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Jim Crow Ethics and the Defense of the Jena Six

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"Remember/The days of bondage"[1]

ABSTRACT: This Article is the second in a three-part series on the 2006 prosecution and defense of the Jena Six in LaSalle Parish, Louisiana. The series, in turn, is part of a larger, ongoing project investigating the role of race, lawyers, and ethics in the American criminal-justice system. The purpose of the project is to understand the race-based, identity-making norms and practices of prosecutors and defenders in order to craft alternative civil-rights and criminal-justice strategies in cases of racially-motivated violence. To that end, this Article revisits the prosecution and defense of the Jena Six in the hope of uncovering the professional norms of practice under de jure and de facto conditions of racial segregation, a set of norms I call Jim Crow legal ethics. Jim Crow ethical norms condone and oftentimes encourage coded claims of race-based identity in describing individual black offenders as culturally and socially inferior, and, thus, in publicly shaping the collective histories of black-offender communities.

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1. Langston Hughes, *Remember*, 193 POETRY 331 (2009) [hereinafter Hughes, *Remember*]. Recently, a librarian at the Beinecke Rare Book and Manuscript Library at Yale University discovered three of Langston Hughes's poems—*Remember*, *You and Your Whole Race*, and *I Look at the World*—written in pencil on the endpapers of Hughes's edition of *An Anthology of Revolutionary Poetry* (1929). *See generally* Arnold Rampersad, *Introduction*, 193 POETRY 327 (2009) (discussing Hughes's three poems, which are presented in the journal on the pages following the introduction).

Instead of rehearsing the Jim Crow norms and narratives typically constructing the identity and history of black offenders, such as "rotten social background" and "black rage," this Article addresses a more provocative claim: that of the "natural" criminal pathology of black male offenders, what I call the antebellum defense. Proffered as an excuse or as a mitigating circumstance, the antebellum defense offers coded racial narratives to diminish the mental capacity and moral character of black offenders and their communities. Under the standard conception of criminal-defense ethics, the antebellum defense permits defenders to excuse black male lawbreaking for reasons of "innate" criminal character, rather than environmental deprivation, cultural deviance, or socioeconomic oppression. Heard at trial and on appeal, the defense finds justification in the instrumental reasoning of conventional lawyer-adversarial discretion.

The defender discretion to assert the antebellum defense in the Jena Six case and elsewhere raises troubling questions of lawyer morality in the criminal-justice system. To evaluate the morality of the antebellum defense for the Jena Six, this Article turns to David Luban's recent writings on legal ethics and human dignity, juxtaposing the standard adversarial conception of criminal-defense ethics against his dignitary conception of ethics, here enlarged by identity-affirming, dignity-restoring, and community-empowering norms of advocacy. Guided by these and other integrity norms, Luban's alternative dignitary conception provides moral direction to civil-rights and criminal-justice advocates in cases of racially motivated violence.

I. INTRODUCTION

"The hungry wretched thing you are today."[2]

This Article revisits the legal–political controversy surrounding the 2006 prosecution of the Jena Six in LaSalle Parish, Louisiana. In a prior work, I investigated the racial norms animating the Jena Six prosecution, a set of norms I called Jim Crow legal ethics.[3] By Jim Crow legal ethics, I mean the professional norms of practice under de jure and de facto conditions of racial segregation.[4] The interwoven product of law, culture, and society, the norms condone and oftentimes encourage coded claims of race-based identity. Race-coded claims advert to both mutable and immutable characteristics in describing individuals, groups, and communities. Mutable traits pertain to the changeable elements of an individual's legal personality, for example, education, geography, or socioeconomic status. Immutable qualities refer to the more constant properties of an individual's legal personality, for example, accent, skin color, or disability. For lawyers working within the criminal-justice system in a time of de jure or facto segregation, race-coded claims shape the image[5] and story[6] of offenders, victims, and affected communities.

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2. Hughes, *Remember*, *supra* note 1, at 331.

3. *See* Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285, 1285 (2008); *see also* Kathryn M. Caretti & N. Pieter M. O'Leary, *The Story of the Jena Six: The Interplay of History, Hate Crimes, Racial Inequality, and Legal Justice in Jena, Louisiana*, 1 HUM. RTS. & GLOBALIZATION L. REV. 3, 5–20 (2007–2008) (reviewing the history of hate crimes and the circumstances of the Jena Six); Ellen S. Podgor, *Race-ing Prosecutors' Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. (forthcoming 2009) (examining prosecutorial discretion in light of the Jena Six incident). For recent studies of Jim Crow traditions, see generally James W. Fox Jr., *Doctrinal Myths and the Management of Cognitive Dissonance: Race, Law, and the Supreme Court's Doctrinal Support of Jim Crow*, 34 STETSON L. REV. 293 (2005); Kevin R. Johnson, *The Legacy of Jim Crow: The Enduring Taboo of Black–White Romance*, 84 TEX. L. REV. 739 (2006) (book review).

4. Alfieri, *supra* note 3, at 1285. For useful work on the professional norms of practice in advocacy and adjudication during periods of de jure and de facto racial segregation, see ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950 (1987); Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97 (2002); *see also* Judith Kilpatrick, *Race Expectations: Arkansas African-American Attorneys (1865–1950)*, 9 AM. U. J. GENDER SOC. POL'Y & L. 63, 63–64, 75–78 (2001) (examining evolution of strategies used by African-American lawyers in local context).

5. *See generally* Bernard E. Harcourt, *Imagery and Adjudication in the Criminal Law: The Relationship Between Images of Criminal Defendants and Ideologies of Criminal Law in Southern Antebellum and Modern Appellate Decisions*, 61 BROOK. L. REV. 1165 (1995) (linking juridical imagery to criminal-law ideology); Reginald Leamon Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority*, 37 WM. & MARY L. REV. 69 (1995) (examining the interweaving of narratives of black inferiority and white superiority in the fair-housing context).

6. *See* Mario L. Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 946 (2006) (explicating narratives to "chart[] the space

In previous work investigating the role of race, lawyers, and ethics in the American criminal-justice system, I examined the identity-making practices of prosecutors[7] and defenders[8] in cases of racially motivated violence. This Article extends that project by exploring race-based, identity-making practices in the law, lawyering, and ethics of noose cases. By noose cases, I mean civil and criminal cases arising out of noose-related conduct motivated by bias or prejudice and intended to harass, intimidate, or terrorize particular individuals, groups, or communities.[9] The goal of this exploration is to craft alternative civil-rights and criminal-justice approaches to noose-related incidents of racial violence.

Traditionally, prosecutors, defenders, and civil-rights lawyers have overlooked "outsider" theories of difference-based identity in representing offenders, victims, and offender or victim communities. Outsider theories provide cultural, political, and socioeconomic accounts of the inequitable, difference-based treatment of minority communities in American law.[10] Identity, embedded in the cultural, legal, and social norms and narratives of difference, resonates throughout the diverse minority communities served by prosecutors, defenders, and civil-rights groups. The prosecution and defense of noose cases illuminate the professional norms, practice traditions, and ethics rules governing the fields of civil rights and criminal justice and, more specifically, accentuate the particularized role of lawyers in

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between law as it is imagined and law as it is experienced"); Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743 (1995) (examining the role of cultural images on television and their impact on criminal trials); Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 HOW. L.J. 1 (1996) (discussing the importance of narratives, and the social depiction of individuals and groups, in maintaining traditional legal methodologies).

7. Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465 (2002); Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999); Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809 (2000); Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141 (2003) [hereinafter Alfieri, *Retrying Race*].

8. Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995); Anthony V. Alfieri, Gideon *in White*/Gideon *in Black: Race and Identity in Lawyering*, 114 YALE L.J. 1459 (2005); Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997); Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325 (1996).

9. *See, e.g.*, Caretti & O'Leary, *supra* note 3, at 36 (arguing for the criminalization of "hanging nooses in public with the intent to 'send a message'"); Allison Barger, Note, *Changing State Laws to Prohibit the Display of Hangman's Nooses: Tightening the Knot Around the First Amendment?*, 17 WM. & MARY BILL RTS. J. 263, 282–91 (2008) (discussing noose cases in private residences, employment settings, and on school grounds).

10. Anthony V. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805, 835–36 (2008) (exploring different theoretical frameworks illuminating identity).

constructing the meaning of racial violence and the noose in law, culture, and society.[11]

Like the initial prosecution mounted against the Jena Six by LaSalle Parish District Attorney Reed Walters, the defense of the Jena Six implicates the sociolegal norms and narratives of racial identity. Rooted in the conscious[12] and unconscious[13] racism of Jim Crow practices, the norms and narratives construct the identity[14] and history[15] of black offenders and black communities.[16] Frequently, contemporary defense narratives in race cases will construct black-offender identity through the familiar tropes of "rotten social background,"[17] "black rage,"[18] and "white fear,"[19] or related

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11. Since the 2006 hanging of schoolyard nooses by white teenagers in Jena, Louisiana and the subsequent arrest of six black teenagers for the beating of a white student at Jena High School, civil-rights groups and law-enforcement officials have documented more than seventy-eight instances of noose-related displays. DiversityInc, Noose Watch, http://www.diversityinc.com/public/2588.cfm (last visited July 3, 2009); *see also* Miguel Bustillo, *Nooses Stir a Year of Racial Unrest*, L.A. TIMES, Sept. 15. 2007, at A9 (describing the use of nooses to harass the Jena Six); Phillip Dray, *Noose—The True History of a Resurgent Symbol of Hate*, BOSTON GLOBE, Dec. 2, 2007, at E1 (reporting on the use of nooses in racial-harassment incidents since the Jena Six case gained widespread notoriety); Erin Haines, *Rash of Noose Incidents Reported Across the Country in Wake of Jena Six Case*, PRESS REG. (Mobile, Ala.), Oct. 11, 2007, at B2 (same).

12. *See* Thomas Ross, *Instrumental Racism: A Convenient Untruth*, 50 HOW. L.J. 685, 698 (2007) (discussing how racism "infects" some individuals at the conscious level).

13. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) ("[A] large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation."); Eva Paterson et al., *The Id, the Ego, and Equal Protection in the 21st Century: Building upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1181 (2008) (stating that unconscious racism is "becoming increasingly mainstream").

14. *See* I. Bennett Capers, *The Trial of Bigger Thomas: Race, Gender, and Trespass*, 31 N.Y.U. REV. L. & SOC. CHANGE 1, 15–25 (2006) (reviewing "three 'real life' cases [that] informed [Richard] Wright as he was drafting [his book] *Native Son*"). *See generally* N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315 (2004) (appraising cases that serve as the foundation for the "myth of the Bestial Black Man"); Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verité and the Pedagogy of Vincent Chin*, 1 MICH. J. RACE & L. 347 (1996) (discussing the film WHO KILLED VINCENT CHIN? (PBS 1989) and its pedagogical value).

15. *See generally* James H. Coleman, Jr., *The Role of the Legal Profession and the Judiciary in Creating and Defining Black History*, 53 RUTGERS L. REV. 573 (2001) (chronicling the animating force of advocacy and adjudication in black history).

16. *See generally* HERBERT SHAPIRO, WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY xii (1988) ("Violence . . . has constituted an ever-present reality in practically every black community . . . ."); Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1770 (1992) (discussing the debate produced by black criminal behavior and its impact on the "ideal of 'the black community'").

17. *See* Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9, 12–22 (1985) (assessing "rotten social background" as a criminal defense); *see also* Stephen J. Morse, *Deprivation and Desert*, *in* FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW 114, 114 (William C. Heffernan & John Kleinig eds., 2000) (arguing that "creating a

"cultural"[20] and "syndrome"[21] attributions. Rather than rehearse the shared form and substance of these implicit race-coded claims, this Article addresses a more explicit and provocative claim: that of the "natural" criminal pathology of black male offenders. Forged in a time of de jure and

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'deprivation excuse' will not contribute to social justice for the worst off members of our society"); SAUNDRA DAVIS WESTERVELT, SHIFTING THE BLAME: HOW VICTIMIZATION BECAME A CRIMINAL DEFENSE 51–58 (1999) (discussing the development of the "rotten social background" defense). *See generally* David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 401–05 (1976) (discussing the social and economic causes of crime); Richard Delgado, Commentary, *Making Pets: Social Workers, "Problem Groups," and the Role of the SPCA—Getting a Little More Precise About Racialized Narratives*, 77 TEX. L. REV. 1571 (1999) (examining the role of racialized narratives in determining civil and criminal outcomes).

18. *See generally* PAUL HARRIS, BLACK RAGE CONFRONTS THE LAW (1997) (tracing the development of the black-rage defense); Patricia J. Falk, *Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731 (1996) (classifying the black-rage defense as a variant of established criminal-law doctrine); Kimberly M. Copp, Note, *Black Rage: The Illegitimacy of a Criminal Defense*, 29 J. MARSHALL L. REV. 205 (1995) (discussing the legitimacy of the black-rage defense and the jurisprudential ramifications of its acceptance); Deborah L. Goldklang, Note, *Post-Traumatic Stress Disorder and Black Rage: Clinical Validity, Criminal Responsibility*, 5 VA. J. SOC. POL'Y & L. 213 (1997) (asserting the validity of the black-rage defense); Judd F. Sneirson, Comment, *Black Rage and the Criminal Law: A Principled Approach to a Polarized Debate*, 143 U. PA. L. REV. 2251 (1995) (arguing that the use of the black-rage defense produces a troubling result).

19. *See generally* JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA (1997) (discussing racial fears and criminal defenses); Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994) (analyzing the social construction of white fears); Camille A. Nelson, *Consistently Revealing the Inconsistencies: The Construction of Fear in the Criminal Law*, 48 ST. LOUIS U. L.J. 1261 (2004) (positing the relationship between fear and criminal-law doctrine).

20. *See generally* CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 96–124 (2003) (evaluating the cultural defense); Alison Dundes Renteln, *Raising Cultural Defenses*, *in* CULTURAL ISSUES IN CRIMINAL DEFENSE 423, 423–66 (Linda Friedman Ramirez ed., 2d ed. 2007) (discussing the cultural defense in trial practice); Rashmi Goel, *Can I Call Kimura Crazy? Ethical Tensions in the Cultural Defense*, 3 SEATTLE J. SOC. JUST. 443 (2004) (considering whether widely held cultural beliefs may be considered insane); Nancy S. Kim, *Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants*, 17 U. FLA. J.L. & PUB. POL'Y 199 (2006) (suggesting that when crime definitions "fail to capture the moral blameworthniess" of cultural-defense defendants, courts reach unfair decisions); Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 915–21 (2007) (describing the use of the term *cultural defense*); Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437, 490–91 (1993) (offering "arguments in favor of the establishment of an official 'cultural defense'").

21. *See generally* Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461 (1996) (placing "syndrome evidence into context as a type of proof designed, *inter alia*, to educate jurors about typical human behavior in response to specified conditions"); Victoria Nourse, *The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law*, 50 STAN. L. REV. 1435 (1998) (reviewing JAMES Q. WILSON, MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM (1997)) (critiquing Wilson's account of the "abuse excuse"); Demetra L. Liggins, Note, *Urban Survival Syndrome: Novel Concept or Recognized Defense?*, 23 AM. J. TRIAL ADVOC. 215 (1999) (discussing the use of Urban Survival Syndrome as a criminal defense).

de facto racial segregation, this claim informs what I will call the antebellum defense.

Akin to other race-based defenses, the antebellum defense offers coded narratives to diminish the mental capacity and moral character of black offenders and their communities. At trial, the defense serves as an excuse. At sentencing, it supplies evidence of mitigation or grounds for mercy. In the Jena Six case and other black-on-white cases of racial violence, it permits criminal-defense lawyers to excuse black male lawbreaking for reasons of "innate" criminal character instead of environmental deprivation, cultural deviance, or historical oppression. The question in this case and cases elsewhere is not whether the defense is ethically permissible or strategically instrumental, but whether it is morally acceptable.

Here, in fact, the antebellum defense is omitted in favor of colorblind and race-coded defenses asserted at successive trial and post-conviction proceedings. The absence of the defense, however, is a function of strategic considerations relevant to the past and future actions of an unsympathetic white prosecutor, an intolerant white judge, and an all-white jury, and the higher consequent risk of retributive punishment, rather than a scarcity of "facts" pertaining to potential claims of offender criminal pathology. Whether authentic or pretextual, bad-character or criminal-pathology claims are almost always available in defending young black male lawbreakers. In the adversary system of criminal-justice advocacy, the presence or absence of such claims turns on strategic calculation, not ethical constraint.

To evaluate the moral import of the antebellum defense for the Jena Six specifically and for young black male lawbreakers more generally, this Article turns to David Luban's recent writings on legal ethics and human dignity.[22] Luban links lawyers to the preservation of client dignity in the advocacy relationships molded by law, legal agents, and sociolegal institutions.[23] Winnowing out the professional norms of advocacy, he provides a naturalized account of legal ethics and lawyers' roles where human dignity operates "as a relationship among people in which they are not humiliated."[24] Under this common-sense account, human dignity exists

22. DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY (2007) [hereinafter LUBAN, LEGAL ETHICS AND HUMAN DIGNITY]; *see also* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988) [hereinafter LUBAN, LAWYERS AND JUSTICE] (examining the role of morality in the profession of law). For helpful commentary on Luban's writings, see generally Colloquium, *Discussing David Luban's Legal Ethics and Human Dignity*, 93 CORNELL L. REV. 1285 (2008).

23. *See* DAVID LUBAN, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, *in* LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 22, at 65, 65–95 [hereinafter LUBAN, *Upholders of Human Dignity*] (arguing "that what makes the practice of law worthwhile is human dignity . . . [and] that adversarial excesses are wrong precisely when they assault human dignity instead of upholding it"); *see also* Katherine R. Kruse, *The Human Dignity of Clients*, 93 CORNELL L. REV. 1343 (2008) (discussing Luban's idea that the law and the people it governs intersect at the lawyer–client relationship).

24. LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 22, at 6.

in "relations among people, rather than as a metaphysical property of individuals."[25] For Luban, legal institutions and their agents "violate human dignity when they humiliate people."[26] Accordingly, "non-humiliation" functions as a "proxy for honoring human dignity" in law and legal advocacy.[27]

Engrafted on the defense of the Jena Six, Luban's dignitary conception departs meaningfully from the standard adversarial conception of criminal-justice ethics. As I have argued elsewhere, the standard conception affords a "colorblind account of legal ethics and lawyers' roles,"[28] but permits race-coded "norms of adversarial competition" to "shape the roles and relationships" among prosecutors and defenders, offenders and victims, and courts and communities.[29] An outsider conception, I have argued by way of comparison, furnishes "a difference-based, anti-subordination account of legal ethics and lawyers' roles" that reshape existing prosecutor and defender relationships.[30] That race-conscious account, I have maintained, draws on the rebellious "identity norms of the civil rights movement and critical theories of race to resist the marginalization of people"—offenders and victims—"in legal relationships" within the criminal-justice system.[31] Both overtly and covertly inflicted, marginalization damages human dignity by casting an offender or victim as inferior and by reducing an offender or victim to the status of an object.[32]

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25. *Id.*

26. *Id.*

27. *Id.*

28. Alfieri, *supra* note 3, at 1287; *see also* Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455, 1456 (2002) (remarking on the deeply contested nature of the "colorblindness principle" in constitutional law); Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 988 (2007) ("[O]ne can trace a general shift over the twentieth century from colorblindness as a progressive demand to a reactionary one.").

29. Alfieri, *supra* note 3, at 1287; *see also* Abbe Smith, Commentary, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1597 (1999) (discounting "the social harm caused by criminal defense lawyers and their advocacy strategies"). *See generally* Albert W. Alschuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 MCGEORGE L. REV. 291 (1998) (discussing the ethical quandaries posed by the O.J. Simpson criminal trial); Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1 (1994) (discussing the ethical issues faced by law students in criminal-defense clinics).

30. Alfieri, *supra* note 3, at 1287. For an exposition of antisubordination norms in race cases, see generally Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004).

31. Alfieri, *supra* note 3, at 1287.

32. *See* Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2128 (1991) ("Hierarchy institutionalizes the transformation of the private subject seeking help into the public object: 'client.'"); Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1560 (1989) ("The claim of pervasive unconscious racism is easily devalued. . . . Nonetheless, the claim is well founded.").

Critical race theory seeks "to locate and overturn subordinating racial identities and racialized narratives in law, culture, and society."[33] The movement and its progeny "give rise to a transformative account of legal ethics and lawyers' roles that emphasize the normative values of difference-based client identity and community-incited legal–political resistance to racial inequality."[34] Borrowing from Luban's alternative conception of legal ethics, the account gains strength from the integration of racial identity and human-dignity norms, and, equally important, from the corresponding merger of non-humiliation and antisubordination narratives.

Despite this combined strength, the Luban-inspired, identity-based account put forward here struggles in the criminal context of the Jena Six. Like other race cases wrought from a noose, the Jena Six present the "special case" of criminal-defense practice where, according to Luban, zealous advocacy serves the "atypical" political ends and social goals of curtailing the state's power to prosecute and to punish its most vulnerable citizens,[35] including young black males. In this special case, as with the Jena Six, Luban elevates the political goal of protecting individual liberty against state encroachment to the same rank as the social goal of attaining legal justice.[36] Luban notes that zealous advocacy is crucial to this elevated standing because it provides an "exceptional means" of achieving the central goal of individual protection.[37] In appropriate circumstances, as here, the antebellum defense supplies the race-coded means to that end.

Neither the political goal of safeguarding liberty, nor the social goal of legal justice, however, exhausts the normative aims of criminal offenders, defenders, or the criminal-justice system. For some offenders, the affirmation of racial dignity, the expression of racial identity, and the empowerment of racial community may be of equal or greater import than the political aims of defenders or the sociolegal goals of the criminal-justice system. Thus, for some offenders, their families, and their communities, the antebellum defense may prove to be an unacceptable means to a legitimate end. Here and elsewhere, the legitimacy of safeguarding individual liberty, particularly the liberty of marginalized and hyper-marginalized young black

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33. Alfieri, *supra* note 3, at 1288; *see also* Anthony V. Alfieri, *Color/Identity/Justice: Chicano Trials*, 53 DUKE L.J. 1569, 1599–1600 (2004) (reviewing IAN F. HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE (2003)) (discussing LitCrit Theory); Anthony V. Alfieri, *Teaching the Law of Race*, 89 CAL. L. REV. 1605, 1607–09, 1624 (2001) (reviewing JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (2000)) (discussing the genealogy of race and racism).

34. Alfieri, *supra* note 3, at 1288; *see also* Alfieri, *supra* note 10, at 835–36, 844 ("By situating identity in law, culture, and society, critical theory supplies a range of insights and interventions to law students striving to meet individual, group, and community needs.").

35. DAVID LUBAN, *The Adversary System Excuse*, *in* LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 22, at 19, 30 [hereinafter LUBAN, *Adversary System Excuse*].

36. LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 22, at 6.

37. *Id.*

male offenders, suffers little or no doubt.[38] Likewise, the instrumental rationality of appealing to the racial passions or prejudices of judges, jurors, and prosecutors in strategically advantageous circumstances invites little or no dissent from defenders.[39] Objection, when it comes, stems from the humiliation of individual offenders, the silencing of their identity-infused voices and stories, and the political and socioeconomic disempowerment of their communities.

The standard adversarial conception of criminal-justice ethics gives defenders the discretion to commit these normative and political transgressions without moral accountability or consequence. More narrowly tailored to the "special case" of criminal-defense practice presented by the Jena Six, Luban's dignitary conception of ethics permits the same "jurispathic" result, a result destructive of the values of difference-based dignity, identity, and community.[40] Indeed, Luban's conception ratifies the general moral propriety of this result. The integrity of criminal-defense advocacy under Luban's dignitary conception of ethics, especially the availability of the antebellum defense, ultimately depends on the resolution of the competing normative and political aims underlying the "special case" of race and the noose.

This Article is divided into four parts. Part II describes the history, prosecution, and defense of the Jena Six. Part III considers the antebellum defense of the Jena Six under the standard conception of criminal-defense ethics. Part IV analyzes the antebellum defense under a dignitary conception of criminal-defense ethics tied to identity-affirming, dignity-restoring, and community-empowering advocacy relationships. Part V examines the tensions between the antebellum defense and the dignitary conception of criminal-defense ethics, particularly the countervailing tendencies toward contrived ignorance and integrity.

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38. *Id.*

39. On strategies of jury nullification, see Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700–12 (1995) (defending jury nullification, Butler argues that "it is both lawful and morally right that black jurors consider race in reaching verdicts in criminal cases"); Long X. Do, Comment, *Jury Nullification and Race-Conscious Reasonable Doubt: Overlapping Reifications of Commonsense Justice and the Potential Voir Dire Mistake*, 47 UCLA L. REV. 1843, 1847–53 (2000) (weighing Professor Butler's proposal that "black jurors disregard the law and acquit black defendants").

40. The term "jurispathic" comes from Professor Robert Cover. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 40–44 (1983); *see also* Anthony V. Alfieri, *The Ethics of Violence: Necessity, Excess, and Opposition*, 94 COLUM. L. REV. 1721, 1728 n.33 (1994) (book review) ("'[Cover] coined the term *jurispathic* to refer to the power and practice of a government that rules by displacing, suppressing, or exterminating values that run counter to its own.'") (quoting Martha Minow, *Introduction: Robert Cover and Law, Judging, and Violence*, *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 1, 1–2 (Martha Minow et al. eds., 1992)).

II. THE JENA SIX

The antebellum racial history of the town of Jena in central Louisiana's LaSalle Parish forms the backdrop for the prosecution and defense of the Jena Six.[41] Jena is the largest town in LaSalle Parish.[42] The parish population comprises 14,000 people, twelve percent of whom are black.[43] The smaller town population includes 750 families with approximately 3000 total residents, of whom fifteen percent are black.[44] The town is "rigidly" divided along a nineteenth-century color line—its homes, churches, and cemeteries all stand "segregated."[45] The black population holds "little political power."[46] Only one black resident, for example, serves on the ten-person parish government, only one serves on the nine-member school board, and only one serves in the Jena Police Department.[47] Only two black teachers work in the Jena public schools.[48] The Census Bureau reported that less than ten percent of the businesses in LaSalle Parish are black-owned.[49]

The racial contours of Jena's population, political economy, and public-school system reflect century-long antebellum tensions.[50] Those tensions resurfaced in September 2006 when students and teachers at Jena High School found three nooses in black and gold school colors hanging from the "white tree" in the center of the campus square.[51] In the ensuing weeks,

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41. This Section enlarges my earlier factual account of the incident. Alfieri, *supra* note 3, at 1288–91. For useful findings on the history of race relations and white supremacy in Louisiana, see *United States v. Lousiana*, 225 F. Supp. 353, 362–81 (E.D. La. 1963) (declaring the Louisiana State voter-registration "interpretation test" requirement unconstitutional).

42. Bill Quigley, *Injustice in Jena as Nooses Hang from the "White Tree,"* TRUTHOUT, July 3, 2007, http://www.truthout.org/article/bill-quigley-injustice-jena-nooses-hang-from-white-tree.

43. *Id.*

44. U.S. CENSUS BUREAU, 2000 CENSUS OF POPULATION AND HOUSING: LOUISIANA 249 (2001), *available at* http://www.census.gov/prod/cen2000/dp1/2kh22.pdf.

45. Alfieri, *supra* note 3, at 1288; *see also* Andrew Stephen, *The Deep South, the White Tree, the Noose*, NEW STATESMAN (U.K.), Oct. 25, 2007, at 26, *available at* http://www.newstatesman.com/print/200710250028 (describing the racial atmosphere of Jena).

46. Quigley, *supra* note 42.

47. *Id.*

48. *Id.*

49. *Id.*

50. For a helpful mapping of these tensions, see Tamara F. Lawson, *"Whites Only Tree," Hanging Nooses, No Crime?: Limited the Prosecutorial Veto for Hate Crimes in Louisiana and Across America*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS (forthcoming 2009); Reginald Leamon Robinson, *The Word and the Problem of Human Unconsciousness: An Analysis of Charles R. Lawrence's Meditation on Racism, Oppression, and Empowerment*, 40 CONN. L. REV. CONNTEMPLATIONS 1, 15–17 (2008), http://www.conntemplations.org/pdf/robinson.pdf.

51. State v. Bailey, 969 So. 2d 610, 610 (La. 2007); *see also Chronological Order of Events Concerning the "Jena Six,"* JENA TIMES (La.), 2007 (on file with the Iowa Law Review) [hereinafter *Chronological Order*] (discussing the "white tree"); Raquel Christie, *Double Whammy*, AM. JOURNALISM REV., Feb.–Mar., 2008, at 16, *available at* http://www.ajr.org/Article.asp?id=4454 (same); Posting of Maria Newman to NYTimes.com: The Lede Blog, http://thelede.blogs.nytimes.com/2007/09/20/race-and-the-spotlight-in-small-town-louisiana/?scp=1&sq=%22You%

student interracial fighting exploded on campus summoning patrols by the Jena Police Department and LaSalle Parish Sheriff Department officers,[52] and threats of criminal prosecution by District Attorney Walters.[53] Neither a school-wide "lock-down" nor an on-campus search for weapons[54] prevented the burning of a central academic building in November.[55] The Parish Sheriff subsequently charged eight people, black and white, with arson.[56]

Soon after, on December 1, interracial fighting spread off campus.[57] The next day, one or more white males beat up a black student, Robert Bailey, at an off-campus party,[58] and a white male also pulled a shotgun on Bailey and other black students at the Gotta-Go convenience store.[59] Two days later, on December 4, seven black students assaulted a white student, Justin Barker, on campus.[60] Reports suggest that Barker had ridiculed one of the students "for having had his 'ass whipped' by a white man the previous

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20know%20you%20can%20sit%20anywhere%20you%20want.%22&st=cse (Sept. 20, 2007, 11:48 AM) (same).

The LaSalle Parish School Board dismissed the incident as a "prank" devised by three white students. *Bailey*, 969 So. 2d at 611; Alfieri, *supra* note 3, at 1289. Jena High School ordered a range of disciplinary sanctions including nine days of alternative school, two weeks of in-school suspension, Saturday detention, attendance in discipline court, post-suspension evaluation, and family-wide participation in a state intervention program. *Corrections*, ATLANTA J.–CONST., Oct. 12, 2007, at 2A (correcting Ken Sugiura, *Jena 6, Meet Spelman 5*, ATLANTA J.–CONST. Oct. 8, 2007, at 1B). The FBI conducted a criminal investigation but concluded that the incident did not warrant federal charges. Newman, *supra*. The U.S. Attorney's Office for the Western District of Louisiana reached the same conclusion. *U.S. Attorney: Nooses, Beating at Jena High Not Related*, CNN.COM, Sept. 19, 2007, http://www.cnn.com/2007/US/law/09/19/jena.six.link/index.html; *see also* Caretti & O'Leary, *supra* note 3, at 6 (U.S. Attorney Donald Washington "claimed the incident was not about race.").

52. Caretti & O'Leary, *supra* note 3, at 14–16.

53. *Id.* at 4, 7–9. Black students attending the assembly perceived Walters's threats of prosecution to be directed at them. *Id.* at 9; *see also Bailey*, 969 So. 2d at 611 (discussing the events before and after the assembly); Robinson, *supra* note 50, at 18 ("Warning black students against further unrest, Walters stated: 'I can make your lives disappear with a stroke of a pen.'" (citation omitted)).

54. *Chronological Order*, *supra* note 51; Chadd De Las Casas, *Exposing Myths About Jena, Louisiana*, ASSOCIATED CONTENT, October 31, 2007, http://www.associatedcontent.com/article/428279/exposing_myths_about_jena_louisiana.html; Gil Kaufman, *Jena Six: What Sparked Protesters to Descend on Small Town in Louisiana?*, MTV NEWS, Sept. 19, 2007, http://www.mtv.com/news/articles/1570075/20070919/id_0.jhtml.

55. Caretti & O'Leary, *supra* note 3, at 16.

56. Christie, *supra* note 51, at 16.

57. *Bailey*, 969 So. 2d at 611.

58. *Id.*; Caretti & O'Leary, *supra* note 3, at 15.

59. *Bailey*, 969 So. 2d at 611; Caretti & O'Leary, *supra* note 3, at 15; Quigley, *supra* note 42; Nicholas Persac, *Legal Team Wants to Overturn Jena Verdict*, DAILY REVEILLE (Baton Rouge, La.), Aug. 16, 2007, *available at* http://www.lsureveille.com/news/1.1176452-1.1176452.

60. *Bailey*, 969 So. 2d at 611. In 2008, Barker's parents filed a civil lawsuit seeking damages from the LaSalle Parish School Board, the Jena Six defendants and their parents, and a seventh student who was never charged. Christie, *supra* note 51, at 16; *Chronological Order*, *supra* note 51.

Friday night."[61] School officials later expelled Barker for transporting in his truck a hunting rifle loaded with thirteen bullets to the high-school campus.[62] Jena Police Department officers arrested Barker, releasing him on a $5000 bond.[63]

The cascade of on-campus and off-campus racial incidents at Jena High School, coupled with the subsequent arrest of the Jena Six, incited widespread political protest involving students, parents, church ministries, and civil-rights activists in LaSalle Parish.[64] Both black students[65] and black parents[66] joined with ministers and faith-based activists from Jena-area churches[67] to participate in prayer meetings[68] and community-wide unity services.[69] National black leaders also joined in local protests.[70] In March 2007, civil-rights activists mobilized to form the LaSalle Branch of the NAACP and the Jena Six Defense Committee.[71] Additionally, in March and July, scores of people attended "Free the Jena Six" rallies at the LaSalle

61. Alfieri, *supra* note 3, at 1289; Stephen, *supra* note 45.

62. Christie, *supra* note 51; *In La., a Missed Opportunity Ignites a Racial Uproar*, USA TODAY, Oct. 5, 2007, at 13A, *available at* 2007 WLNR 19562263; Quigley, *supra* note 42.

63. Christie, *supra* note 51; Quigley, *supra* note 42.

64. Alfieri, *supra* note 3, at 1290–91; Howard Witt, *'Jena 6' Conviction Vacated*, Chi. Trib., Sept. 15, 2007, at C1.

65. Some black students stated that they initiated protests in September 2006, gathering "in an act of solidarity" beneath the "hangman" tree on the Jena High School campus square. *Chronological Order*, *supra* note 51.

66. Black parents subsequently joined with their children in attending protest rallies at the L&A Missionary Baptist Church. *Id.*

67. Ministers and faith-based activists from Jena-area churches escalated protests in December 2006 by organizing a new ministerial alliance of racial and ethnic groups across multiple denominations. *Id.* at 15–16.

68. At Jena High School, more than two hundred people from all denominations and racial groups attended a prayer meeting. *Id.*

69. An estimated six hundred Jena residents assembled for a community-wide prayer and unity service sponsored by local ministries at the Guy Campbell Memorial Football Stadium. *Id.*

70. *See* Richard G. Jones, *Protest in Louisiana Case Echoes the Civil Rights Era*, N.Y. TIMES, Sept. 21, 2007, *available at* http://www.nytimes.com/2007/09/21/us/21jena.html?_r=1 ("'That's not prosecution, that's persecution,' the Rev. Jesse Jackson, the founder of the RainbowPUSH Coalition and an organizer of the demonstration, told a crowd in front of the LaSalle Parish Courthouse. 'We will not stop marching until justice runs down like waters.'"); Newman, *supra* note 51 ('Today's crowd, led by several local and national civil rights leaders, including the Rev. Al Sharpton, plans to march past Jena High School . . . .").

71. In March 2007, civil-rights activists mobilized more than one hundred people at Antioch Baptist Church near Jena to form the LaSalle Branch of the NAACP and the Jena Six Defense Committee. *Chronological Order*, *supra* note 51, at 17.

Parish Courthouse in Jena.[72] In September 2007, twenty thousand people attended a local rally in support of the Jena Six.[73]

A. THE PROSECUTION OF THE JENA SIX

On December 4, 2006, LaSalle Parish Sheriff Department detectives arrested six black students—Mychal Bell, Robert Bailey, Theodore Shaw, Carwin Jones, Bryant Purvis, and Jesse Ray Beard, a 14-year-old juvenile—on charges of aggravated second-degree battery for the assault on Barker.[74] LaSalle Parish District Judge J.P. Mauffray set bond at $70,000 to $138,000.[75] Without extrajudicial comment, District Attorney Walters amended the parish criminal indictment, mounting elevated charges of conspiracy to commit second-degree murder and attempted second-degree murder against the six students.[76] The enhanced charges cited Bell as an adult,[77] based on his prior criminal record of violent crimes.[78] Bell's prior record included four previous violent crimes, including two he committed while on probation for battery.[79]

At Bell's trial in June 2007, District Attorney Walters selected an all-white jury from an all-white parish jury pool.[80] In his opening statement, Walters referred to the Jena Six as a "'gang of black boys'" and argued that the tennis shoes worn by Bell during the attack should be considered a dangerous weapon in the battery.[81] Walters called seventeen witnesses—eleven white students, three white teachers, and two white nurses—to testify at the trial.[82] On June 28, after less than three hours of deliberation, the jury convicted Bell of aggravated second-degree battery and conspiracy to commit aggravated second-degree battery.[83]

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72. Additionally, in March and May of 2007, scores of people attended rallies to support the Jena Six at the LaSalle Parish Courthouse in Jena in collaboration with the American Civil Liberties Union, NAACP, and the National Action Network. Christie, *supra* note 51, at 19.

73. Protesters traveled to Jena from throughout the nation. Peter Whoriskey, *Thousands Protest Blacks' Treatment*, WASH. POST, Sept. 21, 2007, at A1.

74. State v. Bailey, 969 So. 2d 610, 611 (La. 2007); *Chronological Order*, *supra* note 51, at 14.

75. Op-Ed., *In La., a Missed Opportunity Ignites a Racial Uproar*, USA TODAY, Oct. 5, 2007, at 13A, *available at* 2007 WLNR 19562263.

76. *Bailey*, 969 So. 2d at 611; Op-Ed., *supra* note 75.

77. Jeff Kunerth, *Grass-Roots Civil-Rights Cause*, ORLANDO SENTINEL, Sept. 20, 2007, at A1.

78. Reed Walters, Op-Ed., *Justice in Jena*, N.Y. TIMES, Sept. 26, 2007, at A27, *available at* http://www.nytimes.com/2007/09/26/opinion/26walters.html?_r=1&scp=1&sq=Justice%20in%20Jena&st=cse.

79. Christie, *supra* note 51.

80. Jonathan Tilove, *Jena Case Grabs World's Attention: Schoolyard Fight Turns into Cause Celebre*, NEW ORLEANS TIMES-PICAYUNE, Sept. 15, 2007, at 1 ("Black residents were called for the jury pool, but none showed up.")

81. Quigley, *supra* note 42.

82. *Id.*

83. Richard G. Jones, *In Louisiana, a Tree, a Fight and a Question of Justice*, N.Y. TIMES, Sept. 19, 2007, at A14; Howard Witt, *Outcry over Jena 6 Case Rises in Congress: Top Official at the Justice*

On appeal in September 2007, the Louisiana Third Circuit Court of Appeals ordered the reversal of Bell's conviction, the vacatur of the conspiracy charge, and the referral of the case to juvenile court for a new trial.[84] Pursuant to these orders, after ten months in jail, Bell obtained his release on a $45,000 bond.[85] In December, Bell pleaded guilty to second-degree battery in juvenile court.[86] The plea included a sentence of eighteen months, to be reduced by time already served in state juvenile custody, in conjunction with a separate, partially concurrent eighteen-month sentence for three earlier crimes.[87] Later in December 2008, police in Monroe, Louisiana arrested Bell for shoplifting, battery, and resisting arrest.[88] Bell subsequently attempted suicide.[89]

B. THE DEFENSE OF THE JENA SIX

The defense of the Jena Six commenced with the trial of Mychal Bell. Represented by a court-appointed black public defender, Blane Williams, Bell publicly admitted assaulting Barker: "I hit him, you know, whatever."[90] He recalled: "I walked on, I went on about my business, whatever. . . . Ain't anything else about it."[91] He described Jena as "a real racist town," adding that "[i]t always has been like that . . . ."[92]

Department Says Further Action Is Being Weighed, HOUS. CHRON., Oct. 17, 2007, at A3. Subsequently, in July, the U.S. Attorney, Donald Washington, and the FBI announced that an investigation of the Jena school system, police department, sheriff's department, district attorney's office, and the 28th Judicial District Court system failed to produce evidence of civil-rights violations related to racial incidents in Jena during 2006—including the noose incident. *Id.*; *see also* Alfieri, *supra* note 3, at 1290. Walters "reiterated this conclusion, finding no evidence of a federal or state offense." *Id.* On bias-motivated hate crimes, see FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW (2002); Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320 (1994). Federal and state officials steadfastly denied any link between the campus nooses, the school arson fire, and the Barker assault. *Chronological Order*, *supra* note 51; *see also* Alfieri, *supra* note 3, at 1290.

84. State v. Bell, No. KW 07-01106, 2007 La. App. Unpub. LEXIS 59, at *1–2 (La. Ct. App. Sept. 14, 2007); Alfieri, *supra* note 3, at 1290.

85. Associated Press, *Bell Attends Court Hearing, Details Under Seal*, KATC.COM (Lafayette, La.), Oct. 8, 2007, *available at* http://www.katc.com/global/story.asp?s=7164450&ClientType=Printable; *Teenager Released in Louisiana Case*, N.Y. TIMES, Sept. 28, 2007, at A21.

86. Mary Foster, *Racial Strife Returns to Jena on MLK Day*, DESERET MORNING NEWS (Salt Lake City, Utah), Jan. 22, 2008, at A2.

87. Christie, *supra* note 51; Quigley, *supra* note 42.

88. *'Jena 6' Figure Tried to Commit Suicide, Police Say*, CNN.COM, Dec. 31, 2008, http://www.cnn.com/2008/CRIME/12/30/jena.shooting/index.html.

89. *Id.*

90. *Bell to CNN: Jena 'A Real Racist Town,'* TOWN TALK (Alexandria, La.), Aug. 25, 2008, at A1.

91. *Id.*

92. *Id.*

Like many public defenders, Williams urged Bell to accept a plea bargain on the eve of the trial, but Bell declined.[93] At trial, Williams raised no challenge to the all-white jury pool, put on no evidence, and called no witnesses.[94] Instead, in argument and examination, he attempted to sow reasonable doubt regarding evidence of the assault and the reliability of witness identification. He also excluded Bell's parents from the courtroom. After resting his case, Williams stated: "I don't believe race is an issue in this trial. I think I have a fair and impartial jury."[95] He added: "I feel I put on the best defense that I could."[96] On his rationale for calling no witnesses, Williams remarked: "[W]hy open the door for further accusations? I did the best I could for my client . . . ."[97]

At post-conviction proceedings in August 2007, Bell retained new counsel consisting of a pro bono team of Monroe defense lawyers—Louis Scott, Bob Noel, Peggy Sullivan, and Lee Perkins.[98] The defense team challenged Bell's trial as "unfair" and sought to overturn his conviction by vacating the sentence, transferring the case to juvenile court, and convening a new trial.[99] Strategically employing race-coded rhetoric, the team linked race to emotion and emotion to unfairness. Pointing to the "emotion" inflaming La Salle Parish, Bob Noel declared: "[Bell] did not get a fair trial."[100] Amplifying the rhetoric of racially inflammatory emotion, Noel commented: "The case should not be tried in La Salle parish. . . . It's obvious that there isn't anybody in the parish that doesn't have opinions of the case one way or the other. That certainly will effect [sic] anyone's ability to get a fair trial."[101] Likewise, adverting to racially disparate treatment and the jurisdictional and sentencing errors that ensued, Louis Scott observed: "The worst thing that happened from a procedural standpoint [is] normally a person under similar circumstances would be in juvenile court."[102] In addition, Scott said: "I feel it's pretty much impossible for the sentencing to

93. Howard Witt, *Louisiana Teen Guilty in School Beating Case*, CHI. TRIB., June 29, 2007, at C7.

94. On defendant's recusal motion, see *State v. Bailey*, 969 So. 2d 610 (La. 2007).

95. Bill Quigley, *Racial Discrimination and the Legal System: The Recent Lessons of Louisiana*, UN CHRON., Nov. 3, 2007, at 56, *available at* http://findarticles.com/p/articles/mi_m1309/is_3_44/ai_n24217354/.

96. Quigley, *supra* note 42.

97. *Id.*; *accord* Associated Press, *Black Teen Convicted in Beating of White Student*, MSNBC.COM, June 28, 2007, http://www.msnbc.com/id/19488285 (last visited March 30, 2009); Witt, *supra* note 93, at C7.

98. Sana Saleh, *Pivotal Hearing for Mychal Bell, Set Sept 4*, INDYMEDIA, Aug. 18, 2007, http://indymedia.us/en/2007/08/26993.shtml.

99. *Id.*

100. Persac, *supra* note 59.

101. *Id.*

102. *Id.*

be just. If a person is wrongfully convicted, it's impossible for them to have a fair sentencing."[103]

Despite their rhetorical and tactical differences, both Bell's court-appointed public defender and his post-conviction pro bono team deployed traditional race-based defense strategies. In pretrial and trial proceedings, the public defender carried out a colorblind, beyond-a-reasonable-doubt strategy of race neutrality, seeking an acquittal on evidentiary grounds. On appeal, the pro bono team marshaled a color-coded, harmful-error strategy, obliquely citing race-infected passions and disparate treatment in order to overturn the jury verdict, vacate the court's sentence, and obtain a new trial in juvenile court. To better understand the racial substance of these competing defense strategies and the overlooked relevance of the antebellum defense, consider the standard conception of criminal-defense ethics.

III. THE STANDARD CONCEPTION OF CRIMINAL-DEFENSE ETHICS

The standard conception of criminal-defense ethics permitted use of the antebellum defense by both the public defender and the pro bono team in the Jena Six case. Emblematic of the professional morality of lawyers, the standard conception distinguishes between the morality of the client's cause and the morality of the representation. Indeed, as Luban states, "the lawyer's morality is distinct from, and not implicated in, the client's."[104] For Luban, two principles rationalize this partitioned conception of the lawyer's morality and role: the principle of nonaccountability and the principle of professionalism. The principle of nonaccountability or neutrality posits that a lawyer, when advocating for a client, "is neither legally, professionally, nor morally accountable for the means used or the ends achieved."[105] At the same time, the principle of professionalism or partisanship holds that a lawyer, when advocating for a client, "must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail."[106]

To Luban, William Simon, and others, the principles of nonaccountability and professionalism give rise to a claim of neutral partisanship in legal ethics.[107] From a functional or regulatory stance, Luban

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103. *Id.*

104. LUBAN, *Adversary System Excuse*, *supra* note 35, at 20.

105. *Id.* (quoting Murray Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978)).

106. *Id.*

107. *See generally* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 2 (1998) ("[T]he dominant conception of the lawyer's professional responsibilities weakens the connection between the practical tasks of lawyering and the values of justice that lawyers believe provide the moral foundations of their role."); William H. Simon, *The Ideology of*

concedes, the principle of professionalism or partisanship may be true. Nonetheless, he insists, the principle of nonaccountability or neutrality is not. He adds, to the extent that a lawyer's nonaccountability depends on the adversary system, that reliance is misplaced. Exposing the fallacy of nonaccountability and the failed bulwark of the adversary system enables Luban to defend the morality of conscience against the claim that the professional obligation derived from the adversary system can override it.[108] Yet, for the Jena Six and other young black male lawbreakers, the morality of conscience fails to withstand the overriding adversary obligation to assert the antebellum defense when strategically compelled by the circumstances of the criminal-justice system. The next Section assembles Luban's critique of the adversary system and its professional obligations.

A. *THE ADVERSARY SYSTEM*

Luban's analysis of the adversary system incorporates both adversary principles and contexts. His starting point is Lord Henry Brougham's axiom of partisan advocacy. Brougham states: "An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."[109] Cabined by this vision, Brougham's prototypical advocate defines his duty—a duty generalizable to all clients and universal in application—narrowly. On behalf of this universal ideal, Brougham opines:

> To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.[110]

For Luban, moral theory rejects the narrow claim that an advocate knows only his client and, equally, the institutional claim that an advocate's adversary role relaxes ordinary moral obligations while imposing new overriding professional obligations. Luban's rejection of such claims stems from the weak institutional justifications for the adversary system—a weakness that dilutes the force of corresponding institutional excuses.[111] In the criminal-justice system, as in the case of the Jena Six, institutional justifications and excuses hinge on adversary principles.

Advocacy: Procedural Justice and Professional Ethics, 1978 WIS. L. REV. 29, 36–37 (discussing the principles of neutrality and partisanship).

108. LUBAN, *Adversary System Excuse*, *supra* note 35, at 19–21.

109. *Id.* at 22.

110. *Id.*

111. Luban asks: "Can a person appeal to a social institution in which he or she occupies a role in order to excuse conduct that would be morally culpable were anyone else to do it?" *Id.* at 23.

1. Adversary Principles

Adversary principles underlie the antebellum defense and its ideal of "zealous advocacy." Luban finds this ideal entrenched in the text of the American Bar Association ("ABA") Model Rules of Professional Conduct. He points, for example, to the express rule enjoining lawyers to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[112] This injunction directs a lawyer to "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."[113] Vindication, he notes, requires the zealous advocate "to press the client's interests to the limit of the legal"—that is, to the boundaries of both "lawful and ethical" conduct—regardless of others' interests.[114] That limit, he laments, fails to mitigate zealous advocacy.

The interpretive traditions governing law and ethics contribute to this boundary failure. Lawyers, Luban explains, measure the limits of "ethical" conduct against the yardstick of formal ethics rules, not against independent moral principles.[115] Moreover, lawyers gauge the limits of "lawful" conduct against the "double-edged" standard of legal rules that simultaneously bind and unshackle zealous advocacy.[116] This ever-shifting standard allows lawyers to push morally dubious claims to the law's limit and, sometimes more aggressively, to the law's "colorable" margin.[117] Consequently, for Luban, the "limits of the law inevitably lie beyond moral limits, and zealous advocacy always means zeal at the margin."[118] Legal advocacy's unbounded quality casts the lawyer in the adversarial role of a partisan and fashions a duty of one-sided zeal free of moral compunctions.[119] Partisan zeal defines the antebellum defense—its scope and quality—in the adversary context of the criminal-justice system.

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112. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2009).

113. *Id.*

114. LUBAN, *Adversary System Excuse*, *supra* note 35, at 24.

115. *Id.* at 24. The Model Rules declare that a lawyer's representation of the client "does not constitute an endorsement of the client's political, economic, social or moral views or activities." MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2009).

116. *See* LUBAN, *Adversary System Excuse*, *supra* note 35, at 25 (explaining that "double-edgedness is an essential feature of any law because any restraint imposed on human behavior in the name of just social policy may be used to restrain behavior when circumstances make this an unjust outcome").

117. *Id.* at 26 ("'Zeal' means zeal at the margin of the legal, and thus well past the margin of whatever moral and political insight constitutes the 'spirit' of the law in question."); *see* David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 469 (1990) (arguing that "the traditional model of legal ethics is premised on formalistic assumptions about the constraining power of legal rules").

118. LUBAN, *Adversary System Excuse*, *supra* note 35, at 26.

119. *Id.* at 23–28.

2. Adversary Contexts

Adversary contexts further bolster the antebellum defense. Luban considers both criminal and noncriminal adversary contexts. In the criminal and quasi-criminal[120] contexts of the Jena Six, for example, where state prosecutions and school disciplinary proceedings intersect, Luban invites us to treat zealous defense advocacy as a "special case" serving "atypical social goals."[121] Borrowing from political theory, he links the goal of zealous advocacy in criminal defense to curtailing the power of the state to prosecute and to punish its citizens. Instead of cultivating justice, this goal advances the "political ends" of "keeping the state honest" and "keeping the government's hands off people."[122] Echoing Monroe Freedman and others,[123] Luban acknowledges that the imperative of zealous advocacy survives in criminal-defense practice as an "exceptional means" of protecting individual liberty against state encroachment.[124] In that specific context, he emphasizes, "the protection of accused individuals against state overreaching is just as central a goal as attaining legal justice."[125] Protection, here furnished by the antebellum defense, aims to check prosecutorial overreaching and to curb state punitive power.[126] Against this political horizon, the justifications for the adversary system flow out of the criminal

120. Luban explains the inclusion of quasi-criminal contexts as the "progressive correction to classical liberalism." *Id.* at 31 n.36 (citing *id.* at 58–66).

121. *Id.* at 30.

122. *Id.*

123. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS (3d ed. 2004); Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 920 (2005) ("In order to allow zealous investigation and research, defense counsel is forbidden to carry a workload that interferes with this minimum standard of competence, . . . or one that might lead to the breach of other professional obligations." (citation omitted)); John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 321–27 (1980) ("I defend the guilty not simply to protect all of us but also to protect the guilty from the corrupting influences of the criminal justice system."); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 927–30 (2000) (discussing a defense attorney's challenge in a high-profile police-brutality case); Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83, 84–87 (2003) (exploring the differences between criminal and civil cases); Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 147–49 (1987) (considering whether it is necessary to present a false case in order to preserve individual autonomy against the state).

124. LUBAN, *Adversary System Excuse*, *supra* note 35, at 29. *Compare* David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1749–52 (1993) (exempting criminal defense from certain ethical standards), *with* William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1703 (1993) (criticizing a criminal-defense exception), William H. Simon, *Reply: Further Reflections on Libertarian Criminal Defense*, 91 MICH. L. REV. 1767, 1767 (1993) (same), *and* Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1378 (2008) (contending that lawyers who stray from standards of professional responsibility violate morality).

125. LUBAN, *Adversary System Excuse*, *supra* note 35, at 31.

126. *Id.* at 28–31.

and quasi-criminal (school discipline) contexts of the Jena Six, seemingly unchecked by the morality of conscience and the normative commitment to identity.

B. *JUSTIFICATIONS FOR THE ADVERSARY SYSTEM*

Notwithstanding Luban's moral reservations, the antebellum defense garners force from proffered justifications of the adversary system built on consequentialist, pragmatic, and nonconsequentialist grounds. Luban searches these varied adversary justifications in the criminal context to appraise their impact on legal justice. Consequentialist justifications assess the adversary system as a means to accomplish specific goals. Nonconsequentialist justifications look to the adversary system as intrinsically good. Pragmatic justifications evaluate the adversary system in accordance with a more elaborate version of the tradition argument based on the efficacy, expedience, and the continuity of social institutions. First, we turn to consequentialist justifications.

1. Consequentialist Justifications

Luban surveys consequentialist justifications championing the adversary system as the best means of promoting truth, defending individual legal rights, and safeguarding against the excesses of zealous advocacy. For Luban, the consequentialist claim of adversarial fact-finding and truth promotion rests on non-empirical premises[127] and the ambiguous results of laboratory-simulated social-psychology experiments designed to model adversary and inquisitorial systems. These epistemic shortcomings, he points out, are exacerbated by adversarial roles and ethics rules that permit or require behavior designed to obfuscate the truth and to thwart transparency.[128]

Similar shortcomings hamper the consequentialist claim that the adversary system offers the best way of defending individuals' legal rights. The "best defense" claim of adversary advocacy, according to Luban, reasons that a "no-holds-barred zealous advocate tries to get everything the law can give (if that is the client's wish) and thereby does a better job of defending the client's legal rights than a less committed lawyer would do."[129] On this

127. *See* Charles M. Sevilla, *Criminal Defense Lawyers and the Search for Truth*, 20 HARV. J.L. & PUB. POL'Y 519, 523–28 (1997) (describing six myths the public believes about the criminal-justice system).

128. LUBAN, *Adversary System Excuse*, *supra* note 35, at 31–40. Distinguishing disclosures of fact and law, Luban mentions that ethics rules require lawyers "to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." This rule, he observes, promotes transparency in the adjudication of questions of law. *Id.* at 36–37 (quoting MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2004)).

129. *Id.* at 42.

logic, the day-to-day clash of adversaries "most effectively" defends legal rights.[130] But, for Luban, no empirical proof explicates "why an adversary system is the best defender of legal rights."[131] Lacking evidence of functional superiority, Luban concedes only "that under the adversary system an *exemplary* lawyer is required to indulge in overkill to obtain as legal rights benefits that in fact may not be legal rights."[132] Rights expansion, or perhaps degradation, of this sort comes from the result-oriented, institutional-role morality of advocacy.

The risk of overzealous role behavior cited by Luban and others weakens the consequentialist claim that the ethical division of labor within the social institutions of the adversary system mitigates the excesses of advocacy. Luban explains that, in the public sphere, moral constraints apply differentially to the actions and offices of complex bureaucratic institutions, such as prosecutor and public-defender offices, giving rise to ethical divisions of labor and specialization. To an extent, ethical specialization operates within, and gains some legitimacy from, larger existing institutional structures governed by social roles tailored to "counteract" or check the excesses of role-behavior.[133] ABA ethics rules countenance these social roles and institutional structures in the context of law-firm regulation, specifically enumerating the responsibilities of supervisory and subordinate lawyers.[134] To Luban, however, socially engineered systems of institutional checks and balances designed to counter zealous advocacy fail because the adversary advocate deliberately works to evade the constraints of such systems. Within legal education and professional training, in fact, calculated evasion constitutes a core advocacy skill. Additionally, he remarks, the systems fail because they lack "self-correcting" or cost-efficient rectifying mechanisms.[135] Even when transaction costs allow rectification, the division of role-specific institutional authority and function encourages the continuous abdication of moral responsibility in the contest of adversary advocacy. Nonconsequentialist justifications fare no better.

2. Nonconsequentialist Justifications

Luban considers nonconsequentialist justifications of the adversary system based on claims of intrinsic good and tradition. The first of these justifications links the adversary system to the conventional lawyer–client relation, for example the instant defender–offender relationship between

130. *Id.*

131. *Id.* at 43.

132. LUBAN, *Adversary System Excuse*, *supra* note 35, at 43.

133. *Id.* at 44–45.

134. *See* MODEL RULES OF PROF'L CONDUCT R. 5.1 (2009) (creating separate responsibilities for supervisory lawyers and for subordinate lawyers); MODEL RULES OF PROF'L CONDUCT R. 5.2 (same).

135. LUBAN, *Adversary System Excuse*, *supra* note 35, at 44–47.

the public defender Blane Williams and his client Mychal Bell, endorsing that relation as "an intrinsic moral good."[136] The second connects adversary adjudication to tradition, presumably the dominant tradition, and the overall fabric of society defined by the majority culture.[137]

Framed by the lawyer–client relation, the intrinsic-good argument asserts the positive moral value of an advocate serving the "man-in-trouble" in the role of a "special-purpose friend."[138] To Luban, neither the moral worth of the lawyer–client relation nor the morally praiseworthy care of clients, in conjunction with or at the expense of other third persons, justifies the adversary system. Predicated on an ethic of care and a veil of just law, the friendship analogy, Luban shows, not only "undercuts" the principle of nonaccountability but also discounts the impact of the adversary system on the lawyer–client relationship and the responsibility of the lawyer as "the agent of morally-bad-but-legally-legitimate outcomes."[139] Diminishing the creative hand of the lawyer in advocacy, the adversary system, and the acts of lawyer agency in the conduct of representation, Luban concludes, lessens lawyer moral responsibility for adversary behavior.[140]

The social-fabric argument, in contrast, maintains that the adversary system serves as an integral part of contemporary culture ratified by popular consent and enshrined in tradition.[141] Although acknowledging the roots of social-fabric claims in democratic and social-contract theory, Luban disputes the quality and moral force of purported tacit consent to the adversary system. He points to the lack of any showing that the institutions of the adversary system either promote a "positive moral good" or embody the "general will" of society.[142] Similarly, in discarding an alternative claim of adversarial tradition as a moral obligation, he cites the lack of a stable adversary tradition in the common law and the deviation from partisan norms in ethics rules, for example in the requirements of meritorious claims, candor, and fairness.[143] To Luban, the adversary system is an ancillary institution marginal to, and unincorporated in, tradition.[144] Pragmatic justifications falter in the same way.

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136. *Id.* at 47.

137. *Id.*

138. *Id.* at 48.

139. *Id.* at 48, 50–51.

140. LUBAN, *Adversary System Excuse*, *supra* note 35, at 48, 50–51.

141. *Id.* at 51 ("According to the social fabric argument, the moral reason for staying with our institutions is precisely that they are *ours*.").

142. *Id.* at 51–55.

143. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2009); MODEL RULES OF PROF'L CONDUCT R. 3.3; MODEL RULES OF PROF'L CONDUCT R. 3.4.

144. LUBAN, *Adversary System Excuse*, *supra* note 35, at 51–55.

3. Pragmatic Justifications

As a more elaborate version of the tradition argument, pragmatic justifications of the adversary system rest on the efficacy, the expedience, and the continuity of social institutions. To Luban, efficacy suggests that the adversary system does "as good a job as any at finding truth and protecting legal rights" and the costs of replacing it outweigh the benefits.[145] For the purposes of dispute resolution, expedience warrants the necessity of an adjudicatory system of some kind. Continuity backs preservation of the status quo.

Luban disparages both the logical weakness and conservative conclusion of these pragmatic propositions, noting their failure to show that the adversary system as a social institution is "better" than its rivals or even "particularly good."[146] More importantly, he bemoans the effect of pragmatic argument on the moral obligations of lawyers as institutional functionaries, even as he seems to accept that public defenders may appropriately engage in race-coded strategies. Luban contends that a social institution that endures without evidence that it serves a "positive moral good"—and hence receives only a pragmatic justification—is incapable of providing institutional excuses for immoral acts.[147] This contention challenges what he calls the "transitivity" argument.[148]

Luban distills the "transitivity" argument and its pragmatic justification of the adversary system into three steps. The first step presumes that the social institution of the adversary system stands "justified."[149] The second step asserts that the institution of the adversary system "requires its functionary to do A."[150] The third step summarily concludes that "the functionary is justified in doing A."[151] Luban denies that this conclusion follows from such premises. For Luban, the predicate institutional obligation in the first step posits only a prima facie obligation. On this analysis, the weaker the presumed justification of the institution, the weaker the force of the institutional obligation in overriding other morally relevant factors. Thus, he contends, "the presumption that lawyers must fulfill their role-obligations may be overcome by sufficiently weighty values on the other side."[152] For the Jena Six, their families, and the historically interconnected black communities of LaSalle Parish, those "weighty values" are bound up in racial identity and dignity.

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145. *Id.* at 56.
146. *Id.* at 57.
147. *Id.*
148. *Id.*
149. LUBAN, *Adversary System Excuse*, *supra* note 35, at 57.
150. *Id.*
151. *Id.*
152. *Id.* at 61.

Absent the counterweight of overriding values and associated moral obligations, Luban cautions, the transitivity argument approves lawyers engaging in "ruthless, rights-violating activity" without "moral regret at their actions."[153] For young black male lawbreakers, their families, and local communities, the antebellum defense and its race-coded counterparts threaten ruthless, dignitary rights-violating activity by defenders in the form of racial humiliation inflicted at times with moral regret and at times without any. Regret, Luban notes, aids the development of moral character and good judgment in "dirty hands" situations where legal agents—here prosecutors and defenders—confront difficult institutional role obligations.[154] Insofar as the race-coded defense of the Jena Six and other young black male lawbreakers constitutes a "dirty hands" situation, Luban complains that the loss of moral regret renders lawyers "unable to draw adequate lines in *any* sort of situation that requires normative judgment," a moral impairment "inconsistent with what it takes to practice law at all."[155] That result—described by Luban as a kind of super "adversariality"—artificially exempts institutional agents, again like prosecutors and defenders, from ordinary moral requirements that conflict with their role-obligations.[156]

Luban condemns this inertial result and its celebration of conformity and tradition. Aimed at the ideology of the adversary system, his central criticism focuses on the institutional excuses professing to free lawyers from ordinary moral obligations in situations of conflicting professional obligations. Yet, his criticism spares adversarial ruthlessness in criminal-defense cases when, as here, the adversary system offers a compelling institutional excuse, thus implicitly exempting public-defender institutions and agents from ordinary moral obligations toward racial identity and dignity.[157] In such cases, Luban maintains, zealous advocacy is not immoral, even when it frustrates the adversary search for truth or violates individual legal rights.[158] This limited vindication of the adversary system and the mandated duties of partisan advocacy, Luban admits, presumptively favors institutional role-obligation under the principle of professionalism rather than the principle of nonaccountability, unless another "serious and

153. *Id.*

154. LUBAN, *Adversary System Excuse*, *supra* note 35, at 61.

155. *Id.*

156. *See id.* at 57–62 (discussing institutional excuses).

157. Luban remarks that in noncriminal contexts, where the institutional excuse based on liberal fear of the state is unavailable, the adversary system possesses only slight moral force, and thus can excuse only slight moral wrongs. On this analysis, the lawyer's role carries no moral privileges and immunities above the nonlawyer's role. *Id.* at 57–62; *see also id.* at 63 ("Anything else that is morally wrong for a nonlawyer to do on behalf of another person is morally wrong for a lawyer to do as well.").

158. *Id.* at 63 ("Sometimes frustrating the search for truth may be a morally worthy thing to do, and sometimes moral rights are ill served by legal rights.").

countervailing moral obligation" rebuts that professional obligation.[159] Put more forcefully, for Luban, when serious moral obligation conflicts with professional obligation, moral obligation compels lawyer civil disobedience via abrogation of professional rules.[160] For defenders of the Jena Six and other young black male lawbreakers, however, this powerful endorsement of rule civil disobedience fails to resolve the threshold question of whether the normative values of racial identity and dignity give rise to a serious and countervailing lawyer moral obligation of client non-humiliation sufficient to rebut the professional obligation and political goal of zealous advocacy in the criminal-justice system. For guidance in reconciling the pull of moral and professional obligations in criminal cases, we turn next to an alternative dignitary conception of criminal-defense ethics gleaned from Luban's work.

IV. A DIGNITARY CONCEPTION OF CRIMINAL-DEFENSE ETHICS

Luban formulates an alternative dignitary conception of criminal-defense ethics out of two working hypotheses. Both relate to the practice of law and the adversary system. The first asserts that upholding human dignity makes the practice of law "worthwhile."[161] The second rebukes adversarial excesses as wrong when they "assault" human dignity.[162] To Luban, the concept of human dignity derives from theological articles of faith that defy rational proof or metaphysical reconstruction. Hence, he argues, secular efforts to designate human dignity as a metaphysical property of individual autonomy are "wrongheaded."[163] Instead, Luban defines dignity as a way of being human. On this definition, human dignity accrues as a property of relationships between individuals, relationships structured by daily interaction between the dignifier and the dignified.[164] That common sense or naturalized account of dignity extends to the relationships between lawyers and clients, connecting lawyers and the construction of clients' legal personalities and legal rights to the defense of human dignity. Lawyers, he remarks, construct and demolish a client's legal personality and legal rights through story.[165]

A. DIGNITY, STORY, AND VOICE

Luban links client dignity, story, and voice to the lawyers' role in courtroom advocacy. For Luban, human dignity requires clients to be heard. The courtroom provides a forum for clients "to tell their stories and argue

159. LUBAN, *Adversary System Excuse*, *supra* note 35, at 63.
160. *Id.* at 62–63 ("When they don't conflict, professional obligations rule the day.").
161. LUBAN, *Upholders of Human Dignity*, *supra* note 23, at 66.
162. *Id.* at 66.
163. *Id.*
164. *Id.*
165. *Id.* at 65–68.

their understandings of the law."[166] Access to counsel, he notes, ensures the telling of client stories, but it does not assure the integrity or fullness of story.[167] Luban concedes that counsel's advocacy efforts may encroach upon and distort client stories.[168] Well-intentioned lawyer embellishment of a client's story in advocacy, he forewarns, may produce a "fictionalized version of the client's story."[169] That interpretive tendency places limits on advocacy as an instrument for the expression of client voice and story, including identity-based voice and story describing the multifaceted experience of race in law, culture, and society.

For Luban, good faith tempers the encroachments of advocacy. "No matter how untrustworthy somebody may have proved to be in the past," he explains, "one fails to respect his or her dignity as a human being if on any serious matter one refuses even provisionally to treat his or her testimony about it as being in good faith."[170] Doubtless, that good-faith commandment extends to matters of identity—racial or otherwise. Integral to human dignity, identity—class, gender, race, and more—shapes the subjective experience of personhood intuitively and cognitively. Respecting a client's human dignity under Luban's relational principle of good-faith treatment requires lawyers to suspend disbelief and to hear the story the client puts forth without legal or strategic embellishment. Luban's notion of good faith emphasizes the first-personal, subjective character of client story. Chiefly, human dignity means having a story of one's own. A client's story, he notes, "is not just the story in which she figures; it is the story she has to tell."[171] In this sense, the client is both the subject matter and the center of her story.

Luban locates individual subjectivity at the core of human dignity. Advocacy that denies a client's subjectivity—what Luban calls the "ontological heft" of a human being—also denies her human dignity.[172] That denial denigrates a client's status as a subject in the world and amounts to a form of humiliation that violates human dignity. Humiliation treats a client's subjectivity and her point of view as "totally insignificant."[173] For example, ignoring or excluding a client's story in advocacy, as in the case of Mychal Bell, presumes that some clients have no point of view worth hearing or expressing.[174]

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166. LUBAN, *Upholders of Human Dignity*, *supra* note 23, at 68.

167. *Id.* at 69.

168. *Id.* at 70.

169. *Id.* at 69.

170. *Id.* at 68 (quoting Alan Donagan, *Justifying Legal Practice in the Adversary System*, *in* THE GOOD LAWYERS' ROLES AND LAWYERS' ETHICS 130 (David Luban ed., 1984)).

171. LUBAN, *Upholders of Human Dignity*, *supra* note 23, at 70.

172. *Id.* at 71.

173. *Id.*

174. *Id.* at 71–72.

Luban's notion of subjectivity instructs lawyers to honor a client's human dignity. To do so, a lawyer must hear the story a client wishes to tell. Honoring or respecting dignity occurs in the context of the lawyer–client relationship, a relationship between the dignifier and the dignified. Relational respect of this kind affords a common-sense account of human dignity tied to story. Lawyers advance human dignity by giving the client a voice in telling her story and sparing her the humiliation of being ignored, excluded, or silenced.[175] Like its race-coded cohorts, the antebellum defense not only ignores, excludes, and silences the powerful historical voice and story of racial identity, but it also humiliates the dignity and subjectivity of those willing and able to speak of their identity as an intrinsic normative value.

Yet, Luban points out, criminal defenders often construct a story in advocacy that has little or nothing to do with the client's voice or story in reality.[176] This divergence, he explains, inheres in the basic function of criminal-defense advocacy.[177] Skilled defenders, he continues, "construct and promote theories of the case consistent with the evidence even if the theories have nothing to do with reality."[178] To Luban, this case-theory function honors a defendant's human dignity by presuming that she has a "good-faith story to tell" and by crediting her claim of innocence.[179] Both presumptions, he insists, operate to avoid not only erroneous criminal conviction, but also the mistaken moral condemnation and concomitant "loss of stature" that comes with it.[180] Together with the "beyond a reasonable doubt" standard, the twin presumptions of the criminal-defense function permit the construction of a good-faith story of innocence from the adduced evidence, even if the story proves untrue. To do otherwise, Luban warns, would violate the human dignity of the defendant.

In this way, Luban's account of criminal-defense ethics postulates a complex dual role for criminal defenders rooted in human dignity. That duality contemplates direct and indirect approaches to safeguarding dignity. For the Jena Six defenders, the role permits direct efforts to safeguard the defendants' dignity by telling their individual stories as well as indirect efforts to preserve their dignity by demonstrating that for each a good-faith story of innocence may be adduced from the evidence.[181] Reluctant to tell Bell's story directly, given his public confession of lawbreaking and blunt accusation of historical racism across LaSalle Parish, the Jena public defender opted for a good-faith story of innocence tailored to a traditional

175. *Id.* at 72–73.
176. LUBAN, *Upholders of Human Dignity*, *supra* note 23, at 72.
177. *Id.* at 73.
178. *Id.*
179. *Id.*
180. *Id.*
181. LUBAN, *Upholders of Human Dignity*, *supra* note 23, at 68–73.

"beyond a reasonable doubt" defense strategy. Authorized by ABA ethics rules regulating the criminal-defense function, this strategy allows a lawyer for the defendant in a criminal proceeding to "so defend the proceeding as to require that every element of the case be established."[182] That regulatory allowance springs from federal and state constitutional law that "entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention" in opposition to prosecutorial charges.[183] Bell's public defender fairly relied on these constitutional and ethical sources in erecting his "beyond a reasonable doubt" defense strategy. Fair or not, that reliance risks charges of paternalism. To grasp these charges, consider paternalism in terms of dignity, self-humiliation, and non-humiliation.

1. Paternalism

In exploring the dual role of defenders in the criminal-justice system, Luban connects the direct and indirect defense of offender dignity to the issue of lawyers' paternalism toward clients. Luban uses the term paternalism generally to describe interference with another person's liberty for her own supposed good.[184] Extended here, he uses the term more specifically to describe a lawyer's refusal to abide by a client's wishes because of anticipated harm to the client.[185] Paternalism of both sorts, he argues, silences the client's story and voice, and therefore dishonors her dignity as a human being and as a story-bearer.[186]

Silencing story-bearing clients offends human dignity and impacts autonomy. Luban rejects the automatic identification of human dignity with autonomy. To Luban, autonomy focuses too narrowly on the human faculty of free will and equates human dignity too closely with willing and choosing.[187] These focal points of agency, Luban believes, present "a truncated view of humanity and human experience."[188] Honoring a person's "human dignity," he maintains, means "honoring" her "being," a state or status that "transcends" simple choices.[189] Broadly conceived by Luban, being encompasses the way people "experience the world," including their perceptions, passions, sufferings, relationships, cares, and commitments.[190] Lawyers honor human dignity, he adds, when they take seriously client cares and commitments in advocacy. They dishonor dignity when they "ride

182. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2009).

183. MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 3 (2009).

184. LUBAN, *Upholders of Human Dignity*, *supra* note 23, at 74.

185. *Id.*

186. *Id.* On paternalism, see generally David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454.

187. LUBAN, *Upholders of Human Dignity*, *supra* note 23, at 76.

188. *Id.*

189. *Id.*

190. *Id.*

roughshod over the commitments that make the client's life meaningful and so impart dignity to it."[191]

To support this proposition, Luban cites the high-profile criminal case of Theodore Kaczynski, the Unabomber, and his resistance to his federal-public-defender team's "mental defense" strategy.[192] Kaczynski's public defenders, he notes, proffered a psychiatric defense despite their client's "comprehensible and respectable" objections,[193] effectively disregarding Kaczynski's intellectual commitments to domestic terrorism. Overriding Kaczynski's commitments and ignoring his wishes in criminal-defense advocacy, Luban remarks, humiliated him and "demolished" his human dignity.[194] For Luban, that human indignity constituted a moral wrong independent of, and more pernicious than, the public-defender team's deprivation of Kaczynski's choice of defense.[195] For Mychal Bell and the Jena Six, by contrast, the experience of humiliation and indignity was less stark and the moral wrong of representation was less pronounced. Instead of a direct clash over defense strategy and value commitment, Bell and his defense teams differed over racial candor and consciousness. Both at trial and on appeal, the teams opted for colorblind and race-coded defense strategies while Bell elected anti-racist candor. However paternalistic, neither colorblind nor race-coded defense strategies call for the explicit client self-humiliation dictated by the antebellum defense.

2. Self-Humiliation

Paternalism-imposed indignity implies a second form of humiliation relevant to defenders and their clients: self-humiliation. Luban links client self-humiliation to compelled self-incrimination.[196] Compulsory self-incrimination, he explains, is a form of deliberate humiliation that enlists an offender's "own will" in the process of punishment, effectively "splitting" the client "against herself."[197] The notion of splitting or dividing the self, he remarks, contravenes the federal constitutional text of the Self-Incrimination Clause. Inscribed in the Fifth Amendment, the clause states that no person "shall be compelled in any criminal case to be a witness against himself."[198]

To be a witness against oneself, Luban argues, is to adopt a disinterested outsider's stance toward one's own condemnation. In his view, that adoption degrades individual subjectivity and signals "an extraordinary kind of self-

191. *Id.*
192. LUBAN, *Upholders of Human Dignity*, *supra* note 23, at 77.
193. *Id.* at 78.
194. *Id.* at 79.
195. *Id.* at 76–79.
196. *Id.* at 83.
197. LUBAN, *Upholders of Human Dignity*, *supra* note 23, at 83.
198. U.S. CONST. amend. V.

alienation."[199] The inner split and the self-alienation produced by compelling an offender to be a witness against herself in turn generates humiliation. The humiliation of enlisting the offender's will in the process of his own moral condemnation, Luban contends, violates the Self-Incrimination Clause and human dignity itself.[200] More than other race-coded defenses, such as "rotten social background," the antebellum defense dictates an offender's own moral self-condemnation on the grounds of innate criminal character and natural criminal pathology. Unlike the pretense of colorblind defenses or the rhetoric of race-coded defenses, the self-condemnation of the antebellum defense damages both the dignity and subjective will of offender clients.

3. Non-Humiliation

The self-humiliation strand of paternalism in the lawyer–client relationship reinforces the importance of subjectivity and integrity to the preservation of human dignity. For Luban, dignity situates the client as the subject of her own story. Subject-centered storytelling requires a lawyer's good faith, alert listening, and narrative integrity. Integrity-based narratives frame the client as the subject of experience located within a web of cultural, political, and social commitments. The commitments connect the individual self to larger communities—family, church, school, and neighborhood. Honoring human dignity, Luban stresses, means refraining from overriding those commitments and humiliating people for paternalistic reasons.[201]

Positing the intuitive connection between human dignity and non-humiliation, Luban proposes a non-humiliation theorem of human dignity. This theorem treats dignity as a status-concept ranked by "the prestige conferred simply by being human."[202] Indignity and humiliation occur, Luban reasons, when a person is treated as "lesser" than or below her "rank," for example, as "property," as an "object," or as a "subhuman"marked by innate or natural inferiority.[203] That diminution of stature amounts to a loss of dignity and humiliation.[204]

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199. LUBAN, *Upholders of Human Dignity*, *supra* note 23, at 83–84 ("Being a witness against yourself divides you in two, one the individual with an interest in evading condemnation, the other the state's representative; and compelling you to be a witness against yourself subordinates the former to the latter.").

200. *See id.* at 84 (arguing that even if humiliation is not the purpose of self-incrimination, it is the outcome).

201. *Id.* at 88.

202. *Id.* at 89.

203. *Id.*

204. LUBAN, *Upholders of Human Dignity*, *supra* note 23, at 89 ("I am humbled when I am *rightly* taken down a peg—when my own inadequacies, made visible to all, reveal me as a lesser sort than I have represented myself as (to others or to myself).").

Luban casts lawyers as defenders of human dignity. This role facilitates the telling of a client's subjective stories and the expression of her interwoven commitments. Upholding human dignity, specifically the notion of dignity as non-humiliation, for Luban involves lawyers in a "shared enterprise" with clients that reduces their dependency and maintains their self-respect.[205] The antebellum defense accomplishes neither of these objectives, instead focusing on telling stories of inferiority, depicting dependence, and demeaning identity. Luban's vision, by comparison, consonant with his commitment to human dignity, treats clients as rights-bearers and links the advocacy enterprise to the promotion of clients' self-sufficiency. A rights-bearer, Luban notes, is "a legal *person*, with ontological heft that others are obligated to respect."[206] Respecting the rights and dignity of criminal offenders enmeshes lawyers and clients in a moral conversation and relationship. Both identity and community are crucial to that interaction.

B. *IDENTITY, DIGNITY, AND COMMUNITY*

Luban's non-humiliation theorem of human dignity, and its core notions of subjectivity, story, and voice, coincides with a race-conscious-outsider conception of criminal-defense ethics. Coincidence hinges on the lynchpins of identity and community. Both identity and community shape the experience of individual subjectivity. The multiple categories of identity—class, gender, race, and sexuality—influence the tone of a person's voice and the content of her story. Similarly, the varied configurations of community—family, church, school, and neighborhood—forge the personal commitments and relationships expressed in voice and story. Without the meaning-giving substance of identity and community, and their cognitive and interpretive frameworks, the expression of subjectivity through voice and story fails to represent fully the perceptions, passions, sufferings, relationships, cares, and commitments of the self. Under-representation of the self in voice and story excludes parts of human experience that give form to individual subjectivity in context. Exclusion, and the silence that ensues, risks humiliation and indignity. The exclusion of the antebellum defense in discarding the core perceptions, passions, sufferings, relationships, cares, and commitments of the racial self apart from claims of innate criminal character and pathology, for example, silences individual and collective histories of racial independence, self-respect, and power.

A race-conscious-outsider conception links subjectivity, identity, and community to the experience of racial dignity and humiliation in the criminal-justice system. Applied to the defense of the Jena Six, that

205. *Id.* ("Everyone is a subject, everyone's story is as meaningful to her or to him as everyone else's, and everyone's deep commitments are central to their personality.").

206. *Id.* at 94.

conception repudiates colorblind neutrality, reintegrates law and politics, and recognizes the possibility of empowering the legal personality and legal rights of black offenders in criminal law and procedure.[207] Luban's theorem encourages these race-conscious shifts and the recasting of the criminal-justice system as a dignity-affirming institution and the defender role as a dignity-restoring relation. Recasting the "moral properties"[208] of defender relationships and institutions recognizes "offenders and offender communities as identity-bearing moral agents," and calls for a "moral relation" between individual defenders and offender communities.[209] That relationship reconceives the "role-specific duties" of defenders by instilling the "moral obligation" to value identity-based differences and commitments.[210] Fused with a race-conscious vision, Luban's theorem reveals three historically overlooked categories of moral relationships within the criminal-justice system: identity-affirming relations between defenders and offenders, dignity-restoring relations between defenders and offenders in cooperation with offender interest groups such as families and faith-based groups, and community-empowering relations between defenders and offender communities.

1. Identity-Affirming Relations

Luban's non-humiliation theorem of human dignity applies to wide fields of civil- and criminal-justice advocacy, here to encourage identity-affirming relations between defenders and offenders in the defense of Bell and the Jena Six. In revisiting District Attorney Walters's prosecutorial decisions—specifically "to charge Bell with conspiracy and attempted second-degree murder, to demand his trial as an adult, and to reject rehabilitative sentencing"—the theorem construes such lawyering acts as identity-denigrating "acts of naming," in this case naming the black subject.[211] Based on racialized judgments, the acts depict Bell "'as the instigator of the attack,'" infer lawbreaking intent from "'his prior criminal record,'" and condemn him as morally irredeemable.[212] As I have pointed out, the "plausibility"—both legal and ethical—of these sorts of judgments

207. *See* Alfieri, *supra* note 3, at 1302.

208. *See* DAVID LUBAN, *Natural Law as Professional Ethics: A Reading of Fuller*, *in* LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 22, at 118 [hereinafter LUBAN, *Natural Law*].

209. Alfieri, *supra* note 3, at 1302.

210. *Id.*

211. *Id.* at 1303.

212. *Id.* (footnote omitted); Walters, *supra* note 78. On stock stories of black lawbreakers, see Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 290, 291 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) ("[L]awless behavior by some blacks stigmatizes all and impedes collective progress.").

depends for Luban on the sociocultural power of the majority community,[213] here the Jim Crow white majority of LaSalle Parish.[214]

Like Walters, Jena's majority community of whites "equate color—blackness—with natural inferiority, innate immorality, and pathological violence."[215] Such cognitive attributions degrade the Jena Six defendants and the minority community of LaSalle Parish. Degradation occurs in the courtroom telling of Walters's story—what I have called the "story of black-on-white violence at Jena High School," a story that omits "the passions and sufferings, reflections, relationships, and commitments" of Bell, the other defendants, their families, and their neighbors.[216] That omission, when repeated by prosecutors in bench and jury trials, silences the individual and collective voices of black subjectivity, identity, and community in Jena. The result for individuals and their communities is humiliation, both personal and historical.[217]

The implied "correlation of race and pathology"[218] at Bell's trial, coupled with Bell's public acknowledgement of the assault and rebuff of a plea bargain, confronted his court-appointed black public defender, Blane Williams, with three strategic options. The first, a colorblind option, entailed the standard "beyond a reasonable doubt" defense attacking the evidentiary basis of Bell's prosecution. The second, a color- or race-coded option, offered the more corrosive antebellum defense suggesting the innate or natural criminal pathology of Bell and the other Jena Six young black male offenders and, hence, their diminished capacity to form the intent necessary to conspire or attempt second-degree murder. The third, a color-conscious option, involved the recitation of Bell's experience and story assailing Jena as a "racist town" broadened to encompass the Jena Six and the racial history of LaSalle Parish. This expansive color-conscious option allows the Jena Six defenders to raise issues of prosecutorial overcharging and selective prosecution, venue transfer, juvenile court jurisdiction, jury-pool contamination, and rehabilitative sentencing at trial and on appeal. Both the second option and, to a lesser extent, the third option echo the familiar tropes of "social deviance" and "black rage" in seeking to diminish the capacity of the Jena Six to form the intent or mens rea necessary to attempt

213. Alfieri, *supra* note 3, at 1303 (citing DAVID LUBAN, *The Torture Lawyers of Washington*, *in* LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 22, at 162, 193 [hereinafter LUBAN, *Torture Lawyers*]).

214. *See* LUBAN, *Natural Law*, *supra* note 208, at 99, 129 (citing the power of the majority community); LUBAN, *Torture Lawyers*, *supra* note 213, at 193 ("Legal plausibility is a matter for case-by-case judgment by the interpretive community . . . .").

215. Alfieri, *supra* note 3, at 1303.

216. *Id.*

217. *See id.* (footnote omitted).

218. *Id.*

second-degree murder and to advance a conspiracy.[219] This indignity or humiliation risk, part of the repressive historical resonance common to identity affirmations in law and culture, burdens color- or race-conscious attempts to defend young black male lawbreakers in the criminal-justice system.

At trial, Williams elected the first option of colorblind neutrality and "reasonable doubt," raising no challenge to the all-white jury pool, putting on no evidence, calling no witnesses, and finally excluding Bell's parents from the courtroom.[220] Consistent with this strategic option, Williams stated: "I don't believe race is an issue in this trial."[221] That choice decontextualized the individual stories of the Jena Six defendants and the collective history of LaSalle Parish, bolstered the nonaccountability and professionalism principles of neutral partisanship, reinforced the separation of law and politics, and denied the possibility of empowering the legal personality and legal rights of the young black male offenders through the discourse of criminal law and procedure.

Subsequently, at post-conviction proceedings, the Monroe pro bono defense team departed from the strategy of colorblind neutrality and "reasonable doubt," instead challenging Bell's trial as "unfair" and seeking to overturn his conviction, vacate the court's sentence, transfer the case to juvenile court, and convene a new trial.[222] The defense team couched this challenge in a color-coded attack on racial "emotion" and its inflammatory impact on the white majority—prosecutor, judge, and jury—of LaSalle Parish.[223] Deployed in this context, the term emotion meekly evokes the racial passions of Jim Crow era laws and social mores. More specifically, the defense team claimed that such passions prevented a "fair" trial and sentence.[224]

The public defender's color-blind posture and the post-conviction team's color-coded pretense did little to establish lawyer–client relationships that affirm the individual identities of the Jena Six or promote "collective healing" of the town of Jena.[225] Rather their stances preserved "invidious status distinctions" and reinforced the divisions of Jim Crow "racial partition" within the town.[226] Their stances also discounted the legal and political "opportunity" to trace the sources of Jena's racial violence, to test its conflicting "motivations," to experiment with community-based "restorative

219. *See* CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW: CASES AND MATERIALS 207, 224 (2005) (discussing mens rea and intent).

220. Quigley, *supra* note 42.

221. *Id.*

222. Persac, *supra* note 59.

223. *Id.*

224. *Id.*

225. Alfieri, *supra* note 3, at 1304.

226. *Id.*

policies of redemption and reparation," and to seek "reconciliation through cross-racial community dialogue."[227] This manifest opportunity arises out of the "legality and justice" norms encoded in criminal and civil-rights laws,[228] laws that help define the legal personality, the legal rights, and ultimately the legal–political dignity of black offenders and offender communities.

2. Dignity-Restoring Relations

Luban's nonhumiliation theorem of human dignity also extends here to approve dignity-restoring relations of criminal-justice advocacy between defenders and offenders in cooperation with offender interest groups, such as families and faith-based organizations, in defense of the Jena Six. Dignity-restoring relations embrace the stories and voices of past and present civil-rights movements to "break" from traditional conceptions of the defense role and function.[229] Both stories and voices of struggle incorporate "difference-based community" into the defense process.[230] As I have asserted elsewhere, incorporation of the voices and stories of black-offender families, faith-based groups, and communities inside and outside courthouses "opens" the criminal-defense process to race-conscious forms of "civic participation" beyond grassroots protest movements.[231]

Participation of offender support and community groups in the "formulation" of defense goals and strategies here and in related cases of black-on-white violence enlarges conventional punitive theories of criminal justice based on blunt retributive and deterrent calibrations.[232] That participatory enlargement introduces "alternative sanctions" and defense tactics gleaned from emerging "restorative- and transitional-justice experiments."[233] Applied to Jena through its courts, faith-based institutions, and schools, restorative justice entails individual and collective acts of redemptive contrition and forgiving mercy.[234] Cross-racial reconciliation of

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227. *Id.* at 1305; *see also* Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQ. 263, 305–11 (2003) (describing the South African Truth and Reconciliation Commission and using it as a model for exploring racial violence, developing appropriate reparation, and promoting reconciliation).

228. Alfieri, *supra* note 3, at 1305; *see also* SIMON, *supra* note 107, at 149–56 (using an example of university-based union representation to illustrate the opportunities that arise from broad formation); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1107–08 (1988) ("[T]he growth of government regulation and civil-rights enforcement has produced a large number of legal norms that regulate broadly the structures of relationships and organizations.").

229. David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424, 451–52 (1990).

230. Alfieri, *supra* note 3, at 1307.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

this kind works to integrate "offenders, victims, and their adjoining communities."[235] Integration occurs when difference-based stories of dignity and humiliation are spoken and heard in shared forums.[236] In this way, I have pointed out, difference-based stories "foster dialogue between black and white communities about their mutual interests in redemptive forms of criminal justice."[237] The "moral conversation" that ensues redefines "the meaning of human dignity" in pretrial, trial, and post-conviction defense strategies, eschewing historical caste-status distinctions in favor of race-conscious candor and collaboration.[238]

3. Community-Empowering Relations

Luban's nonhumiliation theorem of human dignity similarly reaches out to back community-empowering relations between defenders and offender communities in the defense of the Jena Six. Community-empowering relations arise out of legal–political opposition to prosecutorial overcharging, all-white jury selection, disparate juvenile-status treatment, and sentencing abuse in LaSalle Parish. Prosecutorial misconduct in creating offender–jury and adult–juvenile racial asymmetry violates community norms of equal protection and fair representation. Likewise, the racial "asymmetry" of punishing black-on-white violence and excusing white-on-black threats of violence threatens "norms of even-handed fairness."[239]

LaSalle Parish's racially disparate treatment of black and white communities curtails the assertion of "difference-based dignity and equality interests."[240] Articulated in story, that assertion can resound in open courtrooms and closed-jury deliberations. Here, the selection of an all-white jury deprives the Jena Six black offenders and the LaSalle Parish black-offender communities of a shared "opportunity" to assert their dignitary interests through stories of racial resistance and nonhumiliation.[241] Historically exacted from white-on-black violence and threats of violence, deprivation silences stories of protest against indignity. It also "permits a culture of white-on-black intimidation to flourish" and "preserves black socioeconomic inequality and political powerlessness."[242]

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235. Alfieri, *supra* note 3, at 1307.

236. *See* Alfieri, *Retrying Race*, *supra* note 7, at 1196–97 (describing the role of narrative in racial reconciliation); Robert F. Cochran, Jr., *The Criminal Defense Attorney: Roadblock or Bridge to Restorative Justice*, 14 J.L. & RELIGION 211, 212–13 (1999–2000) (describing how restorative justice sometimes brings a crime victim and perpetrator together to share their stories).

237. Alfieri, *supra* note 3, at 1307.

238. *Id.* at 1307–08.

239. *Id.* at 1306.

240. *Id.*

241. *Id.*

242. Alfieri, *supra* note 3, at 1306.

Restoring black dignity in LaSalle Parish requires defenders to engage in the race-conscious deregulation of "public space" by giving offenders and their families a shared voice in trial and sentencing stories.[243] Voice affords offenders and offender communities the opportunity to "regain their sense of dignity" in the form of "cultural and social narratives of empowerment."[244] Those narratives spur the "organization and mobilization" of grassroots legal–political opposition to the racialized prosecution of noose cases.[245] The integration of identity-affirming, dignity-restoring, and community-empowering defender roles and relationships under a race-conscious-outsider conception of civil-rights and criminal-defense advocacy reconnects subjectivity, identity, and community to the experience of racial dignity and humiliation in the criminal-justice system. The next Section examines the tensions between this conception of criminal-defense ethics and the Jim Crow ethics of the antebellum defense, particularly the countervailing tendencies toward contrived ignorance and integrity.

V. CONTRIVED IGNORANCE AND INTEGRITY IN CRIMINAL-DEFENSE ETHICS

Luban's nonhumiliation theorem of human dignity helps transform the criminal-justice system into a dignity-affirming institution, and the defender role into a dignity-restoring relation. The theorem imbues both institutions and roles with moral properties that return the identity-bearing meaning of subjectivity to offenders and offender communities, and also fosters a moral relationship between individual defenders and offender communities. That deeper relationship carries the moral obligation to value identity-based differences and commitments. Fulfilling this relational obligation transforms the role-specific duties of defenders within the criminal-justice system through identity-affirming, dignity-restoring, and community-empowering actions.

The transformative integration of affirmative, identity-based obligations into the role-specific duties of defenders in the Jena Six case clashes with the "special case" commandment of criminal-defense practice acknowledged by Luban.[246] Premised on the well-settled theory that aggressive advocacy serves the political ends and social goals of curtailing the state's power to prosecute and to punish the most vulnerable, the zealous-advocacy commandment elevates the goal of protecting individual liberty against state encroachment to the same status as the goal of attaining legal justice.[247] In accord with this commandment and its adversarial compulsion, the antebellum defense

243. *Id.*
244. *Id.*
245. *Id.*
246. *See supra* notes 35–40, 123–28 and accompanying text.
247. *See supra* notes 35–40, 123–28 and accompanying text.

supplies an exceptional means of achieving the central goal of protecting the individual Jena Six defendants.

Protection, however, need not preclude the relational affirmation of racial dignity, the courtroom expression of racial identity, and the legal–political empowerment of racial community. Yet, the race-coded antebellum defense and the colorblind defense of the Jena Six discount these competing aims. More troubling, the defenses deny the moral value of affirming racial dignity, expressing racial identity, and empowering racial community.

Luban addresses the notion of deniability broadly through his analysis of contrived ignorance and integrity in legal ethics. Applied here, deniability refers to a lawyer's capacity to deny guilty knowledge truthfully. In advocacy, Luban explains, deniability is a stratagem "to avoid facts that the lawyer really doesn't want to know."[248] The knowledge and the facts at stake under antebellum, colorblind, and color-coded defenses relate to the dual experiences of racial dignity and humiliation, subjectivity and objectification, and resistance and subordination bound up in the stories of the Jena Six and the segregated communities of LaSalle Parish. Strategically, the defenses work to evade the history of such "double" experiences, allowing both the trial and post-conviction defender teams to avoid guilty knowledge of the complex facts of individual and collective racial identity in representing the Jena Six.[249]

To ascertain whether deniability works in the criminal-defense process and in advocacy more generally, Luban investigates the goal, the structure, and the wrongdoing of willful ignorance. The antebellum, colorblind, and color-coded defenses applicable to the Jena Six present three categories of willful ignorance: ignorance of racial dignity, ignorance of racial identity, and ignorance of racial community. Each category correlates with the Jim Crow experience of humiliation for individuals, groups, and communities in LaSalle Parish. At the same time, each category also correlates with the civil-rights experiences of dignity, equality, and liberty. Here again, the question is whether the powerful identity norms of historical struggle impose on lawyers a serious and countervailing moral obligation of client non-humiliation sufficient to rebut the professional obligation and political goal of zealous criminal-justice advocacy embodied in Jim Crow defenses. Consider first the contours of willful ignorance in terms of the structure of

248. DAVID LUBAN, *Contrived Ignorance*, *in* LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 22, at 209, 210 [hereinafter LUBAN, *Contrived Ignorance*]. For Luban, "[d]eniability is the key to succeeding at the world's work, which is often dirty, while keeping a clean conscience." *Id.* at 211.

249. On "doubleness" in American racial history, see generally ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM (2000); *see also* William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, 68 CHI.-KENT L. REV. 1051 (1993) (discussing the instability and incoherence of Southern ideology regarding slavery).

contrived ignorance, the locus of wrongdoing, and the nature of willful blindness.

A. *WILLFUL IGNORANCE*

Luban connects deniability to willful ignorance. Criminal-law doctrine equates willful ignorance with knowledge. For Luban, two intuitive rationales justify ignorance-based criminal convictions.[250] The first rationale asserts that the wrongdoer should have known the lawbreaking ramifications of his actions, implying a legal duty to know and a less culpable standard of negligence for the failure to know.[251] A second rationale assigns a guilty mental state to willful blindness.[252] Both rationales focus on a lawyer's deliberate efforts to avoid guilty knowledge prior to committing any misdeed—in this case, an identity-specific misdeed such as reciting client or community humiliation stories, or worse, prescribing client self-humiliation stories.

Luban notes that the structure of deniability in organizations—here, Jena's public-defender office—screens individuals from liability for misdeeds, including, by extension, identity-based misdeeds.[253] Urging personal accountability, he observes that the law can apportion individual responsibility within an organizational context, even where numerous individuals—such as supervisory public defenders—act at a distance and with imperfect information. In this way, willful ignorance applies to misdeeds committed by group enterprises and captures the dimensions of supervisory wrongdoing.[254] Neither fully reflective of knowledge nor accurately descriptive of negligence, Luban's notion of willful ignorance offers a defense strategy for obscuring the identity-based complexity of racial subjectivity in LaSalle Parish for the Jena Six and others. Fueled by the disparate motivations and moral intuitions of the Jena Six defense teams, this obscurantist strategy permits a lawyer affirmatively to take steps to avoid acknowledging that a colorblind or race-coded story is false or incomplete.[255] Luban traces this familiar advocacy discretion to the structure of contrived ignorance.

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250. LUBAN, *Contrived Ignorance*, *supra* note 248, at 211.

251. *Id.* at 212–13.

252. *Id.* at 213.

253. On organizational structures of deniability, see *id.* at 215–17.

254. Luban explains: "Supervisors implicitly or explicitly encourage their subordinates to meet their targets by any means necessary. . . . Supervisors provide assistance and resources. . . . And supervisors structure the organization to preserve their own deniability. That's willful ignorance." LUBAN, *Contrived Ignorance*, *supra* note 248, at 216.

255. *See id.* at 213–22.

1. The Structure of Contrived Ignorance

Luban defines the structure of contrived ignorance in terms of screening actions and unwitting misdeeds. Screening actions consist of the actions or omissions by which a lawyer shields himself from unwanted knowledge—for example, when a line public defender interviewing his black-offender client breaks off a difficult line of questioning about racial dignity, identity, or community. Unwitting misdeeds comprise whatever misdeeds the lawyer subsequently commits that would be innocent if he were legitimately ignorant—for instance, when a defender evokes the cultural imagery and narratives of black inferiority to excuse a black offender's prior criminal history without investigating that history or consulting with the client about his experience. Luban points out that both screening actions and unwitting misdeeds can be performed with various degrees of mens rea. Recall in this respect that willful ignorance describes the mens rea with which a lawyer contrives his own ignorance. For Luban, this broad state of mind leaves open the possibility that ignorance can be contrived at other levels of culpability—for example, willfulness, knowledge, recklessness, or negligence.[256] This opening allows for a search among multiple levels of culpability for the locus of wrongdoing.

2. The Locus of Wrongdoing

Luban searches for the locus of wrongdoing to assess whether the blameworthiness of willful ignorance comes from a lawyer's screening actions or unwitting misdeeds. That assessment drives the development of a theory of willful blindness as a form of culpable ignorance. Under Luban's culpable-ignorance theory, ignorance obtained from wrongfully screening oneself from guilty knowledge itself becomes blameworthy. Under this analysis, the wrongful screening action—breaking off a difficult line of questioning about racial dignity, identity, or community in representing the Jena Six—bears the primary blame. Yet, for Luban, the unwitting misdeed—here, evoking the cultural imagery and narratives of black inferiority under the antebellum defense—shares in that blame.

By definition, Luban explains, unwitting misdeeds constitute more than the innocent causal consequences of wrongful screening actions. In effect, screening actions put the lawyer on notice of potential wrongdoing such that his "later self . . . knows that he performed the screening actions at an earlier time."[257] Like the ethical obligation of remedial intervention and rectification,[258] with that knowledge comes "an opportunity to reconsider and abandon a course of action that might turn out to be an unwitting

256. *Id.* at 222–23.

257. *Id.* at 225.

258. MODEL RULES OF PROF'L CONDUCT R. 5.1(c)(2) & cmt. 5 (2009).

misdeed."[259] Analogizing agency theory and the relationship between a guilty principal and a reckless agent, Luban reasons that when the screening lawyer persists in acting, he stands to blame.[260] Indeed, on this logic, the more probable the misdeed, the more blameworthy the principal.

The implied principal–agent complicity that binds advocates at two different times—earlier and later—in the lawyering process unites screening actions and wrongful misdeeds into a single framework of analysis. This union treats screening actions and unwitting misdeeds as unitary actions accomplished when the lawyer-as-agent (the later self who commits the unwitting misdeed) ratifies the decision of the lawyer-as-principal (the earlier self) "to screen off potentially guilty knowledge."[261] The unitary treatment of the lawyer self as a complicit principal-and-agent across a broad time-frame of racialized screening actions—breaking off a difficult line of questioning about racial dignity—and unwitting colorblind or race-coded misdeeds—lawyer- or client-recited narratives of innately deviant criminal character—highlights the utility of the doctrine of willful blindness in criminal-defense ethics and its illuminating application to the colorblind and antebellum defense of the Jena Six.

3. Willful Blindness

Luban treats willful blindness as morally equivalent to a culpable state of mind or mens rea for unwitting misdeeds.[262] On this valence, he urges the inclusion of willful ignorance in lawyers' moral deliberations. Inclusion acknowledges the case-by-case importance of avoiding and at times engaging in contrived ignorance. Significantly, for Jim Crow ethics, Luban erects no intuitive bar to contrived ignorance in lawyer moral deliberations. Ignorance, he points out, may be the lawyer's best choice when other morally relevant factors weigh in the balance of advocacy decisions, such as life or liberty. Moreover, Luban fashions no formal rule of legal ethics embodying the willful-blindness doctrine. Ethics rules, he shows, burden lawyers with scant obligations to press a client for knowledge or to corroborate a client's story, and risk damage to the lawyer–client relationship and disruption of lawyer regulation.[263]

Lacking intuitive restraints or rule prohibitions, lawyers adopt what Luban describes as an ethically dubious "Don't ask, don't tell" practice of adversarial advocacy.[264] He discerns this practice in a lawyer's mental state toward a client's story at that moment in a pretrial interview when he

259. LUBAN, *Contrived Ignorance*, *supra* note 248, at 225.
260. *Id.*
261. *Id.*
262. *Id.* at 211
263. *Id.* at 229.
264. LUBAN, *Contrived Ignorance*, *supra* note 248, at 229–30.

counsels his client not to tell him too much[265]—in this case about Mychal Bell's experiences of racial dignity, identity, or community in LaSalle Parish. In race cases like the Jena Six, that moment occurs precisely when a public defender acts to break off a difficult line of questioning or dialogue with the accused about racial dignity, identity, or community and—thus screened from knowledge of the dual experiences of racial dignity and humiliation, subjectivity and objectification, and resistance and subordination common to segregated communities of color—commits the unwitting misdeed of reiterating the cultural imagery and narratives of black inferiority and innate criminality.

To counter the practice of "Don't ask, don't tell" and the silencing of dignity stories in the lawyering process, Luban considers amending contemporary legal ethics rules to define willful and knowing ignorance as a form of knowledge.[266] Incorporating the willful-blindness doctrine into legal-ethics rules, he remarks, requires amendment of the terminology rule governing the lawyer–client relationship within the ABA Model Rules of Professional Conduct.[267] Currently the terminology rule denotes "'knowingly,' 'known,' or 'knows'" to mean "actual knowledge of the fact in question."[268] Luban's proposed amendment adds the phrase: "or conscious avoidance of actual knowledge of the fact in question."[269] This addition, he concedes, transforms the lawyer–client relationship by expanding the scope and altering the content of lawyer inquiry into a client's case.[270] Expansion of this kind, he also admits, threatens to undermine lawyer–client trust, invade privileged and confidential conversations, and induce evasive client tactics.[271]

Despite the risk of these unintended regulatory consequences, Luban argues that the good lawyer should avoid "Don't ask, don't tell" strategies even without doctrinal or rule prohibition.[272] More generally, he urges lawyers to avoid willful ignorance of inconvenient knowledge.[273] On this vision of the good lawyer, the Jena Six trial and appellate defender teams should regard it as their duty to learn about the dual experiences of racial dignity and humiliation, subjectivity and objectification, and resistance and

265. *Id.*

266. *Id.* at 230.

267. *Id.*

268. MODEL RULES OF PROF'L CONDUCT R. 1.0(f) (2009).

269. LUBAN, *Contrived Ignorance*, *supra* note 248, at 230.

270. *Id.* ("Perhaps the doctrine would be read narrowly, so that 'conscious avoidance of knowledge' means only that the lawyer consciously refrained from asking questions that, but for the fear of discovering guilty knowledge, she would obviously have asked in order to help prepare the case.").

271. *Id.* at 229–32.

272. *Id.* at 229

273. *Id.* at 235

subordination shared by the defendants in LaSalle Parish. That duty, Luban cautions, is not absolute. For Luban, exceptional cases arise "in which the morally troubling consequences of knowing too much outweigh the duty to avoid 'Don't ask, don't tell' strategies."[274] In such cases, presumably as here, he accepts the willful-blindness alternative. Acceptance implies moral excuse. Accordingly, he concludes that when "telling the truth might defeat justice, and [when] the stakes are enormous, even a lie might be morally excusable."[275]

Luban's limited acceptance of the willful-blindness alternative simultaneously seeks to accommodate the core ethics principle of lawyer candor, to avoid professional discipline for unlawful lying, and to solve the "dirty hands" dilemma in the criminal defense of noose cases. This accommodation or "moral loopholing," he insists, applies to a narrow range of "extreme cases" when a lawyer "putting on a fundamentally truthful case" advances "a few unimportant false details," which he does not know are in fact false.[276] Put forward in this way, Luban argues, such cases neither commit nor count as misdeeds.

Yet, even when candor principles and disciplinary rules survive Luban's proffered accommodation unimpaired, the willful-blindness alternative confronts "dirty hands" situations in colorblind and race-coded defense cases like the Jena Six. Similar to the institutional setting for the transitivity argument, these situations often call for ruthless, rights-violating activity and engender experiences of moral regret. Rights-violating activity occurs, for example, in excluding or ignoring a client–offender's dual experiences of racial dignity and humiliation, subjectivity and objectification, and resistance and subordination, and in silencing the voices and stories communicating such experiences. To his credit, Luban's non-humiliation theorem of human dignity restrains rights-violating activity and engenders moral regret when that activity inflicts humiliation or commands self-humiliation. Nonetheless, racialized "dirty hands" situations pose difficult institutional-role obligations for public defenders that require normative judgment in drawing adequate curbs on racial adversariality. For the Jena Six, the curbs spring from the subjectivity norms of racial dignity, identity, and community assembled during a half-century of struggle against Jim Crow legal regimes. Honoring those norms raises questions of integrity and dissonance.

B. INTEGRITY AND DISSONANCE

Luban addresses integrity and dissonance in the clash of lawyer conduct and ethical principles. Turning to social psychology, he surveys dissonance theory and dissonance-based phenomena, such as belief modification and

274. LUBAN, *Contrived Ignorance*, *supra* note 248, at 232.

275. *Id.* at 234.

276. *Id.* at 234–35.

social cognition, to discover a fundamental psychic mechanism in the human drive to reduce dissonance between conduct and principles.[277] Typically, he explains, lawyers strive to temper cognitive dissonance by modifying their conduct to conform to their principles or, when conduct and principles conflict, by modifying their principles or prior beliefs. For lawyers, principle-driven conformity risks inflexibility and the loss of common-law styles of contextual reasoning.[278] Belief modification, by comparison, risks conscious and unconscious counterattitudinal actions, such as lawyer-directed client humiliation or lawyer-counseled client self-humiliation under Jim Crow defense strategies.[279]

1. Counterattitudinal Advocacy

Luban explicates the dissonance of counterattitudinal advocacy as a self-rationalizing form of integrity in which a lawyer's beliefs justify his actions after the fact and, thereby, naturally construct a moral world of continuous "righteousness."[280] Experiments in social psychology, he points out, reveal the human tendency to resolve such dissonance when cognitions threaten to undermine individual self-concept—that is "when it occurs to us that we may have done something wrong."[281] Intuitively, he reports, lawyers work to "bend" their moral beliefs and perceptions to "fight off" harsh judgments of their own behavior.[282] Evidence, he adds, shows that counterattitudinal advocacy typically tilts beliefs in the direction of advocacy aims.[283] In this

277. On the impact of social–psychological forces on lawyer behavior, see generally Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998); Donald C. Langevoort, *Ego, Human Behavior, and Law*, 81 VA. L. REV. 853 (1995); Donald C. Langevoort, *The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases and Organizational Behavior*, 63 BROOK. L. REV. 629 (1997); Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75 (1993).

278. *E.g.*, SIMON, *supra* note 107, at 9–10, 69–74, 138–39 (discussing contextual judgment); David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145, 1151 (1993) ("In recent years, this image [of flexible attorneys] has become increasingly difficult to maintain in the face of mounting evidence that most lawyers specialize and that differences across those specialties are relevant to the task of defining and enforcing appropriate standards of lawyer conduct.").

279. *See* David LUBAN, *Integrity: Its Causes and Cures*, *in* LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 22, at 267, 268 [hereinafter LUBAN, *Integrity*] ("[W]hen our conduct clashes with our prior beliefs—when . . . we act 'counterattitudinally'—our beliefs swing into conformity with our conduct, without our ever noticing.").

280. *Id.* at 269.

281. *Id.* at 267.

282. *Id.* at 269.

283. *Id.* at 269–70.

way, the advocacy process tends to channel beliefs into concordance with the means and ends of specific advocacy situations.[284]

The cognitive channeling of means–ends beliefs in counterattitudinal advocacy gains support from the institutional contexts of the criminal-justice system. Luban notes that institutional contexts, in this case the LaSalle Parish prosecutor and public-defender offices, socially influence the character of individual and collective perception. Here and elsewhere among race cases, this cognitive phenomenon produces mutually reinforcing or reciprocal commitments to beliefs, be they right or wrong, regarding a black offender's dual experiences of racial dignity and humiliation, subjectivity and objectification, and resistance and subordination, as well as the presumed advocacy need for lawyer-directed client humiliation or lawyer-counseled client self-humiliation.[285] Luban links the institutional diffusion of individual responsibility in organizational settings to the reciprocal reinforcement of perception and commitment by noting, "once I act, my beliefs will rationalize the action and therefore impel me to further action of the same sort—which, in turn, calls for renewed rationalization, and further action."[286]

Social psychologists, according to Luban, attribute this pattern of action-commitment-action to the self's incessant pursuit of integrity experienced intuitively through belief–action harmony.[287] Lawyers, he comments, reformulate their self-concept in a way that rationalizes their own actions.[288] Because of the self-reinforcing character of commitment, a lawyer–defender's self-conception impels further, structurally similar, rationalizing action bolstered by group social cognition and individual belief modification. The adversary system sustains these patterns of decision-making by framing litigation as a social competition marked by group polarization and in-group favoritism. As a result of polarization and belief-change, Luban mentions, lawyers become committed to their own courses of action and equally committed to other members of their "team" in litigation competitions, such as in the prosecution and defense of the racial violence involving the Jena Six, where socially scripted roles shape the "psychic make-up" of LaSalle Parish prosecutors and defenders.[289]

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284. Luban offers two observations on psychological theory and cognitive dissonance: first, that cognitive-dissonance theory maintains a kind of primacy; and second, that dissonance reduction resembles the quest for integrity. LUBAN, *Integrity*, *supra* note 279, at 269–71.

285. *Id.* at 272 ("Evidently, we respond to situations by checking to see how other people respond, and their response in large measure determines how we perceive the situation and therefore how we ourselves will respond.").

286. *Id.* at 273.

287. *Id.* at 274.

288. *Id.*

289. LUBAN, *Integrity*, *supra* note 279, at 271–81.

2. Situationism

The portrait of lawyer cognition and dissonance that Luban culls from the literature of social psychology depicts a sociolegal world where "there are no selves, only selves-in-roles, selves who slide frictionlessly from role to role, in each case conforming to the expectations of the role and whatever principles of right behavior come attached to its script."[290] To better understand this role-scripted sociolegal world, Luban considers the situationist view "that differences in situations account for much more of the observed variation in human behavior than do differences in personality."[291] He cites experiments indicating that the power of a situation appears to dominate over the power of individual personality and character in determining advocacy behavior.[292] Although conceding that situational changes can affect the proportion of individuals exhibiting a given behavior, he notes that situationists struggle to account for belief–action variation among individuals placed in the same situation.[293]

For a fuller account of behavioral variation, Luban embraces personality theory and the notion of situational dissent.[294] Far less deterministic, this account treats situations as sources of environmental pressure or temptation, the minor manipulation of which may cause large changes in the ease or difficulty of certain courses of action.[295] On this reading, situations set the conditions for decision-making, for example in screening or committing unwitting misdeeds, rather than render choice impossible. Luban's opposition to situational determinism, and the related reductionist claim of institutionally scripted roles existing without any core or larger unity of self, allows for an alternative conception of integrity envisioned as "a complex unity, stitched together with a great deal of self-deception that allows us to deny inconsistencies and the dissonance they induce."[296]

3. Integrity

Under his alternative conception, Luban imagines integrity in terms of personal adherence to a set of right or reasonable principles.[297] Adherence entails not only keeping principles intact, but also bringing actions into conformity with principles. To Luban, the ethical value of integrity derives from the experience of harmony or equilibrium between values and

290. *Id.* at 281.

291. *Id.*

292. *See id.* (Stanford Prison Experiment); *id.* at 282 (Milgram experiment and Isen and Levin experiment).

293. *Id.* at 283.

294. DAVID LUBAN, *The Ethics of Wrongful Obedience*, *in* LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 22, at 237, 245–48.

295. *Id.* at 246–47.

296. LUBAN, *Integrity*, *supra* note 279, at 285.

297. *Id.* at 286–87.

actions.[298] In evaluating that experience, however, he admits that the quest for integrity and the process of self-rationalization seem almost indistinguishable.[299] Lacking a clear distinction between integrity and role-induced rationalization in lawyer decision-making, Luban recommends three remedial strategies: line-drawing, counter-intuitive reflection, and chronic skepticism.[300]

In the context of defending the Jena Six, line-drawing requires boundaries demarcating colorblind, race-coded, and race-conscious forms of advocacy. The boundaries mark the limits of race-based, adversarial ruthlessness in criminal-defense cases. That institutional limitation on the duties of partisan advocacy and the role obligations of professionalism rise out of the serious, countervailing moral obligation to honor racial dignity, identity, and community.

Counter-intuitive reflection demands uncovering client dignity in the experience of humiliation, uncovering client subjectivity in the experience of objectification, and uncovering client resistance in the experience of subordination. Lawyer acts of uncovering demonstrate a willingness to take client cares and commitments seriously in advocacy instead of overriding those commitments and humiliating clients for paternalistic reasons, even when those reasons safeguard client life and liberty.

Chronic skepticism dictates challenging the need for lawyer-directed client humiliation or lawyer-counseled client self-humiliation in advocacy. That challenge casts doubt on the presumption that lawyers must fulfill their role obligations in the face of competing commitments to the ordinary morality of human dignity. Ordinary morality demands the respectful treatment of clients as rights-bearers and, thus, proscribes self-alienation and the degradation of individual subjectivity. Distilled from Luban, these cognitive and interpretive strategies construct a Socratic "stance of perpetual doubt toward one's own pretensions as well as the pretensions of others" in the world, a stance that instills the crucial "habit of doubting one's own righteousness, of questioning one's own moral beliefs, of scrutinizing one's own behavior."[301]

VI. CONCLUSION

Like the prosecution of the Jena Six, the defense of the Jena Six raises difficult questions about race embedded "within the professional norms, practice traditions, and ethics rules of the criminal justice system."[302] And, like its predecessor, this Article addresses those questions in the context of

298. *Id.* at 267, 274.

299. *Id.*

300. *Id.* at 286–88, 296–97.

301. LUBAN, *Integrity*, *supra* note 279, at 285–97.

302. Alfieri, *supra* note 3, at 1308.

the de jure and de facto racial segregation of LaSalle Parish. Emerging studies of the legal profession in the contexts of antebellum and postbellum segregation continue to encounter both colorblind and color-coded claims espoused by prosecutors and defenders, especially the contention of the "natural" criminal pathology of black male offenders and the corresponding narrative denigration of the mental capacity and moral character of black offenders and their communities. Both kinds of race-based identity claims shape the image and story of offenders, victims, and affected communities. The adversarial "embrace" of humiliating race-based identity claims by prosecutors and defenders underscores the importance of the "call for the preservation of dignity in the relationships defined by the law, legal agents, and sociolegal institutions" of the prosecution and defense function and the criminal-justice system more generally.[303] When applied here and elsewhere to the contemporary civil-rights movement and joined with critical theories of race, that "call condemns the identity-degrading and community-disempowering relationships" of both prosecutors and defenders with varied "black offenders and offender communities."[304]

Beyond condemnation, this Article also strives for the "elaboration of a difference-based, antisubordination account of legal ethics and lawyer roles."[305] Indeed, the goal here is to craft alternative civil-rights and criminal-justice approaches to noose-related incidents of racial violence. To that end, it "draws on the identity norms of the civil-rights movement and critical race theory to counter the marginalization of people in legal relationships marked by differences of class, gender, or race."[306] This derivation, I have argued, and the enunciation of a "transformative account of legal ethics and lawyer roles that emphasizes the normative values of difference-based identity and community-driven legal–political resistance to the humiliation of racial inequality enhances human dignity and returns lawyers to a racialized world of moral ambiguity."[307] Enhancement crystallizes the "hard dilemmas" fueled by the "self-deceptions, mixed motives, and good intentions" of advocacy, ineluctably pushing prosecutors and defenders "outside the facile role of neutral partisanship into the moral complexity of ethical judgment."[308]

As I have pointed out previously, Luban "reinstills the ideal of moral activism into the ordinary work" of lawyer defenders battling the 2006 prosecution of the Jena Six in LaSalle Parish, Louisiana.[309] His "ideal locates

303. *Id.*

304. *Id.*

305. *Id.* at 1309.

306. *Id.*

307. Alfieri, *supra* note 3, at 1309.

308. *Id.*

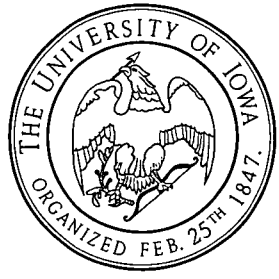
309. LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 22, at 12; Alfieri, *supra* note 3, at 1309.

moral responsibility for injustice in the daily practice of law"—interviewing, counseling, and trial advocacy. By attending to "the work of lawyers in ordinary practice," Luban shows how prosecutors and defenders "exercise good and bad judgment" based on insider and outsider perspectives toward "moral obligation."[310] As before, Luban to some extent cedes "priority to insider role obligation" citing "reasons of moral psychology and professional coherence," thereby treating "role obligation as a baseline presumption that may be rebutted and overridden" by strong outsider "moral reasons," including the "common morality" of affirming racial dignity, expressing racial identity, and empowering racial community.[311]

In this significant way, Luban's dignitary conception advances the development of a difference-based, antisubordination account of legal ethics and lawyers' roles, integrating racial identity and human-dignity norms and merging non-humiliation and antisubordination narratives. To be sure, identity-affirming normative integration and narrative incorporation in the "special case" of criminal-defense practice where, as here, zealous advocacy serves the atypical political ends and social goals of curtailing the state's power to prosecute and to punish its most vulnerable citizens—in this case among the Jena Six—present difficult moral dilemmas. These advocacy dilemmas set the political goal of safeguarding liberty and the social goal of legal justice against the legal–political norms of affirming racial dignity, expressing racial identity, and empowering racial community. Remembering the days of Jim Crow racial bondage enables defenders to break role in collaboration with offenders and offender communities in pursuit of Luban's dignitary conception of ethics and to resolve cooperatively the enduring dilemmas of race in the criminal-justice system.

310. LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 22, at 13; Alfieri, *supra* note 3, at 1309.

311. LUBAN, *Upholders of Human Dignity*, *supra* note 23, at 73; Alfieri, *supra* note 3, at 1309.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