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# Structure and Integrity

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## ESSAY

### STRUCTURE AND INTEGRITY

*Susan Carlet*†

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#### INTRODUCTION

No one critiques legal ethics jurisprudence within the framework of liberalism better than David Luban. Professor Luban identifies himself as a communitarian liberal,<sup>1</sup> and in *Legal Ethics and Human Dignity*<sup>2</sup> he focuses on individual moral rectitude.<sup>3</sup> Until now, at least, Professor Luban has not had much to say about “structural” con-

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<sup>1</sup> See David Luban, *The Self: Metaphysical Not Political*, 1 LEGAL THEORY 401, 402 (1995).

<sup>2</sup> DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY (2007) [hereinafter LUBAN, LEGAL ETHICS AND HUMAN DIGNITY].

<sup>3</sup> See *id.* at 1 (“This is a book about legal ethics that focuses on the lawyer’s role in enhancing or assaulting human dignity.”); DAVID LUBAN, *A Different Nightmare and a Different Dream*, in LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 2, at 131, 132 [hereinaf-

cerns—namely, how lawyers' locations within institutions that organize access to power shape or should shape those lawyers' conduct. In this Essay, however, I aim to show that, in Professor Luban's most recent work, another approach slips in as a supplement to his still dominant individualist framework. In this emerging supplement, structural concerns become increasingly important. What Professor Luban views as ethical conduct changes depending on context, especially on the relative social positions of the actors involved. This Essay proposes such a reading of Professor Luban's new work and explores some of the implications and possible lines of inquiry offered by it.

*Legal Ethics and Human Dignity* is not a novel, but reading it brings the same literary pleasures of being transported to a more aesthetically pleasing world as does settling down with a work of really good literature. The world Professor Luban constructs through his lucid prose is one of gentle humanity, in which one can approach the problems confronting our terribly confused and violent times through the tempered judgment of a truly superior mind. In *Legal Ethics and Human Dignity*, as in his entire body of work, Professor Luban sets the standard for how a law professor can act as a public intellectual, writing for an intelligent, but not necessarily expert, audience in a manner that pleases with its careful attention to "craft values"<sup>4</sup> of analytic clarity, vivid argumentation, coherent organization, and creative imagery.

Indeed, sometimes the world Professor Luban constructs through the marvels of his prose is so much more intelligible than the world that appears in today's newspapers that it appears almost quaintly old fashioned. Professor Luban gives us a picture of the community in which he grew up, for example, in which the only lawyer he knew was his father's friend, a sole practitioner "who lunched at Benjy's Delicatessen to shoot the breeze, over corned-beef sandwiches."<sup>5</sup> In Professor Luban's world, lawyers' personal integrity matters. Lawyers should not paper deals in which "the price is right,"<sup>6</sup> but, "if [they] were to think it through, [those lawyers would] realize [that they were] going to ruin the lives of thousands of people and their families."<sup>7</sup> Lawyers should bring the same moral compass to political appointments at the

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ter LUBAN, *Nightmare and Dream*] ("[T]he integrity of the legal system depends to an enormous degree on the rectitude of the legal advisor.").

<sup>4</sup> I borrow this term from Professor Luban. DAVID LUBAN, *The Torture Lawyers of Washington*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 2, at 162, 198 [hereinafter LUBAN, *Torture Lawyers*].

<sup>5</sup> LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 2, at 1.

<sup>6</sup> DAVID LUBAN, *Contrived Ignorance*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 2, at 209, 235 [hereinafter LUBAN, *Contrived Ignorance*].

<sup>7</sup> DAVID LUBAN, *Integrity: Its Causes and Cures*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 2, at 267, 289 [hereinafter LUBAN, *Integrity*] (quoting LAWRENCE JOSEPH, *LAWYERLAND* 41 (1997)).

highest levels of government. For Professor Luban, even those government lawyers who sought through cautious internal maneuvering to change the Bush Administration's policies condoning torture did not go nearly far enough; they should have voiced righteous protest instead.<sup>8</sup> Lawyers' fundamental ethical mission should be to promote human dignity. Most often, lawyers do this by giving voice to the stories of "flesh-and-blood" clients,<sup>9</sup> though Professor Luban also recognizes that lawyers make an important contribution to "human dignity by knitting together thousands of details that make it possible for ordinary people to accomplish ordinary business smoothly."<sup>10</sup> But contemporary lawyers involved in work such as assisting evils committed by "quiet men with white collars,"<sup>11</sup> fall outside the scope of Professor Luban's ethical approbation.

In this Essay I argue that, although individual integrity continues to matter most in Professor Luban's world view, it increasingly matters in the context of structural relations in which lawyers' ethical duties to particular clients vary. Individual clients facing powerful institutional adversaries deserve client-centered representation, but lawyers representing impersonal and powerful institutions have different ethical responsibilities. In general, Professor Luban approves most of lawyers' work involving the protection of the less powerful against those who would exercise power to cause others great harm.<sup>12</sup>

I proceed as follows: In Part I, I examine, as necessary to set up my later analysis, several of the many contributions of Professor Luban's work to the field of legal ethics. In Part II, I argue that a structuralist supplement to Professor Luban's still predominantly individualist approach has begun to slip into his analysis to help him do certain analytic work that a purely individualist perspective cannot accomplish. In Part III, I discuss several possible implications of this shift in perspective, focusing especially on tough questions that arise in thinking about lawyers' ethics in the face of chronic conditions of institutional injustice. Combined with a structuralist supplement, the analysis in *Legal Ethics and Human Dignity* points to important ques-

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<sup>8</sup> See LUBAN, *Torture Lawyers*, *supra* note 4, at 173–74 (commending JAG officers that criticized the OLC and the Bush Administration's process, and deploring the outmaneuvering of Administration critics); see also DAVID LUBAN, *The Ethics of Wrongful Obedience*, reprinted in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 2, at 237, 266 [hereinafter LUBAN, *Wrongful Obedience*] ("The thought that a small number of righteous dissenters can sometimes sway the judgment of a larger majority is a profoundly hopeful one.").

<sup>9</sup> DAVID LUBAN, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 2, at 65, 87 [hereinafter LUBAN, *Upholders of Human Dignity*].

<sup>10</sup> LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 2, at 4.

<sup>11</sup> LUBAN, *Contrived Ignorance*, *supra* note 6, at 216 (quoting C.S. LEWIS, *THE SCREWTAPE LETTERS AND SCREWTAPE PROPOSES A TOAST* (Collier 1962)).

<sup>12</sup> See *id.* at 232–35.

tions about how to design institutional mechanisms that protect and respond constructively to dissent. Finally, but perhaps most importantly, *Legal Ethics and Human Dignity* compels us to think about these questions in the context of government lawyering, where questions of lawyers' ethical conduct within institutional constraints have become especially pressing today.

## I

### LUBAN'S CONTRIBUTIONS TO LEGAL ETHICS THOUGHT

#### A. The Relevance of Personal Morality to Legal Ethics Analysis

Professor Luban's writing about legal ethics in the 1970s and 1980s, in conjunction with the writings of fellow moral philosopher Richard Wasserstrom, changed a foundational assumption within academic legal ethics thought. Professors Luban and Wasserstrom effectively demolished arguments that lawyers' special "role morality" justifies bad acts on behalf of clients that would be wrong from the standpoint of personal morality.<sup>13</sup> After Professors Luban and Wasserstrom applied their philosophers' analytic tools to the issue, it became difficult to assert role morality claims to justify lawyers' conduct without more. Questions about *how* lawyers should go about adhering to the dictates of personal morality in client representations remained far from resolved, of course; but Professors Luban and Wasserstrom's work established that these were the questions requiring analysis. Professor Kruse discusses this point at greater length in her insightful essay, so I will not belabor it here.<sup>14</sup>

#### B. Lawyers' Practice as Key to Understanding Law

A second contribution of particular interest to my inquiry is Professor Luban's growing interest in lawyers' *practice* as a key question in the analysis of law.<sup>15</sup> This is a point to which Professor Luban returns repeatedly in *Legal Ethics and Human Dignity*.<sup>16</sup> He argues that, in order to gain insights in the study of law generally, scholars should focus on what lawyers, rather than judges, do and think.<sup>17</sup> Professor Luban

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<sup>13</sup> See DAVID LUBAN, *The Adversary System Excuse*, in LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 2, at 19, 57–62 [hereinafter LUBAN, *Adversary System Excuse*]; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

<sup>14</sup> See Katherine R. Kruse, *The Human Dignity of Clients*, 93 CORNELL L. REV. 1343, 1347–51 (2008) (making a similar point about the importance of the Luban/Wasserstrom analysis).

<sup>15</sup> See LUBAN, *Nightmare and Dream*, *supra* note 3, at 131–32.

<sup>16</sup> See, e.g., LUBAN, *Upholders of Human Dignity*, *supra* note 9, at 65, 68–73.

<sup>17</sup> See LUBAN, *Nightmare and Dream*, *supra* note 3, at 131–32; see also Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285, 1309 (2008) (noting how Professor Luban's ideal of moral activism "locates moral responsibility for injustice in the daily practice of law," such as the judgment of local prosecutors that can be made based on "insider's

writes: “[A] better standpoint for jurisprudence is that of the lawyer, not of the judge . . . The lawyer-client consultation is the primary point of intersection between ‘The Law’ and the people it governs[.]”<sup>18</sup> Moreover, Professor Luban argues that the “most characteristic legal events are the meeting and the handshake, not the court order.”<sup>19</sup> In contrast to Ronald Dworkin’s metaphor of “Law’s Empire,”<sup>20</sup> Professor Luban proposes as a better metaphor “law’s landfill, the dregs of legal authority contained in the millions of lawyer-client conversations on which our actual legal civilization is erected.”<sup>21</sup>

Of course, the idea that law is to be found in what ordinary lawyers do, rather than in what grand judges announce, is by no means new: legal realists such as Karl Llewellyn organized whole academic careers around this insight in the 1920s and 1930s.<sup>22</sup> But the idea is still far from established within the legal academy, where most scholars still focus on courts, judges, and legal texts.<sup>23</sup> What Professor Luban’s endorsement contributes is his stature as a leading legal philosopher on the world stage.

In his earlier work, Professor Luban was very much the brilliant philosopher writing about law from an external viewpoint; but in his latest work he has immersed himself within law practice and thus is able to apply his special philosopher’s skills from this internal vantage point. In his latest work, Professor Luban reveals himself as a subtle situational moralist and an ethically sensitive law practitioner. He reveals his increasingly endogenous view of lawyers’ practice dilemmas when he writes passages such as: “I don’t think that the misdeed of

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and outsider’s perspectives of moral obligation”); Kruse, *supra* note 14, at 1343 (also noting Professor Luban’s attention to daily practice decisions).

<sup>18</sup> LUBAN, *Nightmare and Dream*, *supra* note 3, at 131.

<sup>19</sup> *Id.* at 151.

<sup>20</sup> *See id.* at 160–61 (discussing RONALD DWORIN, *LAW’S EMPIRE* (1986)).

<sup>21</sup> *Id.* at 160. Sometimes Professor Luban even seems to claim that it is the ordinary lawyers of “everyday life” whose work really matters in shaping our legal world. *See* LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 2, at 4. Legal scholars should focus more on “humdrum” legal work, as lawyers doing it are “‘architect[s] of social structure[.]’” *Id.* at 3, 4 (quoting LON L. FULLER, *The Lawyer as an Architect of Social Structures*, in *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER* 264, 265 (Kenneth I. Winston ed., 1981)). Here I think Professor Luban is sometimes, but not necessarily, correct. The question of how much power “little guy” lawyers have in shaping the course of society should be treated as an empirical one. Avenues of influence and agency must be detected and studied. *See, e.g.*, Susan Carle, *Re-Valuing Lawyering for Middle Income Clients*, 70 *FORDHAM L. REV.* 719, 733–35 (2001) (noting differences between models of public interest lawyering developed in the late nineteenth century by grassroots and elite lawyers and lamenting the dominance of elite lawyers’ model today).

<sup>22</sup> *See generally* WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973) (examining central ideas motivating Llewellyn’s career and scholarship).

<sup>23</sup> *See, e.g.*, Charles Fried, *Scholars and Judges: Reason and Power*, 23 *HARV. J.L. & PUB. POL’Y* 807, 808 (2000) (“Legal scholarship is still largely about judicial opinions. Theories about what the law is—the legal realists notwithstanding—are still mainly about what judicial opinions have said about the law.”).

putting on a fundamentally truthful case that may have a few unimportant false details—which the lawyer does not know are false—really is a misdeed.”<sup>24</sup>

This passage seems noticeably different from Professor Luban’s earlier work in its sympathy for lawyers, and I will further explore its implication in Part II. But first, I note a final major contribution of Professor Luban’s work as relevant to this analysis: his use of empirical findings from experimental psychology to better understand the nature of individual moral judgment.

### C. Luban’s Use of Experimental Psychology Data

Consistent with his focus on examining the dilemma of personal moral integrity in the face of social pressures to do wrong, Professor Luban draws, in his latest work as well as in earlier writing, on a series of famous social psychology experiments that reveal many individuals’ extreme susceptibility to social pressures to conform despite the dictates of fundamental morality.<sup>25</sup> In one set of such experiments, known as the Milgram Obedience Experiments, subjects proved willing to inflict high-voltage electric shocks on persons apparently writhing in pain. These subjects usually complied so long as experiment supervisors directed them to administer the shocks and other subjects appeared to follow those instructions.<sup>26</sup> Indeed, *sixty-three percent* of the experimental subjects administered such electric shocks, even when the persons on whom they thought they were administering such shocks first complained of pain; then protested more loudly; then screamed in apparent agony; and finally fell ominously silent.<sup>27</sup>

In another famous experiment, known as the Stanford Prison Experiment, volunteer undergraduates took part in a mock prison experiment.<sup>28</sup> Experimenters randomly assigned half of the students to the role of guard and half to the role of inmate.<sup>29</sup> Within a very short period, guards began to act sadistically toward inmates while inmates began to show signs of depression, anxiety, and rage.<sup>30</sup> One student assigned the role of guard wrote in his diary about a prisoner who refused to eat:

That is a violation of Rule Two . . . and we are not going to have any of that kind of shit . . . . I decide to force feed him, but he won’t

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<sup>24</sup> See *id.* at 235.

<sup>25</sup> See, e.g., LUBAN, *Wrongful Obedience*, *supra* note 8, at 238–42 (describing the Milgram Obedience Experiments and their relevance to ethics analysis).

<sup>26</sup> See *id.* at 239–42.

<sup>27</sup> See *id.* at 239–40.

<sup>28</sup> See LUBAN, *Integrity*, *supra* note 7, at 280–81 (describing the design and results of the Stanford Prison Experiment).

<sup>29</sup> See *id.* at 280.

<sup>30</sup> See *id.*

eat. I let the food slide down his face. I don't believe it is me doing it. I just hate him more for not eating.<sup>31</sup>

Other researchers in a variety of countries and settings have replicated these experiments or variations on them.<sup>32</sup> Their basic import appears well established: When a seeming authority commands and others obey, a majority of people will commit atrocious moral acts involving the infliction of pain and suffering on other human beings.<sup>33</sup>

Professor Luban uses these results to excellent effect in developing his arguments about the difficulties of maintaining one's personal moral compass in the face of contrary social pressures. In *Legal Ethics and Human Dignity*, he develops his theme with a witty twist by defining the *problem* as "integrity," in the sense that human beings, confronted with situations in which their actions appear to belie their previously espoused moral beliefs, seem effortlessly to revise those beliefs to correspond to their actions, even without awareness of what they are doing.<sup>34</sup> This, for Professor Luban, is the problem of integrity that requires a cure.<sup>35</sup>

Professor Luban's work on the causes and cures for the problematic working of personal integrity in this sense is a great contribution to legal ethics thinking. As always, he cuts to the core of the issues as few others can. In my teaching experience, law students especially love this work, finding it enormously helpful in shoring up their resolve to face the moral challenges they anticipate as they venture into the deeply morally compromised world of contemporary large firm practice.<sup>36</sup> But, useful as this work is, it leaves unanswered questions about institutional design, a topic I address in Part III.

First, however, I must persuade readers of my thesis that a subtle structuralist supplement is emerging in Professor Luban's latest work. I undertake this task in Part II below.

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<sup>31</sup> *Id.* (quoting Craig Haney & Philip Zimbardo, *The Socialization into Criminality: On Becoming a Prisoner and a Guard*, in *LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES* 198, 209 (June L. Tapp & Felice J. Levine eds., 1977)).

<sup>32</sup> See LUBAN, *Wrongful Obedience*, *supra* note 8, at 240.

<sup>33</sup> See *id.* at 241–42.

<sup>34</sup> See LUBAN, *Integrity*, *supra* note 7, at 285 ("[T]he quest for integrity, manifested in all the psychological phenomena we have been reviewing, can drive us to behavior as disconcerting and morally repellent as that shown in the Stanford Prison Experiment or in Milgram's demonstration.").

<sup>35</sup> *Id.* ("The quest for integrity kills, and in killing it leaves the survivors with their own sense of rectitude intact, like a tattered flag flapping in the wind over the fallen.").

<sup>36</sup> See, e.g., David Luban, *Making Sense of Moral Meltdowns*, in *LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER* 355 (Susan D. Carle ed., 2005) [hereinafter *LAWYERS' ETHICS*].



## II

## LUBAN'S STRUCTURALIST SUPPLEMENT

I confess that I have sometimes associated Professor Luban's work with an almost rigid uprightness about matters of right and wrong, but someone reading his latest work could never make such a claim. As I will show in this Part, to Professor Luban today moral rights and wrongs, on matters such as lawyers' duties with regard to truthseeking and truth-telling, involve difficult questions that must be analyzed in context. Several illustrations from *Legal Ethics and Human Dignity* illustrate this turn in Professor Luban's analysis. One involves his discussion of a factual scenario taken in very general terms from his consulting work in an international human rights clinic.<sup>37</sup> Another details the plight of Lady Mason in Anthony Trollope's *Orley Farm*.<sup>38</sup> In both illustrations, Professor Luban appears to propose that one should examine lawyers' ethical duties on matters of truthseeking and truth-telling with close attention to the relative structural positions of the actors involved.

## A. Lawyers' Truthseeking Function

1. *Miriam's Case*

One example of Professor Luban's context-specific, structurally sensitive analysis is his description of the case of a hypothetical client, Miriam, a political activist who has fled from a dictatorship and is seeking political asylum in the United States.<sup>39</sup> Miriam must prove that she faces a realistic fear of persecution if she returns to her home country, and she has a good deal of persuasive evidence on this issue.<sup>40</sup> But Miriam is evasive about allowing her lawyer to interview her brother, whom her lawyer has discovered lives nearby.<sup>41</sup> When pressed, Miriam gets "flustered and alarmed," "won't look the lawyer in the face," and eventually even has "tears in her eyes" and "gets angry."<sup>42</sup> Miriam's reaction puzzles the lawyer.<sup>43</sup>

There are many possible reasons why Miriam does not want the lawyer to interview her brother to obtain further corroborating information about the persecution she has faced, but one of them, which a lawyer being honest with herself cannot legitimately ignore, is that the brother may fail to corroborate Miriam's story with respect to certain

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<sup>37</sup> See *infra* Part II.A.1.

<sup>38</sup> See *infra* Part II.A.2.

<sup>39</sup> See LUBAN, *Contrived Ignorance*, *supra* note 6, at 232-34.

<sup>40</sup> See *id.* at 232-33.

<sup>41</sup> See *id.* at 233.

<sup>42</sup> *Id.*

<sup>43</sup> See *id.*

details.<sup>44</sup> Many important factual details are established by independent evidence, but some are not.<sup>45</sup> For example, “What if, despite her friend’s testimony, the police never threatened her with death? Or what if she was never raped or beaten in prison, but said she was because someone (wrongly) told her that otherwise she wouldn’t get asylum?”<sup>46</sup> Here is the lawyer’s dilemma, in Professor Luban’s words:

To insist on interviewing Miriam’s brother, or even pressing Miriam on the issue, runs the risk of learning that parts of her story are untrue. In that case, the lawyer is ethically bound to retract court filings containing the false details. Doing so, however, would dynamite Miriam’s credibility, even though the details aren’t essential to proving her case; and a case that Miriam deserves to win is lost, perhaps at the cost of her life.<sup>47</sup>

It is in this context that Professor Luban writes passages in which he condones the lawyer’s decision to be “an unrepentant ostrich” and not push Miriam to consent to the interview of her brother, in which the lawyer may discover uncomfortable factual inconsistencies in the details of her story.<sup>48</sup>

Professor Luban hastens to add, however, that he continues to adhere to “the conclusion that *as a general rule*, lawyers should avoid willful ignorance of inconvenient knowledge,” except in “extreme cases like Miriam’s.”<sup>49</sup> To support his long-standing claim that lawyers should usually seek the truth in client representations, Professor Luban presents the contrasting case of lawyers who “paper questionable deals for questionable clients because the price is right.”<sup>50</sup> Here, Professor Luban argues, willful ignorance of the true underlying facts is not ethically supportable.<sup>51</sup>

Although he is correct on this last point, Professor Luban may mis-estimate the infrequency or extremeness of situations like Miriam’s case. Surely to a lawyer who regularly handles political asylum cases, many representations pose issues similar to Miriam’s. The same would appear to be true for criminal lawyers who regularly represent clients accused of serious crimes for which they are likely to face harsh sentences if convicted—or for some high-stakes civil cases, such as that in *Orley Farm*, as discussed below.<sup>52</sup> Thus, some quality other than rar-

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<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 233–34.

<sup>48</sup> See *id.* at 234–35.

<sup>49</sup> *Id.* at 235.

<sup>50</sup> *Id.*

<sup>51</sup> See *id.*

<sup>52</sup> See *infra* Part II.B (discussing ANTHONY TROLLOPE, *ORLEY FARM* (Alfred A. Knopf 1950) (1862), and also discussing DAVID LUBAN, *A Midrash on Rabbi Shaffer and Rabbi Trol-*

ity or extremeness must distinguish the cases that call for a strong pro-client approach, including some measure of willful ignorance, from the cases that warrant a more demanding approach to truthfulness about questionable client claims.

In short, Professor Luban is precisely on point both in his analysis of Miriam's case and in the contrast he draws between it and the kinds of cases in which a more searching approach to questions of truthfulness may be appropriate. However, it remains necessary to probe further the principle that distinguishes these two categories of cases.<sup>53</sup> In the first category, Miriam's vulnerability in the situation and the fact that her very life is at stake support the lawyer's highly zealous, pro-client approach.<sup>54</sup> In the second category, the lawyers are plainly working for wealthy clients—that's why "the price is right"—and are doing questionable deals, presumably because something about them offends moral considerations.<sup>55</sup> In other words, a factor that appears to distinguish some contexts from others for Professor Luban is the relative power of the clients involved as balanced against the power of the opposing interests affected by the representation. Professor Luban seems poised on the verge of acknowledging a situation-specific ethics that is importantly influenced by the structural locations of the actors involved.<sup>56</sup>

The same structural considerations seem to guide Professor Luban's analysis in other portions of the book. One such example is his last section, perhaps my favorite of the many I admire in *Legal Ethics and Human Dignity*.<sup>57</sup>

## 2. *Orley Farm*

In the last essay in *Legal Ethics and Human Dignity*, *A Midrash on Rabbi Shaffer and Rabbi Trollope*, Professor Luban intertwines an analysis of *Orley Farm* with religiously based reflections on the moral necessity of truth-telling by clients, as well as with the corresponding duty of truth-seeking by their lawyers.<sup>58</sup> Professor Luban further interweaves his analysis of Trollope with his friendly disagreement with Christian

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*lope*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 2, at 301 [hereinafter LUBAN, *Shaffer and Trollope*]).

<sup>53</sup> See LUBAN, *Contrived Ignorance*, *supra* note 6, at 232–35.

<sup>54</sup> See *id.* at 232–34.

<sup>55</sup> See *id.* at 234–35.

<sup>56</sup> See *infra* notes 96–106 and accompanying text. This approach to ethics analysis is one I have tentatively argued for elsewhere. See Susan D. Carle, *Power as a Factor in Lawyers' Ethical Deliberations*, 35 *HOFSTRA L. REV.* 115 (2006) [hereinafter Carle, *Power as a Factor*] (arguing for a context-sensitive approach to legal ethics analysis that shifts between client-centered and justice-centered perspectives depending on the balance of power among the interests involved in the representation).

<sup>57</sup> See LUBAN, *Shaffer and Trollope*, *supra* note 52, at 301.

<sup>58</sup> See *id.* at 306–25.

legal ethicist Thomas Shaffer on some points of literary interpretation. Professor Luban structures this essay so that it unfolds as a series of inter-layered dialogues: Professor Luban addresses Shaffer; Jewish and Christian ethics illuminate each another; and Trollope's text communicates with biblical ones.<sup>59</sup> Just as the essay unfolds in counterpoint, so does its thesis emerge in a dialectic fashion, with insights gained from interacting tensions among ideas.<sup>60</sup>

*Orley Farm* has as its central character the lovely but impecunious Lady Mason, who long ago forged a codicil to her elderly husband's will, which gives her newborn son, Lucius, the benefit of a modest property after her husband (his father) dies. In fact, her deceased husband had intended the property, along with all his other assets, to go to his older, uncharitable, and quite nasty son, Joseph. At the opening of the novel, only Lady Mason knows this. The settling of her husband's will took place long before; she and her adult son, Lucius, live quietly at Orley Farm, to which Lucius fully believes he is the rightful heir.

On Professor Luban's analysis, *Orley Farm* examines a number of paradoxes. One is the paradox of property, in that "the law of property protects titles that invariably originated in crimes against the law of property."<sup>61</sup> On this question, Trollope's novel shares a common thread with biblical texts: "an ambivalence, or even skepticism, toward the moral claims of property."<sup>62</sup> With respect to religious tradition, "Jews have located injustice in oppression born of inequality," just as "alongside an exalted regard for the law, the Hebrew Bible expresses an ambivalence about legalism."<sup>63</sup> Professor Luban attributes this ambivalence to the "attraction so many Jews feel toward political radicalism and political moralism."<sup>64</sup> As Professor Luban writes, "How could it be otherwise, when our founding stories are about the divinely sanctioned subversion of laws that safeguard the rights of property, and our prophets denounce the humiliation of the poor by the rich?"<sup>65</sup>

Professor Luban sees similar dialectic tension in Trollope's "opposition of justice and law."<sup>66</sup> Professor Luban reads Trollope as presenting this dialectic "in a distinctly feminist form" by posing "women's justice against men's law."<sup>67</sup> On Professor Luban's view, Trol-

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<sup>59</sup> *See id.*

<sup>60</sup> *See id.* at 328–31.

<sup>61</sup> *Id.* at 316.

<sup>62</sup> *Id.* at 317.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 319.

<sup>67</sup> *Id.* This trope reminds me of the work of Professor Luban's colleague, Carrie Menkel-Meadow, whose now-classic work explored similar themes between a feminized "justice" and a masculinist "law" in Shakespeare's work. *See* Carrie Menkel-Meadow, *Portia*

lope raises this tension but declines to resolve it.<sup>68</sup> Shaffer describes Lady Mason as a “guilty woman” for forging the property deed, but Professor Luban thinks Trollope intends to leave the issue ambiguous, in order to reflect an ambivalence about the morality of truth-telling over lying in situations in which justice is at tension with law.<sup>69</sup> At the end of *Orley Farm*, after a spiritual advisor has talked Lady Mason into disclosing the truth, she stands as a “broken and defeated” woman.<sup>70</sup> Her “[t]ruthfulness exacts a terrible toll,” not only on herself, but also on her son Lucius, who feels compelled to leave his home community for distant lands, and on her frail, elderly, and kindly fiancé, with whom she breaks off her engagement.<sup>71</sup> As Professor Luban points out, “Trollope never tells us whether he thinks the price was worth paying.”<sup>72</sup>

Maybe sometimes not telling the truth is better than the opposite tack. Just as a community was born from Rebekah’s lie in the Bible, “families whose members do not disclose secrets sometimes thrive.”<sup>73</sup> In other words, truth, justice, human well-being, and community flourishing do not necessarily co-habitate; analysis of the ethics of situations in which truth-telling may cause great harm to human well-being should proceed with this awareness in mind.

Professor Luban points out that Trollope exhibits the same ambivalence about lawyers’ roles in seeking truthfulness in the course of a client representation.<sup>74</sup> Trollope presents an array of lawyers with a spectrum of stances on this question.<sup>75</sup> The lawyer Dockwraith, who dredges up Lady Mason’s long-forgotten misdeed, is a bitter and despicable character, motivated by a grudge.<sup>76</sup> Lady Mason’s longstanding legal advisor, Thomas Furnival, is unwaveringly loyal to her interests (and probably also unduly smitten with her, which raises its own set of ethics issues beyond what Professor Luban wants to explore).<sup>77</sup> Furnival shows no interest in exploring whether the deed is a forgery, although he has clearly long worried about that possibility.<sup>78</sup>

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*Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL’Y & L. 75 (1994), reprinted in *LAWYERS’ ETHICS*, *supra* note 36, at 274.

<sup>68</sup> See LUBAN, *Shaffer and Trollope*, *supra* note 52, at 319.

<sup>69</sup> See *id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 328.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 329.

<sup>74</sup> See *id.* at 325–28.

<sup>75</sup> See *id.* at 304 (describing briefly some of the lawyers in the book).

<sup>76</sup> See *id.* at 303 (quoting THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT* 45–46 (1981)).

<sup>77</sup> See *id.* at 305–06.

<sup>78</sup> See *id.* at 305.

Furnival represents an intermediate type of lawyer. His characteristics contrast with the more extreme amoral approach of the two criminal defense lawyers he recruits to help Lady Mason: Chaffanbrass and Aram (whom, in a move Professor Luban does not allow to go unnoticed, Trollope depicts in anti-Semitic tones).<sup>79</sup> At the other side of the spectrum is the idealistic neophyte barrister Felix Graham, who displays a strong interest in German legal philosophy and becomes lost in the real world of client representation, where he is unable to muster any energy for Lady Mason's representation after developing concerns about her truthfulness.<sup>80</sup>

Reading Professor Luban's exploration of lawyers' attitudes toward truthseeking in *Orley Farm* brings with it the pleasure of reading his expression of the same ambivalence he sees in Trollope.<sup>81</sup> As Professor Luban puts it, "Trollope's dilemma is one that many of us share. He dislikes the way lawyers defeat truth, and he rejects their rationalizations, but he grudgingly admits that the job they do is an important one and that the way they do it may sometimes be what the job requires."<sup>82</sup> Here again, as in Miriam's case, lawyers who are loyal to their client's interests, and do not push their clients too hard for truth where it might play against those interests, are not necessarily bad or wrong. Indeed, they may be adopting the *more* moral approach—albeit uncomfortably and sometimes unattractively so—than that of an adviser who insists on adhering to a universal set of ethical precepts regardless of the justice of particular situations.

Professor Luban organizes the book so that this final essay appears alone in a section entitled "Moral Messiness in Professional Life."<sup>83</sup> Its placement seems to herald where Professor Luban may intend to head in his future work: into greater messiness, where one cannot tie up conceptual dilemmas with neat analytic bows, and where ideas emerge through the dialectic interplay of opposites and dialogues take place across disciplines, religious traditions, and centuries of thought.

Also emerging from the book as a whole, but especially this last essay, is a new particularism in Professor Luban's perspective.<sup>84</sup> Even his focus on his own Jewishness, a theme that emerges in several parts of the book,<sup>85</sup> arises most forcefully here.<sup>86</sup> This new focus is almost

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<sup>79</sup> See *id.* at 305, 321.

<sup>80</sup> See *id.* at 305, 325–26.

<sup>81</sup> See *id.* at 325 ("Trollope turns out to be of two minds.").

<sup>82</sup> *Id.* at 327.

<sup>83</sup> See LUBAN, *Contrived Ignorance*, *supra* note 6, at 229.

<sup>84</sup> See LUBAN, *Shaffer and Trollope*, *supra* note 52, at 301.

<sup>85</sup> See, e.g., LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 2, at 1.

<sup>86</sup> See generally LUBAN, *Shaffer and Trollope*, *supra* note 52 (using Jewish ethics to analyze the work of Trollope and Shaffer).

startling in its contrast to Professor Luban's earlier, more secular voice. This preoccupation with religion perhaps further reflects Professor Luban's acknowledgment that he can only see through the lenses of his own social location and identity.<sup>87</sup>

That said, one should not make too much of this shift toward particularism. Professor Luban has always been a pragmatic contextualist in some respects, especially on the merits of the adversarial system,<sup>88</sup> and has frequently acknowledged the fact of structural injustice. In *Legal Ethics and Human Dignity*, for example, Professor Luban critiques Lon Fuller's doubt about whether legal systems can have morally consistent rules as an internal matter, yet at the same time exhibit "brutal indifference to justice and human welfare."<sup>89</sup> As Professor Luban points out, almost every legal system ever in existence adopted laws that denied equal legal rights to women.<sup>90</sup> This fact, that law has systematically excluded women "from the community of freedom," is one example of what Professor Luban describes as an often "catastrophic asymmetry between whom the law binds and whom the law helps."<sup>91</sup> Other examples include "histories of slavery . . . [and] ethnic subjugation."<sup>92</sup> As Professor Luban notes, "even the most enlightened systems still contain pockets of oppressiveness."<sup>93</sup>

Professor Luban thus recognizes the importance of lawyers' and others' efforts to remedy systemic injustice in legal systems.<sup>94</sup> But Professor Luban has not thus far taken the further step of explicitly connecting structural justice concerns to his theory of legal representation more generally. This Essay suggests, however, that these concerns may, increasingly but still implicitly, be driving his ethics conclusions at this more general level as well. Further evidence that structural justice concerns are influencing Professor Luban's

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<sup>87</sup> See *id.* at 302.

<sup>88</sup> See, e.g., LUBAN, *Adversary System Excuse*, *supra* note 13, at 55–57 (arguing that the adversarial system is justified only in a "weak, pragmatic way as a system we have historically inherited, and for which it would be difficult to develop and implement a feasible replacement").

<sup>89</sup> See DAVID LUBAN, *Natural Law as Professional Ethics: A Reading of Fuller*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 2, at 99, 127 [hereinafter LUBAN, *Natural Law*].

<sup>90</sup> *Id.* at 127 ("[A]lmost every regime that has ever existed has legislated expressly to deny the self-determining agency of women.").

<sup>91</sup> *Id.* at 128.

<sup>92</sup> *Id.* at 127.

<sup>93</sup> LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 2, at 5.

<sup>94</sup> Cf. LUBAN, *Natural Law*, *supra* note 89, at 126 ("Historically, the great social and legal critics have been insiders or semi-insiders whose lively sense of critical morality allows them to pass beyond their own self-interest and identify with the victims of bad law.").

analyses comes from the very language and imagery Professor Luban uses to describe different kinds of clients.<sup>95</sup>

### B. Power Contrasts in the Imagery of *Legal Ethics and Human Dignity*

I first began to notice the influence of a supplement to Professor Luban's liberal individualist perspective in the contrasts between his descriptions of the types of clients worthy of vigorous advocacy and those whom lawyers should approach with more restraint. These contrasts exist throughout *Legal Ethics and Human Dignity* in the very language and imagery Professor Luban chooses. For example, clients who deserve zealous representation include those who:

- “might otherwise be legally mute”;<sup>96</sup>
- need to be spared from “the humiliation of being silenced and ignored[ ]”;<sup>97</sup>
- face an opponent who is “attempting to win an unfair, lopsided judgment”;<sup>98</sup>
- stand as the “hapless and innocent party[ ]”;<sup>99</sup>
- are the “victims of [real estate and financial] predators”;<sup>100</sup>
- or are “the man-in-trouble.”<sup>101</sup>

In contrast, the kinds of clients lawyers should approach more skeptically include:

- “Fried’s profiteering slum lord or unscrupulous debtor”;<sup>102</sup>
- “the graymailing, anticompetitive multiglomerate”;<sup>103</sup>
- those involved “when you’re working on some deal that, if you were to think it through, you’d realize that it was going to ruin the lives of thousands of people and their families”;<sup>104</sup>
- where “the price is right”;<sup>105</sup>
- and situations involving “evils committed by ‘quiet men with white collars and cut fingernails and smooth-shaven cheeks who do not need to raise their voice.’”<sup>106</sup>

The contrast between these two sets of descriptions powerfully connotes inequalities of power and resources. Professor Luban’s chosen imagery is embedded in class status, such as C.S. Lewis’s descrip-

<sup>95</sup> See *infra* Part II.B.

<sup>96</sup> LUBAN, *Upholders of Human Dignity*, *supra* note 9, at 74.

<sup>97</sup> *Id.* at 72.

<sup>98</sup> LUBAN, *Adversary System Excuse*, *supra* note 13, at 45.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 49.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> LUBAN, *Integrity*, *supra* note 7, at 267, 289 (quoting JOSEPH, *supra* note 7, at 41).

<sup>105</sup> LUBAN, *Contrived Ignorance*, *supra* note 6, at 235.

<sup>106</sup> *Id.* at 216 (quoting LEWIS, *supra* note 11, at x).



tion of men with “white collars and cut fingernails,”<sup>107</sup> with their concomitant social power as those who possess authority and are confident of the force of their commands without even shouting.<sup>108</sup> In contrast stand those who are “mute,”<sup>109</sup> “humiliated,”<sup>110</sup> “silenced,”<sup>111</sup> and “ignored.”<sup>112</sup> Professor Luban appears to imply that a lawyer’s ethical analysis should depend in part on the relative power and privilege of her client in relation to other interests affected by the lawyer’s representation. Poor people and people facing powerful opponents who may easily crush them—as in the case of “flesh-and-blood” human defendants in the criminal justice system—deserve a lawyer’s most vigorous advocacy, while those in the opposite situation, poised to crush others with the help of lawyers’ services, warrant a different representational stance.<sup>113</sup> In this latter context, a lawyer’s ethical compass should point in the direction of the search for justice, the public interest, the consideration of others, or some similar formulation of justice-seeking legal representation. The requirements of morality call for lawyers to refrain from employing their personal agency, enhanced by legal know-how and a law license, to cause or contribute to the harming of others.<sup>114</sup>

Anthony Alfieri, in his creative contribution to this Colloquium,<sup>115</sup> also sees an important relationship between the moral underpinnings of Professor Luban’s legal ethics jurisprudence and social justice concerns. Professor Alfieri’s perspective arises from the requirements of justice with respect to axes of oppression based in race or caste. Professor Alfieri’s insights are particularly rich, and even path-breaking, because they are anchored in the particular historical context of U.S. race relations. For this reason, Professor Alfieri offers many stimulating ideas about paths forward, including some that draw on the concepts of restorative, redemptive, and reparative justice.<sup>116</sup>

The more abstract structuralism on which I draw has a related purpose in seeking to probe the ethical implications of the fact that institutions structure human life so that different groups end up having vastly different resources, including access to power.<sup>117</sup> Perhaps in future work, Professor Luban will apply his special philosopher’s

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<sup>107</sup> *Id.*

<sup>108</sup> *See id.*

<sup>109</sup> LUBAN, *Upholders of Human Dignity*, *supra* note 9, at 74.

<sup>110</sup> *Id.* at 79.

<sup>111</sup> *Id.* at 72.

<sup>112</sup> *Id.*

<sup>113</sup> *See id.* at 87.

<sup>114</sup> I have suggested some very preliminary thoughts along these lines. *See* Carle, *Power as a Factor*, *supra* note 56, at 137–43.

<sup>115</sup> *See* Alfieri, *supra* note 17.

<sup>116</sup> *Id.* at 1302–08.

<sup>117</sup> *Id.* at 1303.

tools to help guide scholars who seek to consider these relationships between legal ethics and social justice concerns.

In his reply essay, Professor Luban does not address my query as to how legal ethics should take account of structural inequality, but in a recent symposium on his book he responded to this point by stating that he views the limits of his theory as falling at the boundary of the insights that can be gained from a liberal individualist focus on the importance of human dignity rights.<sup>118</sup> Nevertheless, I see no reason why a structuralist supplement cannot add still more to the analysis, especially where social justice concerns are at issue. To say this is not to argue for eclipsing the important lessons learned through history about the ethical limits to theories that emphasize institutional or structural relations over individuals as the primary unit of analysis. But just as the ethics of different religious traditions may present mutually illuminating contrasts,<sup>119</sup> might not the contrasts between individualist and structuralist insights further illuminate ethics analysis as well?

In Part III, I explore further such lines of inquiry arising from an analysis of the potential emerging connections between Professor Luban's ethics analysis and concerns about structural inequality more generally.

### III

#### STRUCTURING INTEGRITY

##### A. Luban's Positive Ethics Theory

Consistent with his individualist framework, Professor Luban anchors his positive theory of lawyers' ethics in a rights discourse concerned with protecting individual dignity.<sup>120</sup> He acknowledges the potential vagueness of this discourse: because human dignity "can mean anything," it also "means nothing."<sup>121</sup> But Professor Luban believes some tangible content can be poured into the human rights container in the following way: What lawyers do to advance human dignity is to help clients tell their personal stories, and also ensure that these stories are told in such a way that they will be heard.<sup>122</sup> Lawyers thus give effect to the individual's rights to have "a story of one's own,"<sup>123</sup> "to be

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<sup>118</sup> David Luban, Comments During a Panel Discussion on *Legal Ethics and Human Dignity* at Georgetown University Law Center (March 24, 2008).

<sup>119</sup> Cf. discussion *supra* Part II.A.2 (noting Luban's use of counterpunctual analytic techniques in this way).

<sup>120</sup> See, e.g., LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 2, at 3–6.

<sup>121</sup> See LUBAN, *Upholders of Human Dignity*, *supra* note 9, at 68.

<sup>122</sup> See *id.* at 68–69.

<sup>123</sup> *Id.* at 70 (emphasis omitted).

heard,"<sup>124</sup> and to have "the first-personal, subjective character of the story" acknowledged.<sup>125</sup>

For reasons I discuss below, Professor Luban's use of human dignity as a fundamental concept for legal ethics analysis is ultimately less than fully satisfying, at least absent a little tweaking. But first, here is how Professor Luban does succeed in putting the concept of human dignity to work: Professor Luban uses the case of Theodore Kaczynski (the Unabomber) for illustration. He asks why it was ethically wrong for Kaczynski's lawyers to seek to portray their client as mentally disturbed over their client's strenuous objections, even though in doing so they hoped to save him from the death penalty.<sup>126</sup> This was wrong, Professor Luban convincingly argues, because the story Kaczynski's lawyers wanted to tell about his mental state violated Kaczynski's dignitary rights.<sup>127</sup> By telling a story Kaczynski did not want his lawyers to tell, these lawyers were, "in Kaczynski's own words," transforming what he saw as his important life's work, his manifesto explaining the reasons behind his acts as the Unabomber, into a story in which he emerged as "a grotesque and repellent lunatic."<sup>128</sup>

Likewise, Professor Luban argues, lawyers should be required to put the points a client wants to make into briefs they file on behalf of that client.<sup>129</sup> The Supreme Court reached the opposite conclusion in *Jones v. Barnes*,<sup>130</sup> but Professor Luban convincingly argues that this case was wrongly decided.<sup>131</sup> The Court should have required Barnes's lawyer to act on his client's wishes, even though the lawyer judged the arguments ineffective, because to dismiss them was "an affront to Barnes's dignity as a human being and a story-bearer."<sup>132</sup>

There is much to commend in ethics arguments based on advancing clients' dignitary rights. I hope that Professor Luban pursues this line of analysis further, possibly drawing on the excellent literature clinical law professors have developed on related topics.<sup>133</sup> On their analysis, clients' dignitary rights to have their story heard does not begin with, or consist mainly of, their lawyer's courtroom advocacy, but instead involves the lawyer's commitment to client-centered coun-

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<sup>124</sup> *Id.* at 69.

<sup>125</sup> *Id.* at 70.

<sup>126</sup> *See id.* at 77-79.

<sup>127</sup> *See id.* at 79.

<sup>128</sup> *Id.* at 78 (quoting *United States v. Kaczynski*, 239 F.3d 1108, 1121 (9th Cir. 2001) (Reinhardt, J., dissenting)).

<sup>129</sup> *See id.* at 74.

<sup>130</sup> 463 U.S. 745 (1983).

<sup>131</sup> *See* LUBAN, *Upholders of Human Dignity*, *supra* note 9, at 74.

<sup>132</sup> *Id.*

<sup>133</sup> For examples of this literature see Carle, *Power as a Factor*, *supra* note 56, at 129-31 (discussing contributions to legal ethics thought of literature arising out of clinical practice).

seling in all aspects and stages of the relationship.<sup>134</sup> Professor Luban's emphasis on the importance of locating law in lawyers' offices rather than in courtrooms suggests that he would agree.

Professor Luban further argues that a model of lawyers' ethics grounded in furthering individual dignity limits the rationale for client confidentiality to "flesh-and-blood clients" only.<sup>135</sup> Up to here, Professor Luban is correct in my view.<sup>136</sup> Professor Luban is less convincing, however, when he further suggests that the human dignity rationale for lawyers' advocacy "provide[s] an argument for abolishing confidentiality, not for preserving it."<sup>137</sup> This claim contradicts the very idea that lawyers advance human dignity by telling clients' stories. If lawyers' proper role is to advance clients' dignitary interests in having their stories told in the manner these clients wish, then surely the right *not* to have parts of their stories told is equally part of clients' dignitary rights.

This problem reveals the limits of a theory of lawyers' ethics grounded in individual human rights alone. Such a theory quickly runs into all of the well known stumbling blocks of liberal individualist analysis:<sup>138</sup> Clients' dignitary rights and wishes about how to exercise such rights quickly begin to conflict with the interests of other individuals who likewise possess dignitary rights, as well as with considerations of the public interest. On the surface at least, Professor Luban's theory provides no good way to sort through which clients' dignitary rights deserve vigorous promotion and which do not—or so it appears from an individualist perspective, without more.<sup>139</sup> My thesis here, however, is that Professor Luban brings a supplemental source of illumination to these matters. This allows a more complex analysis to emerge in which structural factors may tip the balance in terms of lawyers' appropriate ethics stances. Where clients are underdogs, such as Miriam<sup>140</sup> or Lady Mason,<sup>141</sup> a more vigorously pro-client stance often appears indicated; the opposite tilt may be appropriate with a client capable of crushing the interests of others. Or so it

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<sup>134</sup> This point deserves emphasis because it contravenes the current allocation of responsibilities between client and lawyer in Model Rule 1.2(a), which assigns decision making about "the means" of legal representation mainly to the lawyer. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007); MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 1 (2007).

<sup>135</sup> LUBAN, *Upholders of Human Dignity*, *supra* note 9, at 87.

<sup>136</sup> See Carle, *Power as a Factor*, *supra* note 56, at 144–45 (arguing against the fallacy of equating corporations with individuals for purposes of legal ethics analysis).

<sup>137</sup> LUBAN, *Upholders of Human Dignity*, *supra* note 9, at 80.

<sup>138</sup> See Kruse, *supra* note 14, at 1351 ("[S]ituations in which an adversarial practice upholds the human dignity of one person at the expense of the human dignity of another raise the most difficult cases for Luban's human dignity framework").

<sup>139</sup> See LUBAN, *Adversary System Excuse*, *supra* note 13, at 26 (noting, in the context of zealous advocacy, that "everyone can't be in the right on all issues").

<sup>140</sup> See discussion *supra* Part II.A.1.

<sup>141</sup> See discussion *supra* Part II.A.2.

seems, at least in faint outline. Perhaps Professor Luban's future work will make his views more clear.

### B. Extending the Lessons of the Psychology Experiments

Another way in which Professor Luban's devotion to individualism unduly limits the potential reach of his insights is in the questions he asks based on the experiments described in Part I.C above.<sup>142</sup> Every time I read Professor Luban's work in this area, I want to explore a side of the problem of the interaction between personal agency and social surroundings that is not encompassed in the "shocking" calls to unethical conduct involved in those scenarios, or other patently bad acts such as destroying documents, carrying out a partner's instructions to lie, padding bills, or any number of other decisions we immediately recognize as wrong.<sup>143</sup> The problem I am thinking of is the complicity of all successful human beings in surviving and advancing on the basis of privileges gained through conditions of structural injustice.

Almost anyone assessing the Milgram and Stanford experiments with the benefit of distance and time would agree that the behaviors observed were morally abhorrent.<sup>144</sup> But these situations are in some ways less concerning because, even if it takes a while, such a shocked moral recognition is likely in the end to surface. The more worrisome harms are those that occur through mechanisms that are much harder to point out and condemn. To take one example, drawn from the academic settings in which many readers of this Essay are likely to be familiar, consider the policies of institutions that end up excluding most persons of less advantaged socioeconomic backgrounds from the kinds of higher education opportunities that best endow educational and social capital.<sup>145</sup> One such policy is the enormous weight these institutions place on standardized tests that have harsh disparate impacts based on race and class.<sup>146</sup> These policies play a large role in

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<sup>142</sup> See discussion *supra* Part I.C.

<sup>143</sup> See LUBAN, *Integrity*, *supra* note 7, at 273–75 (discussing ethical lapses in the practice of law, in the context of the Milgram experiments).

<sup>144</sup> See LUBAN, *Wrongful Obedience*, *supra* note 8, at 242 (describing Milgram himself as "flabbergasted by his findings" of destructive obedience).

<sup>145</sup> See, e.g., WILLIAM G. BOWEN ET AL., *EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION* 248 (2005) ("[O]ne of the stunning findings . . . is that the odds of getting into the pool of credible candidates for admission to a selective college or university are six times higher for a child from a high-income family than for a child from a poor family[.]"); see also Susan D. Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models For Institutional Self-Reform Achieve More Effective Structural Change?*, 30 *HARV. J.L. & GENDER* 323, 347 (2007) (summarizing other "literature documenting the unsurprising correlation between the socioeconomic class of a student's parents and the likelihood that she will attend a more elite institution of higher education").

<sup>146</sup> See, e.g., Pamela S. Karlan, *Compelling Interests/Compelling Institutions: Law Schools as Constitutional Litigants*, 54 *UCLA L. REV.* 1613, 1617 (2007) (noting that by the 1960s, elite

perpetuating class privilege across generations, by shutting out the very same groups that were once kept from enjoying privileges and resources through *de jure* segregation. The policies of our institutions thus contribute to the widening gulf between the haves and the have-nots—in other words, to persistent and growing problems of structural injustice.

We can voice many rationales about why such policies are an unfortunate necessity, but the fact that the institutions with which law professors are affiliated have this sorting and class perpetuation function is indisputable and, indeed, becomes all the more pronounced as one climbs the academic elitism ladder. We know this to be true and many of us abhor it; still, most of us report to our offices and collect our paychecks without resigning in protest or demanding change to the point of outright rebellion. Historically, of course, people have similarly overlooked other manifestations of structural injustice in their institutional settings, such as the sexism and racism to which Professor Luban refers,<sup>147</sup> as well as the xenophobia and anti-Semitism we could also add to this list of forms of discrimination disapproved during the last century.<sup>148</sup>

In his reply essay, Professor Luban responds to my point about how persons gain privilege on the basis of structural injustice by arguing that this kind of “complicity is more or less independent of any specific action we take; it is a kind of cosmic background radiation in our moral lives.”<sup>149</sup> But my argument is precisely the opposite—namely, that there always *are* actions one could take in the face of structural injustice.<sup>150</sup> The question is when and how much of such action is ethically required.<sup>151</sup>

It is possible to imagine a world in which it would be considered morally inappropriate for institutions of higher education to maintain admissions policies that widen group-based disparities in life opportunities. We do not currently live in such a society, but that does not mean that protests against such policies are not possible or even ethically indicated. A very few voices are raising such challenges, pointing out that there is no inherent reason why students who test as having

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professional schools were using “admissions criteria (primarily test scores and undergraduate records) that had a marked disparate impact”).

<sup>147</sup> See LUBAN, *Natural Law*, *supra* note 89, at 128–29.

<sup>148</sup> See generally JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 71–72, 100–07 (1976) (discussing xenophobia and anti-Semitism in the U.S. legal profession during the early twentieth century).

<sup>149</sup> David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 *CORNELL L. REV.* 1437, 1446 n.51 (2008).

<sup>150</sup> Professor Luban correctly observes, *id.* at 1439 n.13, that my arguments here are connected to earlier work. See Carle, *Theorizing Agency*, 55 *AM. U. L. REV.* 307 (2005).

<sup>151</sup> DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008).

attained the highest levels of a certain kind of analytic reasoning necessarily deserve the “best” legal educations.<sup>152</sup>

Most interesting, therefore, in drawing lessons from the Milgram and Stanford experiments is their implications in suggesting a need to institutionalize ethical reflectiveness about chronic forms of injustice to which people become inured. Professor Luban points out an interesting paradox in this regard—namely, that the evidence shows that individuals’ tendency to make ideas conform with self-serving behavior becomes all the *more* pronounced to the extent that intellectual or professional loyalties are *not* bought off by money.<sup>153</sup> As Professor Luban explains, the experimental psychology literature suggests that the less one is paid for taking a morally difficult position, the more one is likely to work subconsciously to reconcile it with moral views one believes are legitimate.<sup>154</sup> Conversely, “the higher they bill, the less likely [lawyers] are to deceive themselves into believing what they say on behalf of clients.”<sup>155</sup>

This point brings to mind Derrick Bell’s seminal article, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*.<sup>156</sup> That article, which inaugurated a now-expansive literature on public-interest lawyering, examined the ethical complexities of decisions NAACP lawyers made in the remedial phase of the *Brown* litigation.<sup>157</sup> Those lawyers decided to pursue the uniform goal of school desegregation in every case, despite the desires of some client groups of African-American school children and their parents for alternative remedies, such as more resources for existing neighborhood schools.<sup>158</sup> As Professor Bell wrote in one telling line, “Idealism, though perhaps rarer than greed, is harder to control.”<sup>159</sup> Reading Professor Luban’s use of the Milgram and Stanford experiments through Professor Bell leads to questions about how ethicists should think about the internalization of ideology in human conduct.

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<sup>152</sup> One eloquent voice calling for a creative rethinking of current assumptions about who deserves the benefits of elite education is Lani Guinier. See, e.g., Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 137–71 (2003) (critiquing alternate approaches to admissions policies for educational institutions).

<sup>153</sup> See LUBAN, *Integrity*, *supra* note 7, at 269–70.

<sup>154</sup> See *id.*

<sup>155</sup> See *id.* at 270.

<sup>156</sup> Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

<sup>157</sup> See *id.* at 478–82.

<sup>158</sup> See *id.* at 482–88.

<sup>159</sup> *Id.* at 504.

1. *The Problem of Ideology*

Many examples of the operation of ideology as a system of ideas to mask ethically problematic situations come to mind. Not surprisingly, the examples I see most clearly are those inconsistent with my own beliefs. I wonder, for example, why is it that my students sometimes regard poor people in the United States as suffering from that affliction through some fault of their own, while similarly destitute persons who have suffered more recent “post conflict” traumas in exotic overseas locales deserve their brave efforts and concern. I wonder why my employment law students are sometimes so hostile to the notion that job rights should accrue on the basis of seniority, when they also tell me stories about parents cast into the ranks of the unemployed as a result of corporate reductions-in-force aimed at later-career workers. Or, to take an example to which Professor Luban alludes, why do lawyers we regard as decent human beings not flinch at being involved in commercial real estate deals that will lead to the mass eviction of residents from their communities?<sup>160</sup>

Moreover, as we all so clearly know as lawyers, our analyses of legal and social problems often cannot even begin to grapple with the problems of unintended consequences. Just a few examples include the research showing that divorce reforms instituted by those who pushed, with the best of intentions, for more liberal divorce laws had the unintended effect of throwing more children into poverty;<sup>161</sup> assessments of how the NAACP’s school desegregation strategies destroyed the beneficial aspects of having African-American children attend neighborhood schools, as just discussed;<sup>162</sup> or work on the ways in which international sex-trafficking laws that ban prostitution end up punishing the very class of destitute persons they were intended to protect.<sup>163</sup>

In short, most ethical problems are far harder to think about in ethical terms than those involved in turning an electricity dial or brutalizing a prisoner under one’s control because, very often, the connections between one’s acts and their results are much more complex and uncertain than those scenarios. In real life, the solutions to problems of complicity in structural or institutional injustice seem very hard indeed. In these contexts, it may be better not to walk off in a huff of protest—vacating one’s seat at the dials, so to speak, so that a

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<sup>160</sup> See LUBAN, *Adversary System Excuse*, *supra* note 13, at 48.

<sup>161</sup> See KATHERINE S. NEWMAN, *FALLING FROM GRACE: THE EXPERIENCE OF DOWNWARD MOBILITY IN THE AMERICAN MIDDLE CLASS* 202–28 (1988) (discussing the adverse financial consequences of divorce on middle-class women and children).

<sup>162</sup> See *supra* notes 156–58 and accompanying text.

<sup>163</sup> See Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335 (2006).



Milgram experimental subject more prone to unthinking obedience can take one's place. Is it better to keep one's seat at the table and urge colleagues not to keep turning the dials; to stay and only pretend to turn the dials; or to stay and turn the dials only a little rather than all the way? I do not know of a literature that addresses these questions with Professor Luban's level of analytic rigor, and I hope he will turn to some of these questions in future work.

In other words, I do not intend to advance a claim that lawyers can, or should, always serve the side of the downtrodden angels; how to help the cause of justice is often a puzzling, deeply problematic question. But I do intend the claim, and wish to query Professor Luban as to his thoughts on it, that lawyers may generally have ethical responsibilities to puzzle through and attempt to exercise their moral agency on the side of those with the least power and advantage in our society.

I also want to suggest another problem that the Milgram and Stanford experiments illuminate: The need to consider the institutional aspects of protecting dissent.

## 2. *The Problem of Protecting Dissent Within Institutions*

To Professor Luban and the psychologists on whose work he relies, the fundamental ethical problem lies in flaws built into human nature.<sup>164</sup> When confronted with a choice about doing something objectively terribly wrong, such as administering potentially lethal shocks to human beings, a startling proportion of human subjects will do what they are told, even while watching other human beings writhing in apparent pain.<sup>165</sup> One of the most interesting aspects of these findings concerns what they say about the importance of developing institutional structures that protect dissenters—that is, the 37 percent of the experimental subjects who did *not* go along with the orders of the Milgram experimenters.<sup>166</sup> Any independent thinker (and surely many of us end up in the legal academy due to our inability to shed this difficult personality trait) has experienced the penalties that come from failing to resist the impulse of “speaking truth to power.”<sup>167</sup> Or so it probably often feels to those who venture to make points or take stands they know will provoke disapproval from those around them. On the other side, those inconvenienced by such displays of dissent—usually those attempting to lead or manage institutions—perceive this

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<sup>164</sup> See LUBAN, *Wrongful Obedience*, *supra* note 8, at 239–42 (describing the results of the Milgram obedience experiments and applying them to legal ethics).

<sup>165</sup> See *id.* at 240.

<sup>166</sup> See *id.*

<sup>167</sup> The American Quakers claim to have coined this phrase sometime in the eighteenth century. See Speak Truth to Power, <http://www/quaker.org/stp.html>.

kind of behavior as disloyalty, or nuttiness, or perhaps a lack of political “pitch,” deftness, or skill.

In retrospect, society lauds the behavior of institutional dissenters as acts of political and moral bravery when they take place on a grand scale that proves significant in historical perspective. But writ small, on the murky scale of day-to-day life, people who engage in internal institutional dissent go unheard and unheeded, at best. At worst, they are figuratively or literally crushed within institutions.

Thus, one further lesson we might draw from Professor Luban’s analysis of the Milgram and Stanford results is the need to study effective means to protect the voicing of dissent within institutions, as well as means of mitigating institutional tendencies to react harshly to such conduct.<sup>168</sup> Which institutional features can work best toward these ends? What values or characteristics of institutions allow acceptance and constructive responses to dissent, nonconformity, difference, and even plain weirdness, which may be an important close cousin to dissent?

Recognizing this problem also points to the converse issue of evaluating the ethics of institutional insiders who adopt strategies short of open dissent in seeking to oppose institutional injustice or wrongdoing. Professor Luban raises similar lines of inquiry in *The Torture Lawyers of Washington*, which examines the lawyers involved in drafting the “torture memos” at the U.S. Department of Justice.<sup>169</sup>

### 3. *A Case Study of Internal Institutional Dissent*

If one side of a structural analysis of legal ethics principles considers how to advance the causes of those with little institutional power, the other side involves developing ethical precepts for those whose privileged positions grant them a great deal of such power. One can read Professor Luban’s essay on the drafting of the torture memos and its aftermath, which is among the most incisive commentaries I have read on this subject, as a case study on this very question.<sup>170</sup>

Professor Luban aptly puts a finger on the reprehensibly unethical acts of the lawyers who drafted and approved the torture memos: In the legal world, they are the moral equivalents of the Milgram subjects willing to shock human beings into unconsciousness.<sup>171</sup> As Professor Luban explains, again getting the concept of human dignity to

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<sup>168</sup> For one leading scholar’s work on related issues, see Robert Vaughn, *America’s First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN. L. REV. 1 (2005).

<sup>169</sup> See generally LUBAN, *Torture Lawyers*, *supra* note 4 (analyzing the ethical issues faced by the lawyers who wrote memoranda about the law that should apply to the interrogation of suspects detained by the United States on suspicion of terrorism).

<sup>170</sup> See, e.g., *id.* at 173–74 (describing the dissent of top JAG officers to the torture memos).

<sup>171</sup> See, e.g., *id.* at 205 (condemning the work of the torture lawyers).

perform substantive work, “Torture is among the most fundamental affronts to human dignity, and hardly anything lawyers might do assaults human dignity more drastically than providing legal cover for torture and degradation.”<sup>172</sup> The lawyers involved were like “Hitler’s lawyers la[ying] the legal groundwork for the murder of Soviet POWs[.]”<sup>173</sup> Not only were their moral objectives reprehensible, but their legal arguments also fell so far outside the standards of plausibility as to stand out as outrageous on this front as well.<sup>174</sup> The legal prohibitions against torture include a number of international law instruments to which the United States is a signatory, as well as provisions of federal criminal law, the Constitution, and U.S. military law.<sup>175</sup> As Professor Luban aptly puts it, to conclude that U.S. interrogators were free to disregard these many legal prohibitions against cruel and degrading treatment violated “craft values common to all legal interpretive communities.”<sup>176</sup>

Most of the lawyers in Professor Luban’s account of the torture memos fall into the categories of (1) really bad guys, or (2) good guys, of which there were only a few. Firmly in the bad guy column are Boalt Hall Professor John Yoo, the actual drafter of the torture memos during an academic leave to work for the Bush administration;<sup>177</sup> Jay S. Bybee, then head of the Office of Legal Counsel (OLC), under whose signature the memos went out;<sup>178</sup> and Alberto Gonzales, then–White House Counsel.<sup>179</sup> Also heavily influential in the bad guy group were hardliner Dick Cheney and his even more hardline legal counsel, David Addington, whose wrath toward anyone who dared question the hardliners’ policies was legendary.<sup>180</sup>

In the good guy column, Professor Luban mentions two lawyers in particular: Navy General Counsel Alberto Mora, who repeatedly argued against the use of cruel and degrading interrogation techniques, and Chief Air Force JAG officer, Major General Jack L. Rives, who wrote to his boss reminding him that “the use of the more extreme interrogation techniques simply is not how the US armed forces have operated in recent history.”<sup>181</sup> Instead, the armed forces “take[ ] the legal and moral “high road” in the conduct of our military operations

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<sup>172</sup> *Id.* at 163.

<sup>173</sup> *Id.*

<sup>174</sup> *See id.*

<sup>175</sup> *See id.* at 165–68.

<sup>176</sup> *Id.* at 198.

<sup>177</sup> *See id.* at 162.

<sup>178</sup> *See id.*

<sup>179</sup> *See id.*

<sup>180</sup> *See id.* at 173.

<sup>181</sup> *Id.* at 173 (quoting a Memorandum from Major General Jack L. Rives for the Secretary of the Air Force (February 5, 2003), *reprinted in* THE TORTURE DEBATE IN AMERICA 378 (Karen J. Greenberg ed., 2006))

regardless of how others may operate.’”<sup>182</sup> As strategic advice alone, how truly sage that opinion appears today. However, as Professor Luban points out, these “politically independent JAG officers [were kept] out of the advisory loop.”<sup>183</sup> This is the problem regarding internal institutional dissent discussed above: engage in it too directly and one quickly finds oneself marginalized and stripped of power to effect institutional change.<sup>184</sup>

Most interesting in Professor Luban’s taxonomy is the figure who resides in an ethical gray area—namely Bybee’s successor, Professor Jack Goldsmith, who was appointed head of the OLC after the torture memos were completed.<sup>185</sup> Unlike many commentators, Professor Luban refuses to give Professor Goldsmith unqualified praise for the steps he took to repudiate one of the torture memos and to later supervise the drafting—but not releasing—of a superseding memorandum that refuted in footnotes some of Professor Yoo’s most outrageous distortions of legal precedent.<sup>186</sup> Professor Luban argues that Professor Goldsmith and others instead should have strongly and directly, in text rather than footnotes, quoted the language of Geneva Convention Article 31, stating: “No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties[.]”<sup>187</sup> Professor Goldsmith should have pointed out the purpose of relevant law, “to protect individuals in the clutches of their enemies,” as embodied in this clear and direct language.<sup>188</sup> Such an argument “would have been fatal” to the Administration’s directly contrary policies.<sup>189</sup>

At the time Professor Luban wrote, he was largely relegated to speculation about Professor Goldsmith’s non-public acts within the

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 174.

<sup>184</sup> Professor Luban notes that the highest profile lawyer-heroes at JAG had a degree of political independence. *See id.* at 173–74. But in my limited personal experience as an expert witness in one Guantanamo Bay detainee case, even relatively low-level JAG officers assigned roles in the representation of detainees have exhibited impressive moral courage by resisting orders they viewed as compromising their legal ethics obligations. It is my impression that the very strictness of the military culture of obedience to law may be responsible for these quite surprising displays of moral courage among some of the military lawyers involved at Guantanamo Bay. The role of the JAG in the post-9/11 climate certainly deserves study in investigating the institutional conditions that protect or squash moral dissent. It should come as no surprise that Professor Luban will soon publish an article on this very topic. *See* David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 *STAN. L. REV.* (forthcoming 2009).

<sup>185</sup> *See* LUBAN, *Torture Lawyers*, *supra* note 4, at 184.

<sup>186</sup> *See, e.g., id.* at 189 (describing how Goldsmith admitted, in a footnote, that “some removals of prisoners might indeed violate Article 49 and constitute war crimes” (citation omitted)).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

OLC and the reasoning on which he based his conduct. However, Professor Goldsmith has now published a revelatory book in which he seeks to justify his actions at the OLC.<sup>190</sup> In it, Professor Goldsmith is best at analyzing what went wrong before he came on scene. He identifies a variety of institutional factors responsible for the production of the torture memos, including supervisors' inadequate supervision of Professor Yoo—which, coupled with their lack of substantive expertise in the relevant areas of law, led them to defer too much to Professor Yoo's legal interpretations.<sup>191</sup> Professor Goldsmith also points to the atmosphere of fear and panic after 9/11 and the development of an institutional culture that insufficiently valued careful legal judgment, reasonable interpretation of law, and the other craft values the torture memos flouted.<sup>192</sup> Addington's extreme temperament did not help matters, nor did his notoriety in ruining the government careers of good lawyers who dared disagree with his hardline policies.<sup>193</sup> Most important, Professor Goldsmith argues, was the Bush Administration's disregard of government traditions that sought "consultation and consent" from experienced actors in a variety of agency positions, such as at the Department of State.<sup>194</sup> Bush insiders involved only a very small handful of reliably like-minded lawyers in decision making on national security.<sup>195</sup> Not surprisingly, the results were bad decisions that lacked the tempered quality gained from vetting the multiple perspectives of seasoned decision makers operating in a variety of different institutional locations.<sup>196</sup>

Consistent with Professor Luban's thesis that we cannot help but attempt to justify our own conduct, the reader may find that Professor Goldsmith has cloudier insights on his own shortcomings. A few interesting impressions emerge nonetheless. On Professor Goldsmith's account, a number of insiders recognized that the torture memos clearly went far beyond acceptable legal analysis, as shown by Professor Goldsmith's own revocation of the 2003 torture memo well before the Abu Ghraib scandal broke.<sup>197</sup> Professor Goldsmith seems to have been stymied by an inner tension between his loyalty to the Bush adminis-

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<sup>190</sup> JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).

<sup>191</sup> *See id.* at 165–72.

<sup>192</sup> *See id.*

<sup>193</sup> *See id.* at 27–28.

<sup>194</sup> *Id.* at 202–03.

<sup>195</sup> *See id.* at 205–06.

<sup>196</sup> *See id.* at 206; cf. William H. Simon, *The Past, Present, and Future of Legal Ethics: Three Comments for David Luban*, 93 CORNELL L. REV. 1365, 1374 (2008) (noting that group decisions not only "benefit from diverse perspectives," but also "force participants to articulate and reflect on their notions in ways that they otherwise would not if they had made those decisions on their own").

<sup>197</sup> *See* GOLDSMITH, *supra* note 190, at 158.

tration—especially the CIA operatives he felt he would leave legally unprotected if he withdrew a second 2002 torture memo—and his legal judgment, which told him that the analysis in that memo was unsupported.<sup>198</sup> This ambivalence paralyzed him until the Abu Ghraib scandal altered the political context.<sup>199</sup>

The overarching theme Professor Goldsmith wants to promote, echoing Defense Secretary Donald Rumsfeld's concept of "lawfare,"<sup>200</sup> is that government actors find themselves in a bind when they are forced to juggle political pressures to be effective along with liability concerns that constrain their actions. Echoing Rumsfeld, Professor Goldsmith complains that enemies of the United States manipulate this bind for strategic advantage.<sup>201</sup> But Professor Goldsmith's own account reflects the opposite lesson: his story shows that it was the existence of good lawyers' craft values regarding permissible legal interpretation that allowed him to identify the torture memos' troubling errors. By Professor Goldsmith's own report, it was these values that eventually led to his resignation, timed to make it difficult for the Administration to reverse his belated decision to revoke the second 2002 torture memo.<sup>202</sup> This is perhaps the most important and lasting lesson of Professor Goldsmith's narrative: institutional structures at least sometimes preserve moral integrity in the face of contrary political pressures by creating norms that value fidelity to the purposes of law.<sup>203</sup>

#### CONCLUSION

David Luban values personal integrity within institutions. This Essay urges him to think about the interaction between structures and institutions and the exercise of such personal integrity. There are many settings in which case studies on this topic could be carried out. Among the institutional locations most troubling today from a legal ethics perspective are those in the Executive Branch,<sup>204</sup> where the cur-

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<sup>198</sup> See *id.* at 146–52.

<sup>199</sup> See *id.* at 156–58.

<sup>200</sup> See *id.* at 58–59. I am grateful to my colleague Rick Wilson for pointing out to me the significance of this term in debates about U.S. terrorism policy.

<sup>201</sup> See *id.*

<sup>202</sup> See *id.* at 161–62.

<sup>203</sup> This resonates with Professor Simon's theory of how lawyers should maintain an ethical compass in the practice of law more generally. Cf. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 138 (1998) (arguing that lawyers should take those actions consistent with "justice," where justice is understood as "legal merit," broadly conceived). An interesting question that arises in considering lawyers' ethics in the government context is whether the government lawyer's duty to follow the purposes of law is properly considered to be greater than that of the lawyer representing a private client.

<sup>204</sup> Professor Wendel, indeed, will soon publish an article examining lawyers' ethics in this practice context. See W. Bradley Wendel, *Government Lawyers in the Liberal State*, 60 *STAN. L. REV.* (forthcoming 2009).

rent Administration's policies appear to have caused lasting damage to norms that value fidelity to the purposes of law.

One aspect of that damage is the lasting harm it has caused to the public reputation and honor of government service. This zeitgeist is reflected in that bellwether of the attitudes of the current generation in or soon headed to college and law school, J.K. Rowling's *Harry Potter* series. There, the institution reflecting the Wizarding world's equivalent of the government is the Ministry of Magic, an agency full of ineffectual, rumpled, insufficiently compensated bureaucrats such as Ron Weasley's father, at best, and truly corrupt, evil functionaries in league with the Death Eaters, at worst.<sup>205</sup> In Book Five, *Harry Potter and the Order of the Phoenix*,<sup>206</sup> the Ministry of Magic is the site of a campaign of discriminatory and status-based persecution, murder, and misuse of public office for heinous offenses. Book Seven, *Harry Potter and the Deathly Hallows*,<sup>207</sup> is a shockingly dark version of a so-called children's book. It opens with a good witch being tortured;<sup>208</sup> proceeds to a scene in which the main female character, the teenager Hermione, also endures painful and prolonged torture, vividly described;<sup>209</sup> and returns repeatedly to stories about the persecution, imprisonment, and torture of the family members of persons who refuse to cave to the forces of evil.<sup>210</sup> How very different indeed are the enduring images that will mark this generation of children in comparison to the picture of childhood that Professor Luban provides at the beginning of *Legal Ethics and Human Dignity*.

J.K. Rowling's fantasy reflection captures the current worldwide focus on problems of institutional injustice and oppression, as well as a new generation's lack of confidence in traditional approaches to solving such problems. In this context, new approaches merit consideration. It would be a mistake to throw out liberal individualism, as some would advocate. But I have argued here that it is likewise improvident to eschew the insights of structural supplements that highlight what Professor Luban so aptly coins the "background radiation" of unjust institutional conditions. Such conditions perpetuate vast and growing rifts in resources and power among various groups and cause great human suffering. They accordingly raise ethical conundrums for all human beings, including, or even especially, as Professor Luban has cogently shown,<sup>211</sup> lawyers—who, after all, have special tools and responsibilities for engineering "justice." How lawyers

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<sup>205</sup> J.K. ROWLING, *HARRY POTTER AND THE ORDER OF THE PHOENIX* *passim* (2003).

<sup>206</sup> *See id.* at 805–06.

<sup>207</sup> J.K. ROWLING, *HARRY POTTER AND THE DEATHLY HALLOWS* (2007).

<sup>208</sup> *See id.* at 10–18.

<sup>209</sup> *See id.* at 375–85.

<sup>210</sup> *See id.* at 7–12, 463–74.

<sup>211</sup> *See discussion supra* Part I.A.

should be ethically charged to work toward this end is unclear, but I have argued that legal ethicists' responsibility to consider these issues is not.



