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# THE INEVITABILITY OF CONSCIENCE: A RESPONSE TO MY CRITICS

David Luban†

Many authors, I suspect, share my perception that they do not know their own book until they see the responses it provokes. Only then does it become clear what themes in the book matter, what is controversial, and, of course, what is mistaken, confusing, or self-contradictory. For that reason, I am particularly grateful for the careful readings and thoughtful criticisms of *Legal Ethics and Human Dignity*<sup>1</sup> by scholars whose own work I greatly admire. In addition, each of them has written an essay worth reading for its own ideas, apart from what they have to say about my book.

Several themes recur among my critics. Professor Norman Spaulding and Professor W. Bradley Wendel believe that the fact of moral pluralism poses a deep and possibly fatal objection to my “morally activist” view that lawyers are morally accountable for what they do on behalf of clients and what outcomes they further.<sup>2</sup> (Although the problem of pluralism is not the principal focus of Professor Katherine Kruse’s essay, she has elsewhere criticized me on similar grounds and raises the critique briefly here.)<sup>3</sup> Professor William Simon, Spaulding, and Wendel also criticize the preeminence I give to lawyers’ consciences over the guiding values of the institutions in which lawyers work—the adversary system (Spaulding),<sup>4</sup> the legal and political system more generally (Wendel),<sup>5</sup> or the organizational settings of law

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<sup>1</sup> DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* (2007) [hereinafter *LEGAL ETHICS AND HUMAN DIGNITY*].

<sup>2</sup> Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 *CORNELL L. REV.* 1377, 1388–95, 1407 (2008); W. Bradley Wendel, *Legal Ethics as “Political Moralism” or the Morality of Politics*, 93 *CORNELL L. REV.* 1413, 1415–16, 1435–36 (2008). Although I don’t use the term “moral activism” very often in *Legal Ethics and Human Dignity*, it is the name that I give my view in *Lawyers and Justice: An Ethical Study*. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 160 (1988).

<sup>3</sup> Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 *MINN. L. REV.* 389, 422–25 (2005) [hereinafter Kruse, *Lawyers*]; see also Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics* (Mar. 23, 2007) (unpublished article, on file with author).

<sup>4</sup> See Spaulding, *supra* note 2, *passim*.

<sup>5</sup> See Wendel, *supra* note 2, *passim*.

practice (Simon).<sup>6</sup> Professor Susan Carle and Simon both believe that the future of legal ethics should lie in the exploration and critique of the workplace settings of law practice,<sup>7</sup> and both hint that my chapters on moral psychology should have led me to the same focus on the study and reform of organizations rather than continued emphasis on individual moral deliberation.<sup>8</sup> On other issues, my critics diverge—most strikingly, Kruse believes that my shift in emphasis from justice to human dignity may provide a richer account of legal ethics,<sup>9</sup> while Simon thinks that “it generates confusion wherever it surfaces.”<sup>10</sup>

In this response, I group the critics together thematically rather than responding to each of them individually. The exception is Professor Anthony Alfieri, whose self-standing essay on the prosecution of the Jena Six does not sound the same themes as the others and which I treat in a separate part.<sup>11</sup> Part I addresses the primacy I assign conscience over the professional role and focuses mainly on the arguments of Spaulding and Wendel. Part II explores the challenge of pluralism, replying primarily to Kruse, Spaulding, and Wendel. Part III, in response to Kruse and Simon, elaborates on the concept of human dignity. Part IV discusses institutions and ethics, focusing on Carle and Simon. And the final part discusses Alfieri’s essay.

## I

### INDIVIDUALISM AND AGENCY

I invariably approach legal ethics from the standpoint of an individual moral agent bound by the same moral obligations as other moral agents but who also happens to be a lawyer. Adopting this standpoint presumes that becoming a lawyer does not make you any less a moral agent—in other words, professional identity cannot cancel out or displace the primordial moral agency that we all share simply by virtue of being human.

Among other things, this agent (who happens to be a lawyer) confronts decisions about whether to represent particular clients and how far to go on behalf of those clients. In many or perhaps most cases, these decisions raise no vexing moral problems. But tension arises whenever the lawyer finds the client’s objectives unjust or immoral, or realizes that the only way to succeed is by taking morally

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<sup>6</sup> See William H. Simon, *The Past, Present, and Future of Legal Ethics: Three Comments for David Luban*, 93 CORNELL L. REV. 1365 *passim* (2008).

<sup>7</sup> See Susan Carle, *Structure and Integrity*, 93 CORNELL L. REV. 1311, 1339 (2008); Simon, *supra* note 6, at 1365.

<sup>8</sup> See Carle, *supra* note 7, at 1330–32; Simon, *supra* note 6, at 1372–75.

<sup>9</sup> See Katherine R. Kruse, *The Human Dignity of Clients*, 93 CORNELL L. REV. 1343, 1350 (2008).

<sup>10</sup> Simon, *supra* note 6, at 1366.

<sup>11</sup> Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285 (2008).

disagreeable actions on behalf of the client. The worse the action or the more unjust the objective, the greater the tension. At that point, the lawyer confronts the “problem of role morality”: posed in general terms, this is the problem of whether the special-purpose morality of a social role, like being a lawyer, can trump what I call “common morality” or “ordinary morality.”<sup>12</sup>

Pursuing different arguments, both Wendel and Spaulding object to my way of posing the question; both seem to think that beginning from the standpoint of an unencumbered moral agent and working from there to the lawyer’s role is a mistake.<sup>13</sup> Wendel borrows a distinction from Bernard Williams’s discussion of the morality of public officials: Williams labels as “political moralism” those views that begin with the individual moral agent and ordinary morality; the approach Wendel prefers, which he labels “the inner morality of politics,” begins with the nature of politics and derives the morality of political actors from its freestanding principles.<sup>14</sup> By analogy, my approach would count as a form of what we might call “law practice moralism,” in which “roles are transparent to moral analysis and can never be understood as excluding ordinary moral reasons from consideration.”<sup>15</sup> The alternative would be an “inner morality of law practice,” which, in Wendel’s terminology, treats law practice as “a freestanding normative domain.”<sup>16</sup> Wendel argues for the latter view over my moralistic starting point.<sup>17</sup>

Spaulding goes further and suggests that the entire appeal to common or ordinary morality will “offer only mirage-like comfort.”<sup>18</sup> Common morality is simply too vague, too contested, and too indeterminate to anchor a genuine alternative to professional obligation.<sup>19</sup> He therefore defends a “morally humble” role for lawyers, by which he means (I take it) that lawyers should remain morally neutral toward their clients and should not be held morally accountable for act-

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<sup>12</sup> On the problem of role morality, see LUBAN, *supra* note 2, at 104–27.

<sup>13</sup> In a major article, Carle also rejects an individualist theory of agency in favor of an interactive view; according to the latter view, the self arises from interactions between the organism and its environment. Susan D. Carle, *Theorizing Agency*, 55 AM. U. L. REV. 307 (2005). Carle’s article raises complex questions relevant to my account of moral agency, but which I cannot address here.

<sup>14</sup> Wendel, *supra* note 2, at 1415, 1418–19.

<sup>15</sup> *Id.* at 1423 (emphasis omitted).

<sup>16</sup> *Id.* at 1419. I use the slightly clumsy phrase “law practice” rather than “legal” because “legal” carries other connotations beside the practice of law. “Legal moralism” typically refers to the claim that the law should be used to enforce morality, which is not the topic here; and the “inner morality of law” is Lon Fuller’s name for his famous eight canons of lawmaking.

<sup>17</sup> For Wendel’s analysis of my starting point, see Wendel, *supra* note 2, at 1427–31.

<sup>18</sup> Spaulding, *supra* note 2, at 1389.

<sup>19</sup> *See id.* at 1383–89.

ing on their clients' behalf.<sup>20</sup> In another recent essay, Spaulding criticizes my focus on individual moral agency even more sharply: he accuses moral activists like me of adopting an outlandishly Emersonian view of the self as "the apotheosis of the Cartesian subject,"<sup>21</sup> afflicted with "a kind of antinomian solipsism so extreme as to preclude any kind of meaningful engagement in social affairs."<sup>22</sup>

To this latter charge I plead not guilty. In fact, in *Lawyers and Justice* I explicitly rejected the romantic metaphysical fantasy that, deep down, we are pure, self-reliant selves beyond the influence of all social roles.<sup>23</sup> Indeed, I criticized this romantic "man-behind-the-social-mask" view of the self on precisely the ground on which Spaulding mistakenly criticizes me.<sup>24</sup> However, I likewise reject the equal and opposite fallacy that the self is entirely constituted by, or a product of, social relationships—in other words, that the human self is not an individual.<sup>25</sup> I am uncertain whether Spaulding adheres to the latter view; I find it just as metaphysically extravagant as romantic individualism.

Fortunately, no such metaphysical extravagances are needed to underwrite moral activism and its assumption that being a lawyer does not make you any less a moral being with ordinary moral obligations. There's no denying that social relationships and social roles, like cultural and religious traditions, can matter to us immensely; indeed, the final chapter of *Legal Ethics and Human Dignity* should make clear how much my own Jewish attachments affect the way that I approach ethical issues.<sup>26</sup> In particular, professional identity can matter immensely to lawyers, and for some I have no doubt that their profession lies at the core of their self-conception. But it doesn't devour the self: though we are not Cartesian subjects, it is simply a fact of life that we

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<sup>20</sup> *Id.* at 1389. This is the view, embedded in MODEL RULES OF PROFESSIONAL CONDUCT R. 1.2(b), that constitutes so-called neutral partisanship or the "standard conception of the lawyer's role." LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 1, at 9; see MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2002) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.").

<sup>21</sup> Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1938 (2008).

<sup>22</sup> *Id.* at 1940. Spaulding makes clear that he is referring to me and other defenders of moral activism. *Id.* at 1941 n.47.

<sup>23</sup> See LUBAN, *supra* note 2, at 111–16.

<sup>24</sup> *Id.* at 114.

<sup>25</sup> David Luban, *The Self: Metaphysical not Political*, 1 LEGAL THEORY 401 (1995).

<sup>26</sup> DAVID LUBAN, *A Midrash on Rabbi Shaffer and Rabbi Trollope*, in LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 1, at 301, 301–02. For another example, see the discussion in DAVID LUBAN, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, in LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 1, at 65, 92–94 [hereinafter LUBAN, *Upholders of Human Dignity*]. I might add that my writing on ethics is almost entirely secular, so what I am describing here is not an overt intellectual influence, but something more like an orientation or sensibility.

have the capacity to adopt a critical and reflective stance even toward things that matter to us immensely. People quit the Party, change careers, find or lose religion, become conscientious objectors on the battlefield, and walk away from all-consuming but destructive marriages. Whenever we take up a reflective standpoint toward our own projects and commitments, we confront ineluctable choices over whether to persevere in a course of action or deviate from it; whether to maintain a commitment or detach ourselves from it; whether to follow professional rules or conscientiously disobey them. Abandoning a commitment can be excruciatingly difficult, and even when it is clearly the right thing to do, it usually carries moral costs in the form of disloyalties and broken promises. But difficult is not the same as impossible. To deny our capacity for moral reflection is to deny choice and, in effect, to make the entire subject of ethics impossible.<sup>27</sup>

So my metaphysical priors are modest: that each of us actually is an individual, distinguishable from the groups we belong to and the roles we inhabit; that ultimately we make our own decisions (which does not deny that we may talk over hard choices with other people as Simon recommends);<sup>28</sup> and that we have the capacity to reflect on our commitments and make choices. Take these away, and there might as well be no such subject as ethics.

Modest or not, these priors imply that we cannot simply wave a wand and make our extralegal moral agency, and therefore moral accountability, disappear. I fear that the disappearance of moral accountability is the implication of following Wendel's advice to treat legal ethics as a "freestanding normative domain"—freestanding in the sense that it derives its norms from the imperatives of the legal

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<sup>27</sup> I discuss free will in something like these terms in DAVID LUBAN, *The Ethics of Wrongful Obedience*, in LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 1, at 237, 262 [hereinafter LUBAN, *Wrongful Obedience*], DAVID LUBAN, *Integrity: Its Causes and Cures*, in LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 1, at 267, 283–84 [hereinafter LUBAN, *Integrity*], and *The Self: Metaphysical not Political*, *supra* note 25, at 428–29, 431. As I explain in *Legal Ethics and Human Dignity*, I adopt a compatibilist position in the free-will debate, which means that moral responsibility is compatible with deterministic physical laws. LUBAN, *Wrongful Obedience*, *supra*, at 261. As Kant argues, adopting the practical standpoint requires us to postulate our own freedom to choose. IMMANUEL KANT, *Critique of Practical Reason*, in PRACTICAL PHILOSOPHY 133, 246 (Mary J. Gregor, ed. & trans., Cambridge Univ. Press 1996) (1788); see HENRY E. ALLISON, KANT'S THEORY OF FREEDOM 40–41 (1990). This point is less mysterious than it sounds. A theoretical belief in determinism is perfectly superfluous from the practical point of view. Suppose you are trying to decide whether to do your laundry now or tomorrow. As a determinist, you are convinced that you have no freedom to choose on this or any other issue: *que sera, sera*. What next? Do you simply settle back in your chair and say to yourself, "I await the inevitable workings of the laws of physics!" as though you are a marionette waiting for the puppet master to jerk your strings? Plainly, that is simply a bizarre way of deciding not to do your laundry now. From the practical standpoint, determinism is always one thought too many.

<sup>28</sup> Simon, *supra* note 6, at 1373–75.

system rather than those of ordinary morality.<sup>29</sup> Arthur Applbaum illustrates the difficulty of this approach with a nice analogy.<sup>30</sup> Suppose we are playing sand-lot baseball and I hit a long home run through my neighbor's window. I cannot duck my liability for the broken window by calling the rules of baseball a "freestanding normative domain" in which a homer is a homer and not a tort or trespass. The rules of baseball are undeniably "freestanding" in three important ways: (1) they exist independently of the laws of property, nuisance, trespass, and tort that my home run violates; (2) they form a self-contained, complete system with no conceptual space for the laws of tort or trespass; and (3) they derive from the internal imperatives of the game of baseball.<sup>31</sup> These, I take it, are the relevant ways in which Wendel thinks legal ethics rules constitute a freestanding normative domain. But (1)–(3) do not make tort and trespass go away. To drive the point home, Applbaum also imagines a different game, which he titles "acidball."<sup>32</sup> Acidball includes all the rules of baseball plus one more: the meta-rule that the rules of baseball dissolve (like an acid) the ordinary legal rules that would require me to pay for the broken window.<sup>33</sup> We may object that there is no such thing as acidball, that electing to play baseball doesn't magically grant you privileges and immunities from pre-existing obligations—and that is Applbaum's point. So long as common morality exists, normative domains cannot shake free of it even if they satisfy properties (1)–(3).

Nor, finally, is common morality merely a mirage. It is complicated and may even be indeterminate in hard cases. But that is because life is complicated—the theme of part four of my book, which I titled "Moral Messiness in Professional Life."<sup>34</sup> Moral theories can offer schematic representations of how to deliberate (for example, the

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<sup>29</sup> Wendel, *supra* note 2, at 1418–19. I don't mean to suggest that Wendel intends this implication, only that it is an unwelcome consequence of replacing law-practice moralism with the inner morality of law practice.

<sup>30</sup> ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* 91–92 (1999).

<sup>31</sup> On the sense in which they derive from the imperatives of baseball, see DAVID LUBAN, *Natural Law as Professional Ethics: A Reading of Fuller*, in *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 1, at 99, 118–19 [hereinafter LUBAN, *Natural Law*].

<sup>32</sup> APPLBAUM, *supra* note 30, at 92–96.

<sup>33</sup> *Id.* at 93.

<sup>34</sup> As Carle observes, this section of my book contains only one chapter. Carle, *supra* note 7, at 1323. Originally I intended to include another law-and-literature paper, *Stevens's Professionalism and Ours*, 38 WM. & MARY L. REV. 297 (1996), and had substantially revised it, when it turned out that space and price constraints made it impossible to include it in *Legal Ethics and Human Dignity*. Carle finds that my book exhibits a new-found sensitivity to context, or "particularism." Carle, *supra* note 7, at 1311–12, 1320, 1323. Previously, she had associated my views with "an almost rigid uprightness about matters of right and wrong." *Id.* at 7. I would put it slightly differently: I now emphasize more strongly that the norms of ordinary morality are themselves complex and messy; but I remain as rigid as ever about whether those norms apply in law practice.

four-step procedure I outline in *Lawyers and Justice*),<sup>35</sup> or even systematize large subsets of our moral convictions. But a schema is only a schema, and the morality we live by is likely to outstrip systematic moral theories. One of the clearest demonstrations of this latter point appears in Annette Baier's paper *Theory and Reflective Practices*,<sup>36</sup> which—I can report autobiographically—influenced my own antitheoretical views about morality. Baier points out that in an ideal world, morality might require only direct behavioral norms (e.g., “thou shalt not steal”), which theories could adequately model or represent.<sup>37</sup> But in a world of imperfect compliance, morality also needs norms about how to respond to others' moral failings: norms about how to punish thieves, how to solace the victims of thieves, how to reform society so that thievery decreases, how to raise our children so their thievish impulses are diverted to benign forms of activity, and so on.<sup>38</sup> But of course, even these responsive norms aren't enough. Human beings won't comply perfectly with the responsive norms either; “the world of perfect punishers [and ideally] good Samaritans” is not, alas, the world we live in.<sup>39</sup> So morality also needs to include norms of “how to respond to the presence of bad punishers or bad Samaritans, or unsuccessful reformers of aggression, . . . to the presence of corrupt police, unjust judges, brutal prison officials, . . . ineffective psychiatrists, poor parents.”<sup>40</sup>

By now the direction of Baier's argument should be clear: every new level of norms calls for another to respond to imperfect compliance.<sup>41</sup> There is no way to interrupt the multiplication of complexity simply by adding norms about how to respond to imperfect responders, because responders to imperfect responders are imperfect themselves. Baier is skeptical that any theory can adequately represent all the levels of complexity in the world we live in. “Do we have a moral norm specifically covering responses, individual or collective, to those

<sup>35</sup> LUBAN, *supra* note 2, at 132–33.

<sup>36</sup> ANNETTE BAIER, *Theory and Reflective Practices*, in *POSTURES OF THE MIND: ESSAYS ON MIND AND MORALS* 207 (1985).

<sup>37</sup> *See id.* at 212–13.

<sup>38</sup> *See id.* at 213–27.

<sup>39</sup> *Id.* at 213. Consider the well-known Darley-Batson experiment on altruism. Subjects were assigned a task in another building; one group had to perform it in just a few minutes, while the other had more time. On the way to the task, the subjects encountered a stranger collapsed on the sidewalk. Those in a hurry were substantially less likely to stop and help than those with extra time. The delicious irony of the experiment is that the subjects were students at the Princeton Theological Seminary, and some of the participants' assigned task was to preach a practice sermon on the Parable of the Good Samaritan. The topic of the sermon made no significant difference. John M. Darley & C. Daniel Batson, “From Jerusalem to Jericho”: A Study of Situational and Dispositional Variables in Helping Behavior, 27 J. PERSONALITY & SOC. PSYCHOL. 100, 102–08 (1973).

<sup>40</sup> BAIER, *supra* note 36, at 213.

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



who are, say, unforgiving to bad Samaritans? Do we have a moral norm dealing specifically with hypocritical conscientious disobedience? Our hierarchy of possible worlds quickly loses contact with the norms it was to represent.”<sup>42</sup>

This doesn’t make common morality a mere mirage, however. It implies only that morality cannot be codified or modeled in a systematic theory. Moral choice will involve an ineradicable element of individual judgment, and different people will weigh values differently, arriving at different answers—hence the potential for indeterminacy in hard cases. But if common morality were a mere mirage, we would not even be able to recognize the phenomena that Baier describes. The very fact that we can recognize hypocritical conscientious disobedience as a genuine moral category proves that common morality is more than a mirage.

The complexity of responsive norms matters greatly in legal ethics because in adversarial settings both sides must often respond to perceived and actual misdeeds by the other, some of which are themselves acts of reprisal. As I point out in *Legal Ethics and Human Dignity*,

In fraught, adversarial situations, we will often have a hard time figuring out which principles apply (“Turnabout is fair play,” or “Two wrongs don’t make a right”? “Turn the other cheek,” or “Fight fire with fire”?), or how to weigh them against each other. Real cases, with real people, usually have bad behavior on all sides. Eliminating the stripped-down, simplified moral code of neutral partisanship lands lawyers back in the same messy, dilemma-ridden, ambiguous moral world as everyone else.<sup>43</sup>

Moral activism is simply the view that you can’t hide behind the adversary system when you face dilemmas of legal ethics; the view “is, carefully stated, that often lawyers’ moral obligations will differ very little from those of a non-lawyer in similar circumstances. But it may not be easy to figure out what the non-lawyer’s responsibilities are.”<sup>44</sup> At the same time, once you *have* figured out your responsibilities under common morality, its indeterminacy for you in this situation has been resolved. You may have lingering doubts and trepidations about whether you “got it right.” But, at least here and now, you have decided that *by your own lights*, the settlement your client wants you to achieve is unjust, or that—again, by your own lights—the tactic that offers the best chance of success is immoral.

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

<sup>43</sup> LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 1, at 11.

<sup>44</sup> *Id.*

Let me illustrate with a real-life example that I used in the book, the Dalkon Shield case.<sup>45</sup> Suppose that the best way to defend a products-liability case involving a faulty contraceptive device that sterilized thousands of women is to depose the plaintiffs in great detail about their sexual habits and infidelities in order to intimidate them into dropping their lawsuits for fear of having to answer those questions in open court.<sup>46</sup> You may well find that, by your own lights, humiliating and intimidating injured women by peppering them with “dirty questions” violates your moral code. Even doing so to save a close friend from financial loss (the nonlegal analogue to doing so on behalf of a client) may violate your moral code. At the point you decide this, the indeterminacy of ordinary morality is no longer an issue, and to insist that ordinary morality offers only “mirage-like comfort”<sup>47</sup> errs in two ways: first, because your moral code is no mirage, and second, because in this case it is almost surely no comfort.

Even after you’ve decided what ordinary morality requires, professional role morality remains morally significant because you will still have to decide whether your moral objections to the representation are powerful enough to defeat the presumption that professional obligations create.<sup>48</sup> The fact that you hold yourself out as a lawyer creates reliance interests in your adhering to the rules of professional ethics, and before betraying those interests, you must be convinced that the reasons are serious.

My view of legal ethics causes Wendel to picture “a lawyer perched on the peak of a steeply pitched roof, trying not to fall either in the direction of blind obedience to role obligations or towards a conception of role that is completely transparent to ordinary moral evaluation.”<sup>49</sup> As a fan of *Fiddler on the Roof*, I quite appreciate, and accept, the Tevye-like imagery that Wendel attributes to my view.<sup>50</sup>

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<sup>45</sup> DAVID LUBAN, *The Adversary System Excuse*, in LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 1, at 19, 35–36 [hereinafter LUBAN, *Adversary System Excuse*].

<sup>46</sup> *Id.* Kruse suspects that I find this case particularly abhorrent “because it exemplifies the use of the legal system to perpetuate oppressive patterns of patriarchal sexism.” Kruse, *supra* note 9, at 1351. That is only one reason. A second is that even on the terms of the adversary system excuse, a tactic designed to intimidate plaintiffs into dropping their lawsuits undercuts one of the best arguments for the adversary system, namely that it is the best way for all arguments to be heard before impartial fact-finders. And a third reason is the strategic use of humiliation tactics—humiliation being, in the view I develop in chapter 2, a central case of violating someone’s human dignity. LUBAN, *Upholders of Human Dignity*, *supra* note 26, at 88–90.

<sup>47</sup> Spaulding, *supra* note 2, at 1389.

<sup>48</sup> I present the arguments for regarding professional obligations as defeasible (rebuttable) presumptions in David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424, 432–35 (1990).

<sup>49</sup> Wendel, *supra* note 2, at 1429.

<sup>50</sup> See JOSEPH STEIN ET AL., *FIDDLER ON THE ROOF 2* (1964). The play’s semi-comic image of a fiddler on a roof trying to scratch out a pleasing tune without breaking his neck calls to mind a very beautiful, and altogether uncomic, Chasidic song by Rabbi Nachman

The moral life may be just that precarious. I should note, however, that a great deal of law practice—the overwhelming majority of representations, I suspect—involves no moral dilemmas pitting ordinary morality against role morality.<sup>51</sup> We spend most of our lives on the ground, not on the roof.

Spaulding accuses me of inconsistency for arguing at one point that the adversary system can excuse only slight moral wrongs while elsewhere I argue that any serious and countervailing moral obligation rebuts the presumptions the adversary system creates.<sup>52</sup> But there is no inconsistency in saying that the adversary system's presumptions can excuse slight moral wrongs but not serious ones. Spaulding then asks, "How serious? Whose view of seriousness counts? The lawyer's, the client's, the lawyer's guess about the views of third parties . . . ?"<sup>53</sup> Of course, if the question "how serious?" demands a formula, it is unanswerable because moral reflection does not proceed by formulas. As for whose view of seriousness counts, the answer is the lawyer's because the lawyer is the one deciding what to do.

But why privilege the lawyer's moral views over those of other people? When Spaulding writes that ordinary morality offers "only mirage-like comfort," his specific basis for calling ordinary morality a mirage is that in a pluralist society many different moral codes all claim to be "ordinary."<sup>54</sup> Ordinary morality is not *common* morality, contrary to my assertions, because our society does not hold the same set of moral beliefs in common.<sup>55</sup> This argument takes us to the problem of moral pluralism.

## II

### MORAL PLURALISM

In a 2005 paper, Kruse writes, "Moral pluralism recognizes the existence of a diversity of reasonable yet irreconcilable moral viewpoints, none of which can be objectively declared to be 'right' or

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of Bratslav: "[T]he world is a very narrow bridge, and the main thing is not to be afraid." HESZEL KLEPFISZ, *THE INEXHAUSTIBLE WELLSRING: REAPING THE REWARDS OF SHTETL LIFE* 207 (2003).

<sup>51</sup> As Carle rightly observes, however, there is a sense in which all successful human beings advance "on the basis of privileges gained through conditions of structural injustice." Carle, *supra* note 7, at 1330. 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. While I agree wholeheartedly with Carle that large-scale social injustice cannot be ignored, I have little constructive to offer about how one should deal with it in daily life.

<sup>52</sup> Spaulding, *supra* note 2, at 1381–32 (quoting LUBAN, *Adversary System Excuse*, *supra* note 45, at 63).

<sup>53</sup> *Id.* at 1382.

<sup>54</sup> *Id.* at 1389.

<sup>55</sup> In *Lawyers and Justice*, I deliberately chose the term "common morality" because I regarded it as common to all of us. LUBAN, *supra* note 2, at 110.

‘wrong’ from a standpoint outside of its own theoretical framework.”<sup>56</sup> Pluralism undermines law-practice moralism by recasting its central questions: “Instead of inquiring what the lawyer should do when asked to assist an immoral client, it asks what the lawyer should do when asked to assist a client with whom the lawyer fundamentally morally disagrees.”<sup>57</sup> Pluralists are skeptical about privileging the lawyer’s moral code over reasonable alternatives available in a diverse society. Like Kruse, Wendel thinks that law-practice moralism such as mine “will not be very well suited to the real world of moral pluralism and disagreement.”<sup>58</sup> Spaulding insists that “Americans take their pluralism as a fact to celebrate rather than a problem to be overcome.”<sup>59</sup>

At the outset, we must note an important ambiguity in what my critics mean by pluralism. For Kruse and Spaulding, pluralism is the diversity of moral codes and outlooks within our society.<sup>60</sup> For Wendel, by contrast, “pluralism is the claim that human experience, and the goods and values associated with it, is sufficiently complex that one cannot reduce all of these ethical considerations to some higher-order synthesizing value that can be used to rank and prioritize competing principles.”<sup>61</sup> Wendel’s definition differs substantially from that of Kruse and Spaulding: he is talking about an irreconcilable diversity of values even within a single person’s moral outlook, whereas they are talking about a diversity of outlooks. These two conceptions of pluralism (call them “pluralism of moral outlooks” and “pluralism within moral outlooks”) need not be inconsistent, of course. It may well be that both exist—that our society contains adherents of many moral codes and each of these codes incorporates multiple incommensurable values.

At the same time, we must not exaggerate the extent or implications of pluralism in either form. For one thing, a great deal of legal conflict arises because litigants value the same things, not because they value different things. They battle over corporate control or child custody. (The French king Francis I observed that he and his rival Charles V were in perfect accord: they both wanted Milan.<sup>62</sup>) Furthermore, although different cultures and subcultures may have very different ideals of the good life, when it comes to the great evils, people are nearly unanimous. Physical pain, loss of life or family, imprisonment, homelessness, financial ruin, debt, and exile are univer-

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<sup>56</sup> Kruse, *Lawyers*, *supra* note 3, at 391.

<sup>57</sup> *Id.* (emphasis omitted).

<sup>58</sup> Wendel, *supra* note 2, at 1436.

<sup>59</sup> Spaulding, *supra* note 2, at 1389.

<sup>60</sup> See Kruse, *Lawyers*, *supra* note 3, at 391; Spaulding, *supra* note 2, at 1389.

<sup>61</sup> Wendel, *supra* note 2, at 1416.

<sup>62</sup> This is an anecdote related by Kant in *Critique of Practical Reason*. KANT, *supra* note 27, at 161.

sal bads, and I doubt that any actual moral outlook views them differently. Pluralism about the good is fully compatible with monism about the great evils.<sup>63</sup>

Nor does pluralism within moral outlooks inevitably mean that no rational ordering of values can exist. Even when values are incommensurable, it may be possible to achieve a rational compromise among them. Under assumptions that many economists find plausible, a bargaining game among incommensurable values can have a unique solution.<sup>64</sup> Of course, people who share values may assign them different weights and therefore arrive at different choices: you and your neighbor both value leisure as well as money, but one of you takes time off from work to go to a ball game and the other doesn't. So, even shared values may yield some degree of reasonable disagreement. But precisely because both of you recognize the same values, it is likely that you also recognize that the other's rank ordering is a reasonable alternative. Truly radical disagreement over the range of reasonable choices may be rarer than some pluralists suppose.

Of course, I am not denying the reality of genuine and intense moral disagreement; I merely suggest that it may not be as all-pervasive as my pluralist critics suppose. Kruse offers a genuine example of a conflict between lawyer and client based on possibly irreconcilable moral beliefs. The example concerns a lawyer who, on moral grounds, vehemently disapproves of same-sex parenting and is approached by a lesbian couple to help them carry out an adoption.<sup>65</sup> I agree that this example poses a problem for a lawyer who regards the representation as complicity in something morally intolerable. But I suspect that cases of such intense moral disagreement are rarer than a different sort of case: one in which the moralistic lawyer and the client largely agree in their moral values but differ because the client simply doesn't want scruples to get in the way of a favorable outcome. Earlier I cited the Dalkon Shield case, in which defense lawyers peppered plaintiffs with "dirty questions" to get them to drop their lawsuits.<sup>66</sup> Suppose that a lawyer objects to using (or proposing) this tactic, but the client insists on doing whatever it takes to win. Does that imply that the client has a moral code in which humiliating and intimidating injured women is perfectly acceptable? I think it is far more likely that the client-executive understands how smarmy the tactic is but will not

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<sup>63</sup> This important point—pluralism about the good, monism about the great evils—is emphasized in STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE 105–06 (1989).

<sup>64</sup> For details of how to construct the Nash solution to a bargaining game among incommensurable values, see David Luban, *Value Pluralism and Rational Choice* (Georgetown Law Sch. Research, Working Paper No. 264335, 2001), available at <http://ssrn.com/abstract=264335>.

<sup>65</sup> Kruse, *Lawyers*, *supra* note 3, at 408–09.

<sup>66</sup> See *supra* notes 45–46 and accompanying text.

let moral concerns get in the way of victory with millions of dollars on the line. If so, the disagreement between the scrupulous lawyer and the less scrupulous client is *not* a consequence of moral pluralism.

Furthermore, even if the client's value system finds nothing wrong with the tactic, that may be the result of cognitive distortions of the sort that I discuss in chapters 7 and 8, rather than a fundamentally different moral outlook. Cognitive dissonance makes us intuitive lawyers on our own behalf, subtly distorting our moral views to vindicate our own behavior.<sup>67</sup> When, as in the Dalkon Shield defense, the client is an organization with multiple decision makers, they can reciprocally reinforce each others' acquiescence to bad behavior by taking cues from each other, which further distorts their own antecedent moral beliefs.<sup>68</sup> In the Milgram obedience experiment, compliance with destructive orders to administer high-level electric shocks shot up from 63 percent to 90 percent when subjects teamed up with someone who uncomplainingly obeyed the orders.<sup>69</sup> Judging from behavior alone, it may *appear* that both team members adhere to a moral code under which obeying orders to shock innocent people to death is acceptable. But a better diagnosis is that group dynamics and cognitive distortions locally and temporarily corrupt team members' judgment.<sup>70</sup>

The best evidence for this diagnosis is that pairing subjects with a morally activist teammate who challenged the experimenter and refused to administer the shocks caused destructive obedience by the subjects to plunge to 10 percent.<sup>71</sup> Our own moral compasses are tremendously susceptible to those of the people around us. This finding highlights one important cost of the "morally humble" stance that Spaulding recommends to lawyers.<sup>72</sup> Morally humble lawyers will not challenge clients when the client seems to favor a course of action that the lawyer finds morally repugnant. In cases where the client's decision results from cognitive distortion rather than a genuinely different moral code, moral acquiescence on the lawyer's part will reinforce the distortion, while moral activism may break the spell and reveal that the moral codes of the lawyer and the client were not so different after all.

A final point about the moral significance of pluralism: contrary to what my critics assume, even in cases of genuine disagreement based on plural moral outlooks, it does *not* follow that moral humility

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<sup>67</sup> LUBAN, *Wrongful Obedience*, *supra* note 27, at 248–52; LUBAN, *Integrity*, *supra* note 27, at 269–71, 273–75.

<sup>68</sup> LUBAN, *Integrity*, *supra* note 27, at 271–73.

<sup>69</sup> LUBAN, *Wrongful Obedience*, *supra* note 27, at 240, 247.

<sup>70</sup> On the corruption-of-judgment account, see *id.* at 248–52.

<sup>71</sup> *Id.* at 247, 266.

<sup>72</sup> Spaulding, *supra* note 2, at 1391.

rather than moral activism is the right approach. To be sure, the fact that other people hold moral views different from mine, as strongly as I hold mine, should lead me to question whether mine are the right views. Recognizing pluralism should make us less dogmatic and less cocksure of our own rectitude. Our proper stance should be epistemic (not moral) humility, the reminder to ourselves that we might be wrong, that the other fellow might be right, that maybe we don't know after all.

Ultimately, however, we must make up our minds. Epistemic humility goes too far if it turns us into shoulder-shrugging moral agnostics without the courage of our convictions. Once we have made up our mind, we should act and judge on the basis of our moral beliefs as though they are right and the alternatives are wrong, for one simple reason: the sole alternative to acting on my own beliefs is acting on someone else's. Within the client-lawyer relationship, that will typically mean acting on the client's moral beliefs. But why do that if I think that advancing the client's cause will make me complicit in wrongdoing? Epistemic humility is a two-way street: the same recognition of pluralism that leads me to doubt my own certitudes should lead me to realize that my client's certitudes are no better. It would be perverse to act on reasons that I find less compelling rather than those I find more compelling, simply on the basis of epistemic humility.

Perhaps a legal analogy will clarify this point. Oftentimes, a jury will find a case murky, unclear, or almost too close to call. Eventually, let us suppose, the jurors in a civil case find for the plaintiff because they conclude that the evidence is a bit better than fifty-fifty on the plaintiff's side. Announcing the verdict, each of them privately thinks "I might be wrong; I sure hope not."<sup>73</sup> That is epistemic humility. Next, they turn from the question of liability to the question of damages. At this point, it seems to me that they must set their prior uncertainties aside. Once they have established liability, they should award the full measure of damages no matter how close the case was; it would be illegitimate to discount the plaintiff's award because the case for liability was a close one. I am arguing that the same goes in moral deliberation and action. The fact of pluralism should make us hesitate before pronouncing that the client's goals are (by our lights) too

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<sup>73</sup> I speak from experience. Several years ago I served as jury foreman in a rape trial where it was his word against hers on the issue of consent. (The defendant was the victim's ex and the father of her children. She accused him of raping her at knifepoint.) After six hours of deliberation, we voted to convict because we found the victim's testimony too convincing to doubt. Nevertheless, the jurors all agreed that we hated playing God when anything resembling certainty was out of the question. I have little doubt that all twelve of us were thinking "I might be wrong; I sure hope not." Epistemic humility is the reason we deliberated for six hours on a factually simple case.

wrong or unjust to participate in them. But once we have reached that conclusion, we should act on it without letting doubts undermine action.

Spaulding believes we should “take [our] pluralism as a fact to celebrate rather than a problem to overcome.”<sup>74</sup> Surely it is both. We should indeed celebrate the variety of value-systems and the diversity of judgment, which are the fruits of human creativity and imagination. A world where everyone valued exactly the same things in exactly the same way would be—literally—inhuman, not to mention too boring to inhabit. But before breaking out the champagne, we should think more closely about what exactly we are celebrating. Is it the bare fact of pluralism that deserves celebration or all the varied value systems that humanity adheres to? I doubt it is the latter. At times in history, some moral codes strongly approved of slavery; others approved of the importance of ritually torturing vanquished enemies to death. Celebrating pluralism cannot really require us to give three cheers for the slave traders and Mayan torturers. But we needn’t go to remote times or places to perceive the difficulty. A few minutes scrolling through the rape threats and racist rants on AutoAdmit should convince anyone that even an environment as homogeneous as law school has room for a wide variety of value systems that some of us won’t be rushing out to celebrate any time soon. No doubt celebrating pluralism requires us to take the bad with the good; in an exalted philosophical mood, we may perceive all that is highest in human life inextricably knotted together with all that is lowest and cruelest. Nietzsche thought that you cannot affirm the one without affirming the other as well. But to be an actor in the world requires choices, not blanket affirmations, and from the standpoint of choice and action, pluralism continually sets problems for us. Whose moral views do I accept, and whose do I reject? Who shall I aid (for example, by representing them in a legal matter), and who shall I steer clear of? To recognize that these are problems is not to reject pluralism; it is to live responsibly within it.

### III

#### HUMAN DIGNITY

As I mentioned earlier, Simon complains that my turn from justice to human dignity “generates confusion wherever it surfaces.”<sup>75</sup> I will try to sort out the confusion, but first I want to focus on whether I have in fact turned from justice to human dignity. Though the turn seems clear in one sense—the title of my first book was *Lawyers and*

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<sup>74</sup> Spaulding, *supra* note 2, at 1389.

<sup>75</sup> Simon, *supra* note 6, at 1366; *see* text accompanying note 10.



*Justice*, while this one is *Legal Ethics and Human Dignity*—I do not regard human dignity as a replacement for justice, or a new “master value.”<sup>76</sup> I think of the new book as a complement to the earlier one, not a realignment or repudiation. That is because justice and respect for human dignity belong to different categories of moral concepts that don’t compete with each other.

As I see it, justice is an impersonal, or “third-personal,” virtue in human relationships. To do something good for someone else because justice requires it has nothing particular to do with either the agent or the recipient and presupposes no relationship between them.<sup>77</sup> By contrast, to do something because it honors the recipient’s human dignity is a “second-personal” reason.<sup>78</sup> Honoring someone’s human dignity is not as personal as acting out of love, friendship, or some other relation grounded in the other person’s particularity. But that is because honoring a person’s dignity can itself require us to maintain a respectful arm’s-length distance.<sup>79</sup> Nevertheless, second-personal relationships are definitive of my account of human dignity—my view draws as much on Buber as on Kant or Cicero. I should point out, however, that this emphasis on the second-personal character of morality was already present in *Lawyers and Justice*, where I labeled it “the morality of acknowledgment,” by which I meant the moral importance of acknowledging the plight of a concrete other person.<sup>80</sup> Acknowledging the other is a more general no-

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<sup>76</sup> Simon, *supra* note 6, at 1365.

<sup>77</sup> To illustrate with an especially striking example, the market-share liability rule of *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. 1980), requires manufacturers of a drug that caused birth defects to pay class-action plaintiffs without showing that any particular defendant harmed any particular plaintiff.

<sup>78</sup> Here I am drawing on the vocabulary, although not the specific arguments, in STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* (2006). Darwall argues that morality is inherently second-personal: it depends not on impartial reasons, but on claims we make on each other. See *id.* at 91–100. Darwall may regard both justice and dignity as second-personal in his sense, in which case the distinction I draw here would depart from Darwall’s theory.

<sup>79</sup> I explain this in *Legal Ethics and Human Dignity*, see LUBAN, *Natural Law*, *supra* note 31, at 111, and earlier in my discussion of Maimonides’s argument that charitable giving best maintains the recipient’s dignity if both giver and recipient are anonymous to each other, LUBAN, *Upholders of Human Dignity*, *supra* note 26, at 93 & n.74.

<sup>80</sup> LUBAN, *supra* note 2, at 127, 145–47. I chose the terminology under the influence of Stanley Cavell’s remarkable essay *Knowing and Acknowledging*, in *MUST WE MEAN WHAT WE SAY?: A BOOK OF ESSAYS* 238 (updated ed. 2002), which, along with the rest of the book, bowled me over when I read it as a graduate student. Cavell’s topic is skepticism about our knowledge of other minds; his argument amounts to a qualified defense of skepticism against its ordinary language critics because the skeptic more honestly faces the moral problem that we might fail to respond to another person’s pain because we do not recognize it. See *id.* at 263–64. Skepticism represents our awareness of our own possibility of failure in the face of another’s suffering. Cavell writes, “[Y]our suffering makes a *claim* upon me. It is not enough that I *know* (am certain) that you suffer—I must do or reveal something (whatever can be done). In a word, I must *acknowledge* it, otherwise I do not

tion than respecting another's human dignity, but my point here is simply that in both books the second-personal, relational character of ethics is central to the enterprise.

In *Legal Ethics and Human Dignity*, I link legal ethics with both justice and dignity by arguing that lawyers' work generates the rule of law,<sup>81</sup> and the rule of law—which is obviously connected with corrective if not distributive justice—enhances human dignity. Furthermore, Carle perceptively highlights my nearly obsessive concern with power imbalances.<sup>82</sup> Many power imbalances arise from structural injustices, and Carle is absolutely right to notice that I have a special horror that lawyers representing the Goliaths and Leviathans of our world may accentuate injustices and grind up the weak and powerless.

To my way of thinking, these are the most alarming forms of injustice. This focus reflects a human-rights sensibility, and I invoke human dignity because of its connection with the discourse of human rights.<sup>83</sup> Simon suspects that the turn from justice to human rights may represent an effort to move away from “the decreasingly popular idea of social democracy”<sup>84</sup> toward something more minimalist and less politically controversial—a suspicion he has raised elsewhere as well.<sup>85</sup> His fear is that left-of-center academics and law students, possibly worn down by years of defeat, have simply abandoned the pursuit of economic justice and are willing to settle for (merely) the elimination of cruelty, especially in remote parts of the world.<sup>86</sup> I think there is something to this critique, although the action in human rights law and advocacy has turned increasingly toward economic issues and domestic human rights. But the critique seems misplaced in a discussion of legal ethics because the occasions where lawyers' ethical decisions can directly advance economic justice and social democracy are few and far between. And here, my point is that concern for human dignity and human rights helps motivate the pursuit of justice.

One complication in my book's remarks on human dignity is that they actually contain three parallel accounts of it. The primary (“official”) theory is, as I have indicated, relational.<sup>87</sup> To quote Buber, “Ba-

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know what ‘(your or his) being in pain’ means.” *Id.* at 263. More briefly: “To know you are in pain is to acknowledge it, or to withhold the acknowledgment.” *Id.* at 266.

<sup>81</sup> See LUBAN, *Natural Law*, *supra* note 31, at 100, 102–04.

<sup>82</sup> Carle, *supra* note 7, at 1325–27, 1333.

<sup>83</sup> On this subject, the essays in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* (David Kretzmer & Eckart Klein eds., 2002) are very useful.

<sup>84</sup> Simon, *supra* note 6, at 1366.

<sup>85</sup> William H. Simon, *Fear and Loathing of Politics in the Legal Academy*, 54 J. LEGAL EDUC. 175, 183–84 (2001).

<sup>86</sup> *Id.*

<sup>87</sup> See *supra* notes 77–81 and accompanying text.

sic words do not signify things but relations.”<sup>88</sup> “Human dignity” does not name a property of persons. Rather, it is defined implicitly through the various relations that we describe as honoring human dignity, respecting human dignity, enhancing human dignity, violating human dignity, degrading human dignity, and so forth. To say that these relations implicitly define human dignity means that it is a derivative concept, parasitic on the catalogue of specific modes of relationship that make one person a dignifier and the other a dignified.<sup>89</sup> This raises the concern that different ethical traditions may offer varying elaborations of the defining relations. In reality, however, the range of variation may not be vast. During the drafting of the Universal Declaration of Human Rights, a committee of scholars canvassed leading thinkers from around the world about what the basic dignity-defining rights should be and discovered remarkable consensus despite sharp disagreements about the underlying philosophical basis for them. One of the authors, Jacques Maritain, famously commented, “Yes, we agree about the rights but on condition no one asks us why.”<sup>90</sup>

The second account of human dignity appears in a section of chapter 2 where I wrote that “[i]ntuitively, . . . our own subjectivity lies at the very core of our concern for human dignity.”<sup>91</sup> Several of my critics regard this sentence as my basic account of human dignity.<sup>92</sup> If so, however, it appears to undermine my primary “official” claim that human dignity is fundamentally relational, not personal. Actually, however, the accounts reinforce each other. The self-recognition that I labeled “subjectivity” implicitly incorporates other-recognition.<sup>93</sup> Experiencing ourselves as subjects implies experiencing ourselves as subjects among other subjects, who likewise experience themselves as subjects among other subjects. Just as none of us can help regarding our self as something distinctive in the order of things, we must recog-

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<sup>88</sup> MARTIN BUBER, *I AND THOU* 53 n.1 (Walter Kaufmann trans., 1970). The quoted sentence appeared in the first edition of *I and Thou*, but Buber omitted it from subsequent editions.

<sup>89</sup> To be terminologically fussy, “human dignity” on my account is a *syncategorematic* term, grammarians’ jargon for a term that has no meaning when it stands by itself, only when it is used in conjunction with other words.

<sup>90</sup> MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 77 (2001).

<sup>91</sup> LUBAN, *Upholders of Human Dignity*, *supra* note 26, at 71.

<sup>92</sup> Thus, Kruse writes that subjectivity lies “at the core of [my] analysis of human dignity.” Kruse, *supra* note 9, at 1346. Wendel thinks my view of human dignity is “rooted in the subjectivity of all persons.” Wendel, *supra* note 2, at 1429. And Alfieri writes, “At bottom, individual subjectivity lies at the core of Luban’s concern for human dignity.” Alfieri, *supra* note 11, at 1299.

<sup>93</sup> This is a central theme in German idealism. For one classic statement that self-recognition requires other-recognition, see G. W. F. HEGEL, *PHENOMENOLOGY OF SPIRIT* 110 (A.V. Miller trans., 1977) (1807).

nize the same about others. And “honoring human dignity” seems as good a name as any for reciprocally recognizing others who share the same capacity.

But in any case, the subjectivity account was never meant to be a unified field theory of human dignity because it is entirely possible that “human dignity” means different things in different contexts, including different legal contexts. The subjectivity account comes in the course of an argument for the right to counsel based on the importance to litigants of having an opportunity to be heard in court, which for many people requires a lawyer.<sup>94</sup> This argument, advanced by Alan Donagan, was that excluding litigants’ voices from the court in effect treats them as if they have no good-faith story to tell about the case that is worth hearing.<sup>95</sup> Reflecting on Donagan’s argument, I emphasized the central notions of having a story to tell and being the subject of a story.<sup>96</sup> The sentence quoted above about subjectivity lying at the core of human dignity tries to articulate the intuitions that make Donagan’s argument sound natural and plausible.<sup>97</sup> To treat a litigant as if he or she has no good-faith story to tell amounts to treating the litigant as a thing rather than a human being. This does not necessarily mean that “having a story to tell” is the best explanation of human dignity in all contexts. Thus, although Kruse is correct to notice that thinking of lawyers as lawmakers (as I do in chapter 4) is far different from thinking of them as voices for their clients’ stories,<sup>98</sup> my topic in chapter 4 was lawyers in their role as advisors about what the law means, not in their role as advocates.<sup>99</sup>

Chapter 2 investigates human dignity by asking how it manifests itself in law practice.<sup>100</sup> The method is something akin to ordinary-language philosophy: investigating the meaning of words by examining the way we use them when we aren’t philosophizing. I don’t mean to oversell the analogy to ordinary-language philosophy: legal discourse and theorists’ reflections on it are hardly ordinary language or ordinary life, and the jurists I quote are hardly the Man on the Clapham Omnibus. The point of affinity is that here, as in ordinary-language philosophizing, noticing when it comes naturally to use the term “human dignity” in connection with law practice can reveal the implicit meanings of “human dignity.” Meanings in the plural: the phrase can mean different things in different contexts, not all of

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<sup>94</sup> See LUBAN, *Upholders of Human Dignity*, *supra* note 26, at 68–69.

<sup>95</sup> See *id.* at 68–70.

<sup>96</sup> See *id.* at 70–71.

<sup>97</sup> See *id.* at 71.

<sup>98</sup> Kruse, *supra* note 9, at 1346.

<sup>99</sup> See DAVID LUBAN, *A Different Nightmare and a Different Dream*, in LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 1, at 131, 131–32.

<sup>100</sup> See LUBAN, *Upholders of Human Dignity*, *supra* note 26, *passim*.

which have to do with storytelling or even with subjectivity. Ultimately, I take no position on whether theoretical constructs like the subjectivity account are general theories of human dignity or local theories specific to some meanings of human dignity but not others.

Thirdly, I often focus on humiliation as the paradigm violation of human dignity. A reader could be excused for supposing that I am offering a largely naturalistic theory of human dignity, according to which honoring human dignity just means not wrongly humiliating people.<sup>101</sup> But respecting human dignity is not identical to treating people in nonhumiliating ways. After all, even if our moral vocabulary lacked the concept of human dignity, we would surely continue to have a concept of humiliation.<sup>102</sup> In the book, I propose that any plausible conception of human dignity must entail nonhumiliation—but I never suggest that the concepts are interchangeable.<sup>103</sup> Systematically humiliating people is the paradigm case of violating their human dignity, and I argue only that nonhumiliation often provides a useful surrogate for thinking about the more abstract concept of human dignity.

Can't we simply scrap the abstract terminology of human dignity, then, as Simon seems to prefer? In 1797, Friedrich Schiller wrote the following epigram: "Enough about human dignity, I pray you. Give a man food and a place to live. When you have covered his nakedness, dignity will follow by itself."<sup>104</sup> What Simon and Schiller overlook, it seems to me, is the importance of moral vocabulary in structuring debates and deliberations in ethics. The language of human dignity carries several important connotations: egalitarianism (because if all humans have inherent dignity, we no longer reserve the notion of dignity for those of exalted social rank); universalism (because if it is truly *human* dignity, then all people deserve to have it respected, not just those within our own group); the notion that intangibles can matter just as much as tangible goods (because dignity is an intangible); and, of course, the moral focus on reciprocal respect (because dignity and respect go together). Perhaps we could express all these thoughts without resorting to the admittedly fuzzy language of human dignity. But why rob ourselves of a concept that structures and organizes other moral ideas in compact form? Simon, like Schiller, seems to regard

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<sup>101</sup> See *id.* at 88–90.

<sup>102</sup> See the helpful paper by Daniel Statman, *Humiliation, Dignity and Self-Respect*, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE, *supra* note 83, at 209, 209–17.

<sup>103</sup> LUBAN, *Upholders of Human Dignity*, *supra* note 26, at 88.

<sup>104</sup> See Hubert Cancik, 'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero, *De Officiis* I, 105-107, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE, *supra* note 83, at 19, 36 (quoting FRIEDRICH SCHILLER, *Würde des Menschen*, in MUSENALMANACH 32–33 (1797)). I have slightly amended Cancik's translation.

talk about human dignity as an evasion that distracts us from the real task of pursuing economic justice or clothing the naked. I think this overlooks the role that human dignity arguments have come to play in understanding why it would be morally shameful not to clothe the naked adequately. Think, for example, of Adam Smith's famous argument that a linen shirt may be a necessity of life, not a luxury:

By necessities I understand, not only the commodities which are indispensably necessary for the support of life, but whatever the custom of the country renders it indecent for creditable people, even of the lowest order, to be without. A linen shirt, for example, is not, strictly speaking, a necessary for life. The Greeks and Romans lived, I suppose, very comfortably, though they had no linen. But in the present times, through the greatest part of Europe, a creditable day-labourer would be ashamed to appear in public without a linen shirt, the want of which would be supposed to denote that disgraceful degree of poverty which, it is presumed, no body can well fall into without extreme bad conduct.<sup>105</sup>

This, of course, is an argument steeped in the language of human dignity and what would offend it ("indecent for creditable people," "ashamed to appear in public," "disgraceful degree of poverty").

I would like to comment briefly on why Kruse finds the framework of human dignity so useful and Simon does not. The main reason, I believe, is that Kruse applauds the idea that advocates are vehicles for clients to tell their own stories, while Simon thinks that it takes "desperate contortions" to fit actual law practice into this characterization.<sup>106</sup> Beginning with his first published paper, Simon has often portrayed advocacy as a kind of tyranny of lawyers over their clients in which the lawyer imputes ends to the client and aims to tell the story that will win, not the story that the client actually believes.<sup>107</sup> In Simon's view, "the litigant will be an alien spectator at his own trial. . . . It is not himself whom he will see represented, but a puppet manipulated by his lawyer . . ." <sup>108</sup> Kruse seems to believe in the possibility of a more authentic form of client representation.<sup>109</sup> Obviously, this is a factual disagreement about what happens in law practice, and I cannot even pretend to be able to settle it. I do concede that if Simon's picture of advocacy accurately portrays the large majority of cases, my description of the advocate as the client's voice in the court-

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<sup>105</sup> ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 821-22 (Edwin Canaan ed., Random House 1937) (1776).

<sup>106</sup> Simon, *supra* note 6, at 1366; see Kruse, *supra* note 9, at 1347-51.

<sup>107</sup> William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 52-59, 97-99.

<sup>108</sup> *Id.* at 99.

<sup>109</sup> See, e.g., Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 422-23 (2006) (describing a "Narrative Integrity Approach" to client-centered legal representation).

room would be absurd. Simon's picture may well be accurate of many criminal trials, where defense lawyers typically advise their clients not to take the stand, and thus can hardly be said to champion their clients' human dignity by giving them voice. I explicitly address this difficulty in the book and reply that the special character of criminal law—with its presumption of innocence and the moral condemnation of the defendant if he is convicted—changes the terms of the human dignity argument.<sup>110</sup> Simon may regard this as a desperate contortion. I do not.

To conclude this Part, I wish to consider one criminal context that raises this issue explicitly: a date rape case in which the sole issue is consent, and the man assumed the woman's consent because of her earlier provocative behavior and her lack of resistance at the time of the alleged rape (which she describes as the result of fear). Kruse singles this case out for extended discussion.<sup>111</sup> May the defense counsel brutally cross-examine the woman to paint her as a willing sex partner taking out her morning-after regret on an innocent man? In earlier work, I answered no.<sup>112</sup> Kruse believes that my current arguments about honoring the defendant's human dignity by telling his story will not support this answer.<sup>113</sup> The reason is that the brutal cross-examination tells the story as the defendant experienced it—the story of a sexual invitation that he accepted.<sup>114</sup> True, the brutal cross-examination will profoundly humiliate the victim, but the failure to display her behavior the way the defendant saw it will exclude the defendant's voice. Kruse suggests that this points to a more general difficulty with my theory, namely the impossibility of balancing one person's human dignity against another's.<sup>115</sup> That difficulty provides a reason for the advocate to take on the traditional role of simply telling the client's story without pulling punches.

I find Kruse's critique of my arguments about the date-rape case compelling, and for just the reasons she offers.<sup>116</sup> Of course, what makes the argument compelling is that in this hypothetical the defendant actually believed that the victim had consented to sex, so the defender actually is telling the defendant's story. But Kruse could press the argument further still. After all, I also argue that in criminal

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<sup>110</sup> LUBAN, *Upholders of Human Dignity*, *supra* note 26, at 72–73.

<sup>111</sup> See Kruse, *supra* note 9, at 1352–58.

<sup>112</sup> LUBAN, *supra* note 2, at 150–53.

<sup>113</sup> See Kruse, *supra* note 9, at 1358.

<sup>114</sup> See *id.* at 1355–58.

<sup>115</sup> See *id.* at 1357.

<sup>116</sup> I might note that in the two decades since I first wrote about brutal cross-examination in rape defenses I have never met any lawyer, prosecutor or defender, including feminist prosecutors, who agreed with me about the date-rape case. Even before Kruse's critique, this led me to suspect that I might be wrong. (Epistemic humility!)

cases lawyers defend human dignity by arguing reasonable doubt even when they know the client is guilty, provided that the evidence supports the inferences they invite the jury to draw.<sup>117</sup> If so, the brutal cross-examination is proper even if the defendant told the lawyer confidentially that he couldn't care less whether the victim consented. In an earlier paper, I tried to distinguish the rape defense from other criminal cases.<sup>118</sup> I argued that rape defenses are unique because the oppressive potential of the state is matched with the oppressiveness of patriarchy.<sup>119</sup> Simon rightly took me to task for this argument, which reifies patriarchy and treats it as if it were an organization.<sup>120</sup>

None of this settles the question of what rules of engagement are appropriate for criminal defense. A rule of evidence or ethics that forbids the defender (on grounds of irrelevancy) from asking the victim whether she was wearing sexy clothes that night would not offend against the defendant's human dignity even if the defendant interpreted the way she dressed as a sexual invitation. For that matter, neither would a radical change in prevailing ethics rules forbidding defenders from arguing theories that they know are false.<sup>121</sup> These may well be improvements over current rules in rape defenses.

I am not saying that in a criminal case anything goes if the rules permit it. For example, unlike Spaulding, I see no reason for applauding advocates' efforts to play on jurors' biases and prejudices.<sup>122</sup> Of course he is right that there is no "Manichean dichotomy" between reason and passion.<sup>123</sup> But that does not make every bias a form of reason. The fact that a lawyer can get a jury to like him—to take a rather innocent example of playing on jurors' biases—is not, under any conceivable description, a method of demonstrating reasonable doubt. If jurors acquit the rapist because his lawyer is lovable, the outcome has nothing to do with either justice or the defendant's human dignity. It would be impossible to regulate such behavior, but that doesn't make it ethical. Even less so if the lawyer plays on more insidious jury biases, such as racial or sexual prejudice.<sup>124</sup>

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<sup>117</sup> See LUBAN, *Upholders of Human Dignity*, *supra* note 26, at 72–73.

<sup>118</sup> See David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1028 (1990).

<sup>119</sup> See *id.*

<sup>120</sup> William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1709–10 (1993).

<sup>121</sup> See LUBAN, *Upholders of Human Dignity*, *supra* note 26, at 70; Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 129–36, 152 (1987) (proposing such a change to ethics rules).

<sup>122</sup> See Spaulding, *supra* note 2, at 1393–95.

<sup>123</sup> *Id.* at 1394.

<sup>124</sup> Alfieri has explored some of the complexities of this topic in a series of case studies, of which his essay in this Symposium is the latest. See, e.g., Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999); Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293 (1998); Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L.



IV  
FROM ETHICS TO INSTITUTIONS?

Carle and Simon both argue that legal ethics should pay more attention to the complex organizations and “structures” (to use Carle’s term)<sup>125</sup> in which lawyers practice, and both suggest institutional solutions to ethical problems. Carle argues for institutional protection of dissenters and whistleblowers,<sup>126</sup> while Simon focuses on “institutional structures that encourage reflection, articulation, and transparency.”<sup>127</sup> I have no quarrel with these proposals or with the implicit suggestion that reform in legal ethics should focus on institutional design, for which insights from organization theory will prove more useful than moral philosophy.<sup>128</sup>

Simon goes further than that, however, and argues that ethics teachers “should spend less time focusing on judgment and more on circumstance.”<sup>129</sup> He suggests that focusing on individual decision making is an error<sup>130</sup> and implicitly sets up an either-or where none is really necessary. (In an amusing footnote, Simon notices that his own greatest weakness is contentiousness.)<sup>131</sup> I have two concerns with Simon’s argument. First, it is descriptively inaccurate. Simon believes that “self-conscious group-deliberation produces better decisions” and asserts that the psychological studies I discuss all involved situations that did not permit subjects to deliberate in groups.<sup>132</sup> But this is untrue of the Stanford Prison Experiment, where the guards met to plan strategy about how to handle rebellious prisoners and were in each other’s company throughout the long hours of the experiment.<sup>133</sup> Simon discounts the possibility of groupthink—the phenomenon that groups of like-minded individuals will reinforce and amplify faulty ide-

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REV. 1063 (1997); Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995). Abbe Smith has responded to Alfieri in *Burdening the Least of Us: “Race-Conscious” Ethics in Criminal Defense*, 77 TEX. L. REV. 1585 (1999), and defended the appeal to prejudice by criminal defenders in “Nice Work If You Can Get It”: “Ethical” Jury Selection in *Criminal Defense*, 67 FORDHAM L. REV. 523 (1998) and *The Complex Uses of Sexual Orientation in Criminal Court*, 11 AM. U. J. GENDER SOC. POL’Y & L. 101 (2002).

<sup>125</sup> See Carle, *supra* note 7, at 1311.

<sup>126</sup> See *id.* at 1333–39.

<sup>127</sup> Simon, *supra* note 6, at 1375.

<sup>128</sup> For a sophisticated discussion of the linkage between moral reflection and institutional settings, see Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941 (2007). Institutional reform has been a major theme in writings by Deborah Rhode. See, e.g., DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* *passim* (2000).

<sup>129</sup> Simon, *supra* note 6, at 1373.

<sup>130</sup> See *id.*

<sup>131</sup> *Id.* at 1367 n.10.

<sup>132</sup> *Id.* at 1374.

<sup>133</sup> Stanford Prison Experiment, [www.prisonexp.org/slide-12.htm](http://www.prisonexp.org/slide-12.htm) (last visited July 31, 2008).

ologies.<sup>134</sup> This possibility is not a fatal or even serious objection to Simon's proposal for deliberative institutions; it means only that designers of deliberative institutions must take the dangers of groupthink into account and ensure that the institutions do not become echo chambers. Simon himself suggests that such institutions should be made transparent, and that would certainly help.<sup>135</sup> (To take one salient example that forms my chief case study in the book, I would favor abolishing the Office of Legal Counsel's practice of issuing secret legal opinions.)<sup>136</sup> It seems clear that, as researchers, we need to consider both institutional structures and individual decision making.

My second concern is that Simon's pedagogical proposal of focusing ethics instruction largely on the circumstances of practice may prove disempowering and demoralizing to students. Not that I object to law students studying "how practice can be structured in ways that make for ethically better decisions."<sup>137</sup> Students should know far more than they do about the work world they are about to enter, and thinking in advance about how it can be structured to yield ethically better decisions is entirely worthwhile. The worry is that students may conclude that it will be years before they have any say in how the firms they practice in are structured. The study of organizational cultures may also convey the subtext that institutions, not individuals, bear the sole responsibility for bad behavior. Taken together, these ideas are a recipe for quiescence.

Simon might reply that I err in the opposite direction by focusing excessively on individuals standing at the crossroads and deciding which path to pursue. That may be true, but it seems to me important to discuss ethics under the presupposition that what each and every one of us does matters; so I resist the suggestion that the focus on individual judgment should be left on the curricular cutting-room floor.

Carle takes seriously the notion of individual responsibility in organizational settings and raises an exceedingly difficult question. She observes that within complex organizations, most problems are "far harder" than the stylized hypotheticals in my book; furthermore, the causal connections between individual action and any suffering it brings about are far less direct than in the Milgram or Stanford Prison

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<sup>134</sup> See Simon, *supra* note 6, at 1375. The literature on this phenomenon is vast, but for a useful overview, see Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 *YALE L.J.* 71 (2000).

<sup>135</sup> See Simon, *supra* note 6, at 1375.

<sup>136</sup> See DAVID LUBAN, *The Torture Lawyers of Washington*, in *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 1, at 162, 162 [hereinafter LUBAN, *Torture Lawyers*].

<sup>137</sup> Simon, *supra* note 6, at 1374.

Experiment scenarios.<sup>138</sup> If so, how do we analyze complicity and culpability? “In these contexts, it may be better not to walk off in a huff of protest . . . . 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?”<sup>139</sup>

I am certainly not able to answer these questions in the abstract, and they are devilishly difficult in the concrete as well. But I can suggest one place to look for serious thinking about these issues, and that is the jurisprudence of international criminal tribunals dealing with mass atrocities. Because their statutes restrict these tribunals to considering individual guilt (rather than corporate or organizational guilt), they have been compelled to devote substantial attention to sorting out the culpability of individuals at all levels of involvement in joint criminal enterprises. Of course, criminal culpability raises different questions than moral responsibility because the question is not “who is blameworthy?” but “who is blameworthy enough to punish?” So we cannot expect complete overlap in these issues. Nevertheless, the basic questions the criminal law asks—questions about mens rea, about aiding and abetting, about chains of command and the power to influence the actions of others—seem to me precisely the questions that Carle raises.<sup>140</sup>

## V

### ALFIERI ON THE JENA SIX

Anthony Alfieri asks whether themes from *Legal Ethics and Human Dignity* might shed light (or fail to) when the subject is a racially charged criminal prosecution<sup>141</sup>—a subject that has occupied him for many years and about which he has written many important articles.<sup>142</sup> I agree with most of Alfieri’s analysis of the Jena Six events, with one significant disagreement and one hesitation about whether the position he advocates differs significantly from my own.

Alfieri scrutinizes the legal ethics of Jena Six prosecutor Reed Walters and concludes that the colorblind and depoliticized frame-

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<sup>138</sup> Carle, *supra* note 7, at 1333. Spaulding also emphasizes that real-life decision making can involve far more complicated questions of causation and responsibility than I suggest. Spaulding, *supra* note 2, at 1384–88 (discussing the Chiquita-Hills case).

<sup>139</sup> Carle, *supra* note 7, at 1333–34.

<sup>140</sup> For one example of an international opinion that raises these questions in a sophisticated way, see *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Judgment, ¶¶ 282–12 (Nov. 2, 2001), available at <http://www.un.org/icty/kvocka/trialc/judgement/index.htm>. This decision was eventually reversed by the Appeals Chamber. *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Judgment (Feb. 28, 2005). I do not cite it to endorse its conclusions, but only to offer it as an exemplar of a serious effort to sort out the questions Carle poses.

<sup>141</sup> See Alfieri, *supra* note 11, at 1296–1302.

<sup>142</sup> See *supra* note 124.

work through which Walters explained his decisions is in fact “color-coded” and larded with “bias and discrimination.”<sup>143</sup> This does not, I take it, mean that the norms Walters invokes are intrinsically biased or color-coded; Alfieri does not deny that criminal cases exist where race plays no role. But in a deeply segregated town where the legacies of Jim Crow inflect the social meaning of charging decisions, facially neutral standards may *in fact* be deeply color-coded. As Alfieri nicely puts it, “Charging decisions, trial strategies, and sentencing recommendations all constitute acts of naming.”<sup>144</sup> In the Jena Six case, the grave charges against Bell, and Walters’s explanation that he is a repeat offender, reinforce (and derive their plausibility from) the stereotype of young black men as dangerously and uncontrollably violent.<sup>145</sup> Walters’s far-fetched insistence that the attack on Barker had nothing to do with the turmoil at Jena High—the nooses, the racial conflict they provoked, the arson—make Bell’s assault on Barker seem like an inexplicable and inexcusable criminal assault out of nowhere, which is exactly how Walters depicts it.<sup>146</sup> It is hard not to suspect that had the races of assailant and victim been reversed, Walters might have cited the escalating violence at Jena High as a mitigator that would have led to different decisions: to charge the assailant as a juvenile, to seek rehabilitative sentencing rather than hard jail time, to charge lesser offenses, or conceivably, to forego charging Bell at all.

If so, quite possibly Walters was being disingenuous when he offered race-neutral explanations. To take the most obvious example, Walters explained that he charged Bell as an adult because of “the seriousness of the charge.”<sup>147</sup> But of course it was Walters’s own controversial choice to ratchet up battery charges to attempted second-degree murder and conspiracy to commit second-degree murder—charges that even the all-white jury rejected.<sup>148</sup> Blandly describing himself as “bound to enforce the laws of Louisiana,” Walters downplayed the role prosecutorial discretion played in his charging decisions.<sup>149</sup> Perhaps he actually believed that race was irrelevant to the case: after all, he did *not* charge Bell with a hate crime.<sup>150</sup> But it seems equally plausible that he chose not to charge a hate crime because that would have made the racial turmoil at Jena High factually rele-

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<sup>143</sup> Alfieri, *supra* note 11, at 1287–88, 1304.

<sup>144</sup> *Id.* at 1303.

<sup>145</sup> *See id.* at 1296, 1303.

<sup>146</sup> *See id.* at 1294.

<sup>147</sup> *Id.* (quoting Reed Walters, Op-Ed., *Justice in Jena*, N.Y. TIMES, Sept. 26, 2007, at A27).

<sup>148</sup> *See id.* at 1290. According to Alfieri, the jury convicted Bell of “aggravated second-degree battery and conspiracy to commit aggravated second-degree battery.” *Id.*

<sup>149</sup> *Id.* at 1293 (quoting Walters, *supra* note 147).

<sup>150</sup> *See id.* at 1290.

vant in a way that Walters was determined to deny. So too, his decision not to request alternative sentencing<sup>151</sup> amounted to a proclamation that Walters viewed Bell as beyond rehabilitation, and we can suspect that Walters might have concluded differently if Bell were white.

But Alfieri also condemns Walters for failing to prosecute the noose incident as a crime, and here I cannot go along with him. Walters correctly explained that Louisiana has no statute to prosecute it under because the hate-crime statute is simply a penalty enhancer for other designated crimes, which were not committed.<sup>152</sup> Louisiana criminalizes cross-burnings, but stringing the noose was not a cross-burning.<sup>153</sup> What, then, does Alfieri have in mind? Walters could not indict the noose hangers under a nonexistent statute. Perhaps he could have prosecuted under the assault statute—the Louisiana code defines assault as “the intentional placing of another in reasonable apprehension of receiving a battery.”<sup>154</sup> But that would be a tremendous departure from the normal legal meaning of assault, coming close to the kind of frivolous legal interpretation that I condemn in chapter 5,<sup>155</sup> not to mention the more serious violation of the principle of legality and its American instantiation in the Due Process Clause. More salient for Alfieri’s argument, a race-conscious and antisubordination approach to legal ethics should be very, very afraid of aggressive, stretch-the-statute criminal prosecution because it is a standing invitation to racist law enforcement. It would surely be used to imprison minorities far more often than to protect them. In theory, an antisubordination jurisprudence could favor a double standard: highly creative legal interpretation to prosecute racism against African-Americans in order to fully extend them the “protection of the laws” that the Fourteenth Amendment promises, coupled with strict construction of statutes under which minority defendants are typically charged. But this is an apolitical fantasy: precisely those communities in which segregation and subordination persist are the ones least likely to elect antisubordination-minded prosecutors.

Alfieri distinguishes my “dignity conception” of legal ethics from what he calls a “race-conscious outsider conception.”<sup>156</sup> But as he

<sup>151</sup> See *id.* at 1291–92.

<sup>152</sup> See LA. REV. STAT. ANN. § 14:107.2 (2004).

<sup>153</sup> See *id.* § 14:40.4. You might think that a state criminal code with subparts entitled “Offenses Affecting the Public Sensibility” and “Offenses Against the General Peace and Order,” see *id.* tit. 5, pts. VI.B–C, which contain prohibitions of hog and dog fighting, bear wrestling, and the ritual “ingestion of human or animal blood or human or animal waste,” might also criminalize the stringing of nooses in schoolyards, *id.* §§ 14:102.19, 14:102.10, 14:107.1(A)(2)(b). It is not there yet.

<sup>154</sup> *Id.* § 14:36.

<sup>155</sup> See LUBAN, *Torture Lawyers*, *supra* note 136, at 163.

<sup>156</sup> Alfieri, *supra* note 11, at 1288, 1302.

elaborates the latter, I don't see sharp contrasts between Alfieri's critical perspective and my own. Alfieri diagnoses Walters's prosecutorial choices as acts of naming that degrade black identity and disempower Jena's black community.<sup>157</sup> In the terminology of my book, these choices violate human dignity because they are unjustified humiliations;<sup>158</sup> what makes them humiliations is the message they express that blackness means "natural inferiority, innate immorality, and pathological violence."<sup>159</sup> Of course, it's possible to disagree with Alfieri's interpretation of Walters's choices. And perhaps Alfieri overreads the social meaning of Walters's decisions. But if Alfieri is right, it seems to me that race-based humiliation is exactly the right diagnosis of why "identity-degrading relations"<sup>160</sup> are morally wrong, in which case his view and mine are entirely consonant. Alfieri's wise and creative proposals for "restorative policies of redemption and reparation"<sup>161</sup> are equally harmonious with the Fullerian vision of lawyers as architects of social structure who seek "'reasoned harmony'" in human relations.<sup>162</sup> The welcome novelty is that Fuller had transactional lawyers in mind,<sup>163</sup> while Alfieri extends the notion to prosecutors.

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157 See *id.* at 1303–05.

158 See LUBAN, *Upholders of Human Dignity*, *supra* note 26, at 88–90.

159 Alfieri, *supra* note 11, at 1303.

160 *Id.*

161 *Id.* at 1305.

162 See LUBAN, *Natural Law*, *supra* note 31, at 103 (quoting LON L. FULLER, *LAW IN QUEST OF ITSELF* 3–4 (Northwestern Univ. Press 1940)); LUBAN, *Natural Law*, *supra* note 31, at 104 (describing Fuller's concept of lawyers as architects of social structure).

163 See LUBAN, *Natural Law*, *supra* note 31, at 104.

