the client, 'Do what you want; it is all indeterminate and manipulable,' does the client no favor." Kaufman at 654. True. I do not believe that the phenomenon described in pt. III of my essay boils down to this advice; at least that was not my intention.

44. The phrase "legal realism" was used in my paper to stand for an amalgam of several points of view characteristic of contemporary American lawyers and legal education. Pepper at 624–25.

HeinOnline -- 1986 Am. B. Found. Res. J. 668 1986

my essay, he has chosen to create a caricature of that problem and deride it. It is difficult to respond to that derision. I was attempting to be primarily descriptive, and he seems to have chosen to perceive it as primarily prescriptive. At the risk of appearing to defend that which I think it important to understand, the following will be an effort to suggest where Professor Luban's perception of the world of the modern lawyer is amiss.

The vehicle for Professor Luban's caricature is the construct of "Low Realism."[45] But Low Realism, so far as I can tell, simply describes unscrupulous lawyers and judges, and I believe both he and I are trying to determine the proper ethic for lawyers who want to be ethical, for the scrupulous. (Certainly the description of legal realism in my essay assumed lawyers genuinely interested in ethically correct behavior.) This aspect of Luban's conception is apparent when one looks at his delineation of "High" and "Low" Realism: "High Realism is the claim that law is a prediction of what human officials will do in their good faith efforts to interpret and enforce authoritative rules."[46] If one leaves out the reference to "good faith," what I have just referred to as the difference between the scrupulous and the unscrupulous, then this attempted distinction has essentially no content. It merely substitutes terminology. "Authoritative rules" replaces "law," but the underlying questions remain. One of the most basic, for both practicing lawyers and students of jurisprudence, is the obvious one: What qualifies as an "authoritative rule"? Or, before Luban's terminology switch: What is law; how do we *identify* it? In the water pollution example,[47] is the "authoritative rule" .050 grams, .075 grams, somewhere in between, or something quite different from a number? What is the "authoritative rule" the lawyer should look to in advising the cohabiting couple?[48] Their cohabitation is criminal; it is formally criminal, but actually lawful; or sort of unlawful, but tolerated? In contract law, is the "authoritative rule" (which Professor Luban would pass on to his client) that breach of contract is prohibited? To paraphrase Professor Kaufman, the lawyer who gives that advice "does the client no favor." Professor Luban has oversimplified the problem to such an extent that he seems to have missed it.

Luban asserts that there is no difference between telling the client the truth in the water pollution example and counseling that murder is not unlawful if you can get away with it.[49] I wonder why he didn't choose the cohabitation analogy or the contract analogy instead, claiming something like: "There is no difference between telling a client the law allows you to breach a contract, but may make you pay some of the other party's damages, and telling the client 'that the law against murder need not be com-

45. Luban at 646–48.
46. *Id.* at 646 (emphasis omitted).
47. Pepper at 627–28.
48. *Id.* at 629–30.
49. Luban at 647.

HeinOnline -- 1986 Am. B. Found. Res. J. 669 1986

plied with if the client can do it without getting caught."[50] Or "there is no difference between informing the clients that the law against cohabitation is never enforced and informing the client how to murder without leaving the kind of evidence upon which a conviction could be based." Was it, perhaps, because he "knows" intuitively that violation of the water pollution law is morally "wrong," but isn't so sure about the cohabitation example? If so, that is exactly the kind of lawyer arrogation of the client's moral autonomy that I submit is very troubling. Such subjective screening of access "to the law"—or of deciding what is "truly" the law—is highly problematic both on equality of access to law and on autonomy grounds.[51] As to why advice about breach of contract was not chosen as identical to advice about murder, perhaps Professor Luban realized the extent to which such a claim would run counter to the shared understanding of a legally trained audience.[52]

There are two further observations I would like to make about this refusal to acknowledge a difference between counsel concerning possible murder and counsel concerning possible breach of contract or possible pollution of water. First, it reveals quite clearly Professor Luban's slippage from description to prescription. Laymen intuitively know there *is* a difference; scrupulous lawyers (including those following the amoral ethical role) know that there is an important difference;[53] and legal philosophers know there is a difference.[54] That difference may be difficult to articulate; it surely can be drawn and justified in quite different ways; and it *perhaps* may not with-

50. *Id.* at 647.

51. How would Professor Luban counsel the lawyer who has been consulted by a client who desires information about the legal aspects of contemplated euthanasia? Where does advice by that lawyer about the role of the jury in a murder prosecution (including the possibility of jury nullification), or about the possibility of prosecutorial discretion, fit into his view? Is advice about these "procedural" aspects of "the law" out of bounds because of the "substantive" law prohibiting murder? Or would their propriety depend on the lawyer's *personal* moral views about euthanasia under the client's circumstances? Why should the client's access to knowledge about the law in such a situation vary with the moral beliefs of the lawyer he or she happens to consult? I suggest that the model presented in my paper, including *both* the obligation to give the legal advice *and* the encouragement to engage with the client in moral dialogue, is superior to the hit-or-miss moral screening of the law suggested by Professor Luban. Compare Pepper, *supra* note 1, with Luban, The Adversary System Excuse, *in* D. Luban, ed., The Good Lawyer 83 (1984), and Luban, *supra* note 3.

52. If one posits a continuum with breach of contract on one end and murder on the other, where the line is drawn on the advice a lawyer can give about enforcement possibilities and the consequences of violation, and on which side of that line the water pollution example falls, may well be questions leading to large and difficult jurisprudential problems. (The situation posited in note 51, *supra*, leads in the same direction.) Professor Simon, for example, has pointed out the tension between lawyers asserting a "right to breach contracts" but never asserting the parallel "right to commit murder" as exemplifying the tension between substantive and procedural law, and thus as an aspect of the complex problem of the need for order and the conflicting need for citizen discretion. Simon, The Ideology of Advocacy, 1978 Wis. L. Rev. 30, 48. It has recently been stated in these pages that the legal profession course may be "a sleeping jurisprudential giant," Schneyer, Professional Responsibility Casebooks and the New Positivism: A Reply to Professor Chermerinsky, 1985 A.B.F. Res. J. 943, 958. The dispute between Professor Luban and myself on the "legal realism" issue at least suggests that issues of jurisprudence are unavoidable in the course.

53. This difference is recognized in the new ABA Model Rule 1.6(b) reproduced in the text accompanying note 21 *supra*. See also note 22 *supra*.

54. See, e.g., H. L. A. Hart, The Concept of Law 35–41 (1961).

HeinOnline -- 1986 Am. B. Found. Res. J. 670 1986

stand analysis; but as a matter of observation, it does exist. Ridicule will not make it go away. Professor Luban's assertion to the contrary tells us that he does not accept (or perhaps does not morally approve of) the fact that contract law and tort law have become significantly less normative and more regulatory in the last century, but that does not change the *fact*, and lawyers do not have the luxury that professors might have to pick and choose what in contemporary legal culture they will accept and reject. (Lawyers may choose to guide their personal conduct by what they believe the law ought to be, rather than what it is; but certainly they ought not have the right to unilaterally impose what they think the law ought to be on their unsuspecting clients.) Similarly, criminal law has become the vehicle for an infinity of regulatory provisions which lack intuitive moral content (such as the water pollution example),[55] and Professor Luban may not like or accept the consequence that the criminal sanction itself has lost some of its normative content. But it remains a *fact*, and lawyers do not have the luxury to pretend that all violations of the criminal law are normatively similar to murder.

This brings us to my second observation. Lawyers must deal with the law as it is. And the way it is, is complex, with issues of enforcement often inextricably entwined with issues of application and interpretation. Professor Luban's refusal to acknowledge the difference between likelihood of enforcement as a legitimate element of the law of water pollution as opposed to the law of murder is simply a refusal to acknowledge complexity where it in fact exists. For example, if an administration or administrator has chosen to change "the law" on water pollution through enforcement policy rather than legislation, lawyers, in Professor Luban's view, ought to deceive their clients as to this change. He would say, I guess, that "the law" hasn't changed. But the "authoritativeness" of "the rule" certainly has changed. Perhaps Professor Luban would say that "the law" is unchanged because the officials are failing to use good faith in enforcing the .050-gram standard.[56] But this depends on whether some other "authoritative rule" gives those officials discretion to change "the law." To assume that they do not have that legal authority begs a very important question.[57] The root problem of Professor Luban's approach is that he assumes that the law is always clear and available—that it is always "there," concrete and at hand—when the lawyer's frequently perplexing problem is to figure out what it is.

55. Hazard, How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct? 35 U. Miami L. Rev. 669, 673 (1981).

56. See text accompanying notes 45–48 *supra*.

57. It is a matter of some contemporary controversy whether or not the Reagan Justice Department's and various federal agency's policies of nonenforcement are legally justifiable. Litigation seeking to force enforcement of "the law" is a staple of administrative law. See, e.g., Young v. Community Nutrition Institute, 106 S. Ct. 2360 (1986); Heckler v. Chaney, 470 U.S. 821 (1985); K. Davis, Administrative Law, § 28.06 (1972); K. Davis, Discretionary Justice (1969); Mashaw & Merrill, Administrative Law 706–46 (2d ed. 1985). For a discussion of the legality of nonenforcement decisions by police, see K. C. Davis, Police Discretion 79–97 (1975).

HeinOnline -- 1986 Am. B. Found. Res. J. 671 1986

To go one step further, let us assume in the water pollution example that the officials do not have the legal authority to make the changes they are making through enforcement policy. If they have the effective power to make those changes, however, there will be very little difference in effect from the perspective of the client. Professor Luban doesn't like that fact, doesn't want to call this second possibility "law." But should the client be punished for the government's exercise of power in excess of authority? What Professor Luban may fail to appreciate is that legal realism as defined in my essay is a useful and often appropriate approach to "the law" for clients, and hence for lawyers. That it may be much less useful and appropriate for officials enforcing law, for judges applying law, or for philosophers seeking to distinguish true from false law, or good from bad law, is worth exploring; but it does not justify ridicule for what competent lawyers, working within the currently accepted bounds of professional conduct, do to serve their clients.

Professor Luban's oversimplification is abetted by his choice of examples. To choose bribery and murder is to select violations of the criminal law, and within criminal law it is to select crimes we would think of as *mala in se*: not just prohibited, but wrong in their very nature. As noted above, contemporary "law"—and hence lawyers—treats crimes differently than it treats negligence or breach of contract; crimes are wrongs of a different kind. And the dominant legal culture perceives *mala in se* crimes as different from driving 60 miles per hour in a 55-m.p.h. zone.[58] Professor Luban wants to conflate all this into a simple lawful/unlawful dichotomy.[59] My effort in the legal realism section of my essay was to be descriptive about the dominant American lawyer view of law and to suggest how certain elements of that modern understanding have combined to have certain untoward effects.[60] "Legal realism" was a shorthand term for "the dominant

58. Hazard, *supra* note 55, at 672–75. Note the reflection of this difference in the ABA and ATLA rules on revealing client confidences. See text accompanying notes 21 & 22 *supra* and note 22 *supra*.

59. Rule 7-102(A)(7) of the ABA's Model Code states: "In his representation of a client, a lawyer shall not: Counsel or assist his client in conduct the lawyer knows to be illegal or fraudulent." The ambiguity in the words "illegal" and "counsel" make it possible that the core lawyer function of client counseling concerning the law is covered, and if the client uses the advice in unlawful conduct, the lawyer may have violated the provision. See Hazard, *supra* note 55. The breach of contract, negligence, and water pollution examples in pt. III of my essay could be categorized as "counsel" in regard to "illegal" conduct. The new ABA Model Rule 1.2(d) clarifies (or changes) Disciplinary Rule 7-102(A)(7) as follows:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Note the clarification from "illegal" to "criminal," and the approval of counseling concerning "legal consequences." The corresponding ATLA rules state:

> 3.3 A lawyer shall not advise a client about the law when the lawyer knows that the client is requesting the advice for an unlawful purpose likely to cause death or serious physical injury to another person.
>
> 3.4 A lawyer shall not knowingly encourage a client to engage in illegal conduct, except in a good faith effort to test the validity or scope of the law.

60. Pepper, *supra* note 1, pt. III.

HeinOnline -- 1986 Am. B. Found. Res. J. 672 1986

view of the law" I sketched involving elements taken from positivism, from legal realism, and from process jurisprudence.[61] My examples involved lawyers dealing with genuinely difficult questions of legal interpretation—questions of contract law, tort law, and unenforced or underenforced regulatory and criminal law. Professor Luban has chosen to direct his comments not at the situation I was identifying, but at a caricature of that picture, a creation he calls "Low Realism." Low Realism may be a problem with a small segment of the bar; but it is not the far more generalized problem with which my essay is in part concerned.

61. *Id.* at 624–25.

HeinOnline -- 1986 Am. B. Found. Res. J. 673 1986

HeinOnline -- 1986 Am. B. Found. Res. J. 674 1986