

ESSAY

PROSECUTING THE JENA SIX

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INTRODUCTION

"You just never was a man."¹

This Essay explores the racial norms animating the prosecution of the Jena Six in LaSalle Parish, Louisiana, a set of norms I will call Jim Crow legal ethics. By Jim Crow legal ethics, I mean the professional norms of practice in a time of de jure or de facto racial segregation.² Historically segregated since the nineteenth century, the town

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I also wish to thank Leslie Armendariz, Freddy Funes, Karen Shafir, Robin Schard, and the University of Miami School of Law library staff for their research assistance, as well as Jennifer Roberts, Charles Stern, Ashley Miller, Brendan Mahan, and the editorial staff of the *Cornell Law Review* for their commitment to the scholarship of legal ethics.

¹ WALT HARRINGTON, *CROSSINGS: A WHITE MAN'S JOURNEY INTO BLACK AMERICA* 326 (1992) (quoting Bienville Kees on growing up in Jena, Louisiana).

² Earlier studies of the professional norms of practice in a time of de jure or de facto racial segregation focused primarily on the judiciary. See, e.g., ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 8–28, 131–47 (1975); J.W. PELTASON,

of Jena is divided culturally, socially, and geographically along a postbellum color line.³ That line informed the practice norms of LaSalle Parish District Attorney Reed Walters in prosecuting the Jena Six.

The prosecution of the Jena Six, and the legal-political controversy that ensued, implicates themes deftly parsed in David Luban's new book, *Legal Ethics and Human Dignity*.⁴ An elegant and prolific scholar of legal ethics,⁵ Luban's work is distinguished equally by its keen moral discernment of the lawyering process and by its clear-eyed embrace of the legal profession, notably including clinical legal education.⁶ In *Legal Ethics and Human Dignity*, Luban links the profession to the preservation of dignity in the relationships defined by law, legal agents, and sociolegal institutions, relationships forged in the context of the criminal justice system discussed here.⁷

Enlarging that embrace, this Essay evaluates the prosecution of the Jena Six against three conceptions of professional norms applicable to the criminal justice system: (1) District Attorney Reed Walters's colorblind conception, (2) Luban's dignitary conception, and (3) a difference-based, outsider conception. Walters's conception presents

FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 3–29 (1978). See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 470–72 (1976), for an example of an early study that focuses on civil rights litigation during the post-*Brown* era of remedial implementation. More recent studies explored segregation-era professional norms in the context of civil rights litigation and bar regulation. See, e.g., MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 70–81 (1987); Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97, 97–100 (2002). Nonetheless, few studies considered the roles of prosecutors, defenders, and state bar rules in regulating criminal justice norms of practice during periods of racial segregation. For examples of the studies that considered role, regulation, and criminal justice, see PAUL D. NELSON, FREDRICK L. MCGHEE: A LIFE ON THE COLOR LINE, 1861–1912, at 12–24, 50–66 (2002); Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809, 817 (2000); 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). This Essay sketches the outlines of a larger contemplated project on Jim Crow legal ethics in American history.

³ See Andrew Stephen, *The Deep South, the White Tree, the Noose*, NEW STATESMAN, Oct. 29, 2007, at 26.

⁴ DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* (2007) [hereinafter LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*].

⁵ See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988) [hereinafter LUBAN, *LAWYERS AND JUSTICE*]; LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 4 (collecting selected essays from Luban's recent work); see also, e.g., DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* (4th ed. 2004).

⁶ See, e.g., David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 31 (1995).

⁷ 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 4, at 65, 65–95 [hereinafter LUBAN, *Upholders of Human Dignity*].

a traditional, colorblind account of legal ethics and lawyers' roles.⁸ Under this functional account, race-neutral norms of adversarial competition shape the roles and relationships among prosecutors, offenders, and offender communities. Neutrality allows prosecutors to treat the race of offenders and offender communities as immaterial. Likewise, neutrality permits prosecutors to treat race relations between offenders and victims, and between offender-victim communities, as inconsequential. Locating race outside law and the criminal justice system artificially immunizes prosecutors from bias and insulates the adversary process from prejudice.

By contrast, Luban's conception of professional norms provides a naturalized account of legal ethics and lawyers' roles such that human dignity operates "as a relationship among people in which they are not humiliated."⁹ Under this contextual account, human dignity exists in "relations among people, rather than as a metaphysical property of individuals."¹⁰ To Luban, legal institutions and their agents "violate human dignity when they humiliate people."¹¹ In this way, "non-humiliation" stands as "a common-sense proxy for honoring human dignity."¹² The opportunity to honor human dignity occurs regularly throughout the lawyering process in the criminal justice system; for example in the charging, trying, and sentencing of offenders.

An outsider conception, by comparison, offers a difference-based, anti-subordination account of legal ethics and lawyers' roles. This race-conscious account draws on the identity norms of the civil rights movement and critical theories of race to resist the marginalization of people in legal relationships marked by their differences in class, gender, or race. Synonymous with humiliation, marginalization damages human dignity by casting a person as inferior or by reducing a person to the status of an object. More post-modern than Luban's conception,¹³ Critical Race Theory and its progeny LatCrit Theory¹⁴ furnish

⁸ See Reed Walters, Op-Ed., *Justice in Jena*, N.Y. TIMES, Sept. 26, 2007, at A27.

⁹ LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 4, at 6.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Modernism encompasses philosophical and aesthetic traditions. See David Luban, *Legal Modernism*, 84 MICH. L. REV. 1656, 1656 (1986) (classifying Critical Legal Studies as a form of "legal modernism"). See generally DAVID LUBAN, LEGAL MODERNISM (1994) (discerning the elements of legal modernism in the trial of Dr. Martin Luther King, the Nuremburg trials, and various Greek trials). Outsider conceptions draw on both modern and post-modern strands of jurisprudence. See Anthony V. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805, 835–36, 844 (2008).

¹⁴ "LatCrit Theory discerns a broad unity of identity and narrative in the splintered experience of Latinos. In the criminal justice system, that experience merges with the subordination of other communities of color in selective state prosecution and prosecutorial racism." Anthony V. Alfieri, *Color/Identity/Justice: Chicano Trials*, 53 DUKE L.J. 1569, 1599–1600 (2004) (book review).

rich sociolegal studies of race and racism to locate and overturn subordinating racial identities and racialized narratives in law, culture, and society.¹⁵ The studies disclose anecdotal and empirical evidence of bias and discrimination in colorblind and color-coded forms of legal advocacy and adjudication. Culled together, they 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.

This Essay is divided into four parts. Part I describes the legal and political history of the Jena Six. Part II considers the prosecution of the Jena Six under District Attorney Walters's colorblind conception of prosecutorial discretion. Part III analyzes the same prosecution under Luban's dignitary conception. Part IV revisits that prosecution in light of a race-conscious outsider conception favoring dignity-restoring relations over identity-degrading and community-disempowering relations.

I

THE HISTORY OF THE JENA SIX

“[T]he noose is among the most repugnant of all racist symbols.”¹⁶

The history of the Jena Six echoes the racial history of Jena, Louisiana. The small, racially segregated town of Jena falls within LaSalle Parish in central Louisiana.¹⁷ The town contains an estimated population of 3,000 people, more than 85 percent of whom are white.¹⁸ Town housing, churches, and cemeteries lie “rigidly segregated.”¹⁹

A. Jena High School

During an assembly at Jena High School in late August 2006, a black male student asked an assistant principal if the school would permit black students to sit beneath the lone tree in the center of the campus square.²⁰ The principal replied: “You know you can sit any-

¹⁵ See Anthony V. Alfieri, *Black and White*, 85 CAL. L. REV. 1647, 1650–51 (1997) (reviewing CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995) and CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995)); Anthony V. Alfieri, *Teaching the Law of Race*, 89 CAL. L. REV. 1605, 1607–09, 1624 (2001) (reviewing RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (Juan F. Pera et al. eds., 2000)).

¹⁶ *Williams v. New York City Hous. Auth.*, 154 F. Supp. 2d 820, 824 (S.D.N.Y. 2001).

¹⁷ See Stephen, *supra* note 3, at 26.

¹⁸ U.S. CENSUS BUREAU, 2000 CENSUS OF POPULATION AND HOUSING: LOUISIANA 259 (2001), available at <http://www.census.gov/prod/cen2000/dp1/2kh22.pdf>.

¹⁹ Stephen, *supra* note 3, at 26.

²⁰ See *Chronological Order of Events Concerning the “Jena Six,”* JENA TIMES, 2007, at 1, (on file with author).

where you want.”²¹ The next morning two nooses were found hanging from the tree. School officials quickly removed the nooses, conducted an investigation, and suspended three white students.²² The officials characterized the nooses as a “prank” instigated without racial motivation, adding that the students “had no knowledge of the history concerning nooses and black citizens” and “really were very remorseful.”²³ A local, FBI-bolstered criminal investigation concluded that the incident warranted neither federal nor state criminal charges.²⁴ The Civil Rights Division of the Louisiana U.S. Attorney’s Office reached the same conclusion.²⁵

In early September, racial tensions at Jena High School erupted into student interracial fighting on campus.²⁶ School officials summoned Jena Police Department and LaSalle Parish Sheriff Department officers to patrol the campus and invited District Attorney Walters to address an assembly during which he warned students of the threat of criminal prosecution.²⁷ School officials also instituted a school-wide “lock-down” and mounted an on-campus search for weapons.²⁸ On November 30, the school’s main, two-story academic building suffered widespread damage in an arson-ignited fire.²⁹ Soon after, on December 4, a group of seven black students led by sixteen-year-old Mychal Bell attacked a white male student, Justin Barker, on campus, beating him unconscious.³⁰ Reportedly, Barker had taunted Bell’s friend Robert Bailey in the school gym at lunchtime “for having had his ‘ass whipped’ by a white man the previous Friday night” in town.³¹ Sheriff Department detectives arrested Bell, Bailey, Theodore Shaw, Carwin Jones, Bryant Purvis, and two juveniles on charges of second-degree battery.³² Bond for the seven students ranged from \$60,000 to \$138,000.³³

²¹ *Id.*

²² *See id.* at 1–2.

²³ *Id.* at 2, 3.

²⁴ *See id.* at 2, 18.

²⁵ *See id.*

²⁶ *See id.* at 4.

²⁷ *See id.* at 7–9. Many black students attending the assembly perceived Walters’s threats of prosecution to be directed at them. *See id.* at 9.

²⁸ *See id.* at 4–5.

²⁹ *See id.* at 11.

³⁰ *See id.* at 13–14.

³¹ *See* Stephen, *supra* note 3, at 27.

³² *See Chronological Order of Events Concerning the “Jena Six,” supra* note 20, at 14. The Louisiana Criminal Code defines second-degree battery as “a battery committed without the consent of the victim when the offender intentionally inflicts serious bodily injury.” LA. REV. STAT. ANN. § 14:34.1 (2007).

³³ *Chronological Order of Events Concerning the “Jena Six,” supra* note 20, at 14.

B. Legal Proceedings

Following the arrest of the seven black students, District Attorney Walters amended his criminal indictment to include new, more serious charges of conspiracy to commit second-degree murder and attempted second-degree murder.³⁴ Walters charged Bell as an adult rather than as a juvenile,³⁵ citing his prior criminal record and probationary status.³⁶ At trial in June 2007, an all-white jury convicted Bell of aggravated second-degree battery and conspiracy to commit aggravated second-degree battery.³⁷

In July, the U.S. Attorney, Donald Washington, and the FBI announced that a wide-ranging investigation of the Jena school system, police department, sheriff's department, district attorney's office, and the 28th Judicial District Court system had not produced evidence of civil rights violations germane to any of the incidents in Jena during 2006—including the noose incident.³⁸ Walters subsequently reiterated this conclusion, finding no evidence of a federal or state offense.³⁹ Both federal and state officials denied any link between the campus nooses, the school fire, and the black-on-white student assault.⁴⁰

On appeal in August 2007, the Louisiana Third Circuit Court of Appeals reversed Bell's conviction, vacated the conspiracy charge, and referred the case to juvenile court for a new trial.⁴¹ In September 2007, after 10 months in jail, Bell obtained his release on a \$45,000 bond.⁴²

C. Political Protest

Political protest around the Jena Six involved students, parents, church ministries, and civil rights activists. Black students initiated

³⁴ See *id.* The Louisiana Criminal Code defines second-degree murder as "the killing of a human being: (1) When the offender has a specific intent to kill or to inflict great bodily harm." LA. REV. STAT. ANN. § 14:30.1A (2007). The Criminal Code defines criminal conspiracy as "the agreement or combination of two or more persons for the specific purpose of committing any crime; provided that . . . one or more of such parties does an act in furtherance of the object of the agreement or combination." *Id.* § 14:26A. To hold a person "guilty of an attempt to commit the offense intended," the Code requires evidence of "a specific intent to commit a crime" and the commission or omission of "an act for the purpose of and tending directly toward the accomplishing of his object." *Id.* § 14:27A.

³⁵ See *Chronological Order of Events Concerning the "Jena Six," supra* note 20, at 14, 19.

³⁶ See Walters, *supra* note 8, at A27.

³⁷ See *Chronological Order of Events Concerning the "Jena Six," supra* note 20, at 18.

³⁸ See *id.*

³⁹ See *id.* at 19–20.

⁴⁰ See *id.* at 15, 17.

⁴¹ See *State v. Bell*, No. KW 07-01106, 2007 La. App. Unpub. LEXIS 59, at *1–2 (Sept. 5, 2007). Walters announced that he would appeal the decision to the Louisiana Supreme Court. See *Chronological Order of Events Concerning the "Jena Six," supra* note 20, at 20.

⁴² See *id.* at 20; *Teenager Released in Louisiana Case*, N.Y. TIMES, Sept. 28, 2007, at A21.

protests in September 2006, gathering “in an act of solidarity” beneath the “hangman” tree on the Jena High School campus square.⁴³ Black parents subsequently joined with their children in attending protest rallies at the L&A Missionary Baptist Church and Good Pine Middle School.⁴⁴ 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 all denominations.⁴⁵ This alliance published an interracial resolution in the local newspaper, encouraged their members to pray for peace, and organized a prayer vigil at Jena’s four public schools.⁴⁶ At Jena High School, more than 200 people from all denominations and racial groups joined hands in a prayer meeting.⁴⁷ Later, at the Guy Campbell Memorial Football Stadium, approximately 600 Jena residents assembled for a community-wide prayer and unity service sponsored by local ministries.⁴⁸ National black leaders—the Reverend Jesse Jackson, the Reverend Al Sharpton, and Martin Luther King, III—participated in local protests.⁴⁹

In March 2007, civil rights activists mobilized more than 100 people at Antioch Baptist Church near Jena to form the LaSalle Branch of the NAACP and the Jena Six Defense Committee.⁵⁰ Additionally, in March and July, scores of people attended “Free the Jena Six” rallies at the LaSalle Parish Courthouse in Jena in collaboration with the American Civil Liberties Union, the NAACP, and the National Action Network. In September 2007, 15,000 people attended a rally in support of the Jena Six. Protesters traveled to Jena from throughout the nation and abroad.⁵¹

II

DISTRICT ATTORNEY WALTERS’S COLORBLIND CONCEPTION

“I am a small-town lawyer and prosecutor.”⁵²

The indictment of the Jena Six illustrates a postbellum, Jim Crow conception of prosecutorial ethics common to situations of de facto segregation. That partitioned conception of race relations influenced District Attorney Walters’s use of prosecutorial discretion in charging Bell with conspiracy to commit second-degree murder and attempted

43 See *Chronological Order of Events Concerning the “Jena Six,” supra* note 20, at 3.

44 See *id.*

45 See *id.* at 15.

46 See *id.* at 16.

47 See *id.*

48 See *id.*

49 See *id.* at 19.

50 See *id.* at 17.

51 See *id.* at 17–18.

52 Walters, *supra* note 8, at A27.

second-degree murder, demanding that Bell stand trial as an adult, selecting an all-white jury, declining prosecution of the school noose incident, and rejecting alternative sentencing for Bell in a Louisiana Community Rehabilitation Center.⁵³ Tainted by both identity-degrading and community-disempowering consequences, Walters's crucial judgments resulted from role-specific professional norms, practice traditions, and ethics rules.⁵⁴

A. Practice Traditions

The professional norms that shaped Walters's prosecution of the Jena Six draw on practice traditions of prosecutorial discretion predicated on the separation of law and politics, legal positivism, and racial decontextualization.⁵⁵ Prosecutorial discretion guides the role and function of district attorneys in investigating, charging, and sentencing criminal offenders.⁵⁶ Prosecutors' role is to make independent judgments of legality and justice.⁵⁷ Their function is to enforce the law and to promote justice.⁵⁸ For district attorneys like Walters, both role and function command the separation of law and politics.

During the Jena Six prosecution, Walters publicly questioned the need for a new civil rights movement in Jena, Louisiana.⁵⁹ Disparaging the "thousands" of "young African-Americans" for their "vanguard" belief in "a new civil rights movement," he differentiated his "16 years" of legal experience as "a small-town lawyer and prosecutor" from the "cause" of "social activists" and "politicians."⁶⁰ The "job" of the district attorney, he insisted, was "to review each criminal case brought . . . by the police department or the sheriff."⁶¹ Charged with this passive, mechanical function, a district attorney must attempt to

⁵³ See *Chronological Order of Events Concerning the "Jena Six," supra* note 20, at 20. Community Rehabilitation Centers are facilities operated and maintained by the Louisiana Department of Corrections "for prisoners who have strong rehabilitation potential." LA. REV. STAT. ANN. § 15:1131A (2007).

⁵⁴ See ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* 45 (1999) (discussing the moral "nexus of obligations, values, and goods" related to social roles).

⁵⁵ See ALASDAIR MACINTYRE, *AFTER VIRTUE* 199–201 (2d. ed. 1984) (defining the activity of practice). On the significance of tradition in law and legal practice, compare Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1047–48 (1990) (amplifying Edmund Burke's defense of traditionalism), with David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1057–60 (1991) (examining the justification of traditionalism).

⁵⁶ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.8 (2004).

⁵⁷ See R. MICHAEL CASSIDY, *PROSECUTORIAL ETHICS* 2–5 (2005) (discussing the prosecutor's role-specific obligation "to pursue a just result through a fair process").

⁵⁸ See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 3-1.2 (3d. ed. 1993).

⁵⁹ Walters, *supra* note 8, at A27 ("Whether America needs a new civil rights movement I leave to social activists, politicians and the people who must give life to such a cause.").

⁶⁰ *Id.*

⁶¹ *Id.*

“match the facts to any applicable laws and [to] seek justice for those who have been harmed.”⁶² Doing so effectively depends on local knowledge and dispassionate reasoning.⁶³ Walters noted that outsiders like “the 10,000 or more protesters who descended on Jena . . . after riding hundreds of miles on buses” misunderstood Jena’s “town of 3,000 people” and had misplaced their anger.⁶⁴

Walters’s separation of law and politics rests on claims of legal positivism. Publicly, Walters claimed to be “bound to enforce the laws of Louisiana as they exist today, not as they might in someone’s vision of a perfect world.”⁶⁵ Under this pragmatic logic, the “plac[ement] of the nooses on the schoolyard tree” in LaSalle Parish “broke no law” for purposes of either a “stand-alone offense” or a “hate crime.”⁶⁶ In drafting the criminal code, Walters observed, the Louisiana Legislature addressed crimes motivated by race “in a way that d[id] not cover what happened in Jena.”⁶⁷ In fact, he remarked, “the United States attorney for the Western District of Louisiana, who is African-American, found no federal law against what was done.”⁶⁸ Because legislatively delegated powers limit a district attorney’s actions, Walters explained, he “cannot take people to trial for acts not covered in the statutes.”⁶⁹ Unchecked prosecutorial power, he cautioned, would result in “the trampling of individual rights.”⁷⁰

Walters’s commitment to legal positivism and the separation of law and politics worked to decontextualize the nature of racial violence at Jena High School. To Walters, Bell’s on-campus assault of Barker constituted a race-neutral incident in spite of its black-on-white form. On this colorblind reading, neither the race of the victim nor the race of the offender was factually relevant. Without racial context, the event materialized as a sudden act of random violence inflicted by a group of young black males led by a black, habitual offender. Indeed, in characterizing the Bell assault, Walters commented: “Imagine you were walking down a city street, and someone leapt from behind a

62 *Id.*

63 *See id.* (“I can understand the emotions generated by the juxtaposition of the noose incident with the attack on Mr. Barker and the outcomes for the perpetrators of each.”).

64 *Id.* (“Their anger at me was summed up by a woman who said, ‘If you can figure out how to make a schoolyard fight into an attempted murder charge, I’m sure you can figure out how to make stringing nooses into a hate crime.’”).

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.* (“The hate crime statute is used to enhance the sentences of defendants found guilty of specific crimes, like murder or rape, who chose their victims based on race, religion, sexual orientation or other factors.”).

70 *Id.*

tree and hit you so hard that you fell to the sidewalk unconscious. Would you later describe that as a fight?"⁷¹

The racial objectivity implicit in this description echoed in Walters's prosecutorial narratives of the guilt and innocence of the Jena Six offenders and victim. For Walters, Bell's guilt and "adult status" resulted from his "role as the instigator of the attack, the seriousness of the charge and his prior criminal record."⁷² Barker's innocence, in contrast, and his "all but forgotten" victim status, resulted from "credible evidence" that he "was not involved in the nooses incident" but was instead "blindsided and knocked unconscious by a vicious blow to the head" and then "brutally kicked by at least six people" while "lying on the ground unaware."⁷³ Put simply, for Walters, the incident at Jena High School was not about race.

B. Ethics Rules

The ethics rules that regulated Walters's discretion in prosecuting the Jena Six stem from the Louisiana Rules of Professional Conduct. Background rules framing that discretion come from the American Bar Association's (ABA) Model Rules of Professional Conduct and the ABA's Standards Relating to the Administration of Criminal Justice.⁷⁴ Specifically, Rule 3.8 of the Louisiana Rules of Professional Conduct governs the special responsibilities of prosecutors.⁷⁵ Under Rule 3.8, the prosecutor in a criminal case must "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."⁷⁶ Moreover, the prosecutor must "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."⁷⁷

Walters's actions and comments surrounding the prosecution of the Jena Six challenge the ethical bounds of Rule 3.8. First, Walters's enhanced charges of conspiracy to commit second-degree murder and attempted second-degree murder⁷⁸ strain the requirement of probable cause. Likewise, his color-coded, extrajudicial comments⁷⁹ heighten the risk of *white* public condemnation.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See *Horaist v. Doctor's Hosp. of Opelousas*, 255 F.3d 261, 266 (5th Cir. 2001) (noting that the Louisiana Rules of Professional Conduct are "identical to the ABA's Model Rules of Professional Conduct in all relevant aspects").

⁷⁵ LA. RULES OF PROF'L CONDUCT R. 3.8 (2005) (codified at LA. REV. STAT. ANN. tit. 37, ch. 4 app., art. XVI, R. 3.8 (2007)).

⁷⁶ *Id.* R. 3.8(a).

⁷⁷ *Id.* R. 3.8(f); see MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(A) (1980) (discussing performing the duty of a public prosecutor)

⁷⁸ See *Chronological Order of Events Concerning the "Jena Six," supra* note 20, at 14.

⁷⁹ See *supra* notes 59–64 and accompanying text.

Louisiana Rule 8.4 also governs the conduct of prosecutors.⁸⁰ Under Rule 8.4, it is professional misconduct for a prosecutor to violate or attempt to violate the Louisiana Rules of Professional Conduct, engage in conduct involving dishonesty, deceit or misrepresentation, or engage in conduct that is prejudicial to the administration of justice.⁸¹ Both Walters's elevated charges and color-coded comments⁸² imply a degree of dishonesty. Further, his demand for an adult trial, selection of an all-white jury, refusal to prosecute the school noose incident, and rejection of alternative sentencing in the form of community rehabilitation⁸³ all carry potentially prejudicial consequences for the Jena Six.

The Model Rules of Professional Conduct define prosecutorial responsibilities broadly to encompass the prosecutor's role not only as "an officer of the legal system," but also as "a public citizen having special responsibility for the quality of justice."⁸⁴ That responsibility extends to "a lawyer's duty to uphold legal process."⁸⁵ To bolster the norms of legal process, "[a] lawyer should demonstrate respect for the legal system" and "should use the law's procedures only for legitimate purposes."⁸⁶ Neglect of these responsibilities, the Model Rules note, "compromises the independence of the profession and the public interest that it serves."⁸⁷ Additionally, personal conflicts can often arise between a lawyer's personal sense of honor and the lawyer's public responsibilities.⁸⁸ Resolution of such conflicts under the Model Rules turns on a lawyer's sound discretion applied "through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules."⁸⁹ Fundamental to these principles is "personal conscience."⁹⁰

⁸⁰ See LA. RULES OF PROF'L CONDUCT R. 8.4 (2005).

⁸¹ *Id.* R. 8.4(a), (c)–(d). In the same way, Model Rule 8.4 prohibits a lawyer from engaging in conduct involving dishonesty, deceit, or misrepresentation, and from engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice. See MODEL RULES OF PROF'L CONDUCT R. 8.4(c), (d) (2008).

⁸² See *supra* notes 59–64 and accompanying text.

⁸³ See *supra* notes 34–40 and accompanying text.

⁸⁴ MODEL RULES OF PROF'L CONDUCT pmb. para. 1 (2008). A Comment to Model Rule 3.8 explains that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate." MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2008).

⁸⁵ *Id.* pmb. para. 5.

⁸⁶ *Id.*

⁸⁷ *Id.* para. 12.

⁸⁸ See, e.g., FLA. RULES OF PROF'L CONDUCT pmb. (West 2005) ("Difficult ethical problems may arise from a conflict between a lawyer's responsibility to a client and the lawyer's own sense of personal honor, including obligations to society and the legal profession. The Rules of Professional Conduct often prescribe terms for resolving such conflicts.").

⁸⁹ MODEL RULES OF PROF'L CONDUCT pmb. para. 9 (2008).

⁹⁰ *Id.* para. 7. Additionally, Model Rule 3.3 prohibits a prosecutor from knowingly making a "false statement of material fact or law to a tribunal." *Id.* R. 3.3(a)(1). Likewise,

Amplifying the public responsibilities and process values of the Model Rules, the ABA Standards Relating to the Administration of Criminal Justice buttress the moral obligations of the prosecutorial function.⁹¹ By design, the standards “are intended to be used as a guide to professional conduct and performance.”⁹² Standard 3-1.2 defines the prosecutor as “an administrator of justice, an advocate, and an officer of the court” duty bound to “exercise sound discretion in the performance of his or her functions.”⁹³ It also declares that “[t]he duty of the prosecutor is to seek justice, not merely to convict.”⁹⁴ That duty includes the obligation “to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor’s jurisdiction.”⁹⁵

Strictly construed, neither the Louisiana Rules of Professional Conduct nor the ABA Model Rules or Standards Relating to the Administration of Criminal Justice address race in the present context. This race-neutral stance pervades long-standing prosecutorial norms and practice traditions⁹⁶ permitting the colorblind, and alternatively color-coded, tolerance of postbellum segregation to continue unabated. That tolerance and willful blindness underlies Walters’s identity-degrading decisions to ratchet up Bell’s criminal charges, to demand an adult trial, and to reject alternative sentencing. This same contrived ignorance of race also drives Walters’s community-disempowering decisions to select an all-white jury and to decline to prosecute others for the school noose incident.

III

PROFESSOR LUBAN’S DIGNITARY CONCEPTION

“[H]onoring human dignity requires not humiliating people.”⁹⁷

Luban’s dignitary conception illuminates Walters’s discretionary judgment in denigrating Bell’s racial identity and disempowering Jena’s black community. For Luban, good judgment turns on both a lawyer’s moral character and a lawyer’s cast of mind.⁹⁸ Denoted by

Rule 4.1 prohibits a prosecutor from knowingly making a false statement of material fact or law to a third person. *Id.* R. 4.1(a)–(b).

⁹¹ ABA STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION AND DEFENSE FUNCTION, Standard 3-1.1 to 3-6.2 (3d ed. 1993).

⁹² *Id.* Standard 3-1.1.

⁹³ *Id.* Standard 3-1.2(b).

⁹⁴ *Id.* Standard 3-1.2(c).

⁹⁵ *Id.* Standard 3-1.2(e).

⁹⁶ See Beverly McPhail, *Research Study Summary on Considering Hate Crime Enhancements in Charging Decisions*, PROSECUTOR, Sept.–Oct. 2006, at 30 (discussing prosecutors’ preference “to adopt a colorblind lens”).

⁹⁷ LUBAN, *Upholders of Human Dignity*, *supra* note 7, at 88.

⁹⁸ See DAVID LUBAN, *The Ethics of Wrongful Obedience*, in LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 4, at 237, 248.

openness⁹⁹ and social responsibility,¹⁰⁰ those qualities enable a prosecutor to render a “good judgment of people”¹⁰¹ tailored to the pursuit of the common good.¹⁰² Calibrations of the common good embodied in the ABA Model Rules and the ABA Standards Relating to the Administration of Criminal Justice entail moral activism. Luban urges morally activist lawyers to “sometimes refrain from zealously advancing lawful client interests even when the threat to third parties is minimal or even intangible, and even when the benefit to the client may be substantial.”¹⁰³ Specifically, he recommends avoiding the performance of “collectively harmful actions.”¹⁰⁴

On this account, moral activism carries the obligation “to engage the client in moral dialogue, to attempt not merely to save the client from the consequences of her deeds but to transform and redeem her.”¹⁰⁵ For a small-town, Southern prosecutor like Walters struggling to muster a “reasoned moral response” to a criminal offender’s “background, character, and crime,”¹⁰⁶ the command of moral redemption may risk too much state paternalism, erring toward “invasive preference.”¹⁰⁷ Luban defines an “invasive preference” as “an individual preference for an option that someone else has excluded as a matter of right.”¹⁰⁸ More typical of private-law relationships, exerting an in-

⁹⁹ Compare David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2620 (1995) (linking the settlement process to the values of openness, legal justice, and the creation of public goods), with Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (criticizing the settlement process for its sacrifice of important public values).

¹⁰⁰ See David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955, 955 (1995) [hereinafter Luban, *The Social Responsibilities of Lawyers*]; see also Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 264–66 (1990) (explicating the notion of the Progressive lawyer-statesman); David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 725 (1988) [hereinafter Luban, *The Noblesse Tradition*] (defining progressive professionalism); William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565, 565–66 (1985).

¹⁰¹ Luban, *The Noblesse Tradition*, *supra* note 100, at 725.

¹⁰² David Luban ascribes the idea of a universal common good to the “New Wave of progressive professionalist lawyers” in public interest law practice during the late 1960s and early 1970s. *Id.* at 731. By this logic, “lawyers could advance the public interest simply by pursuing their clients’ interests.” *Id.* at 733.

¹⁰³ Luban, *The Social Responsibilities of Lawyers*, *supra* note 100, at 955.

¹⁰⁴ *Id.* at 960.

¹⁰⁵ LUBAN, *LAWYERS AND JUSTICE*, *supra* note 5, at 163.

¹⁰⁶ Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325, 348 (1996) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)).

¹⁰⁷ See David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 487–93 (discussing lawyers who override clients’ values and preferences for nonmaximizing ends); see also William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083 (1988); Mark Spiegel, *The Case of Mrs. Jones Revisited: Paternalism and Autonomy in Lawyer-Client Counseling*, 1997 BYU L. REV. 307, 313–20.

¹⁰⁸ David Luban, *Social Choice Theory as Jurisprudence*, 69 S. CAL. L. REV. 521, 551 (1996).

vasive preference signals a lawyer's "act of taking utilitarian control of a client's story by placing [a] legal construct upon it."¹⁰⁹

Structurally, the prosecutorial function contemplates a substantial degree of state paternalism and invasive preference in enunciating victim, offender, and community stories within the boundaries of the rule of law. Luban links legal ethics to the rule of law. To Luban, "the rule of law relies on the professional ethics of lawyers."¹¹⁰ Bad faith and errant judgments risk damage to the profession and the law itself. Indeed, "lawyers can sin against the enterprise in which they are engaged."¹¹¹

Like many, Luban views the enterprise of law and lawyering as interpretive in their shared qualities of craft and community. He finds "craft values common to all legal interpretive communities."¹¹² Such values enable lawyers to "translat[e] client problems into the terms of the law" and to serve as "independent intermediaries between private and public interests."¹¹³ Both translation and mediation fare badly in the adversary context of the criminal justice system.¹¹⁴ By instinct, Luban stands wary of the violence of state power embedded in the criminal justice system, which is manifested in the form of disproportionate law enforcement resources and prosecutor-skewed criminal procedure.¹¹⁵ He ties the criminal law to mobilizing or threatening to mobilize the "instruments of state violence."¹¹⁶

The prosecution of the Jena Six mobilized the instruments of state violence to assault the human dignity of six young black males and an entire black community. Luban focuses on the lawyer's funda-

¹⁰⁹ Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063, 1098 (1997) (quoting Cathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law*, 61 BROOK. L. REV. 889, 918 (1995)). Compare David Luban, *What's Pragmatic About Legal Pragmatism?*, 18 CARDOZO L. REV. 43, 63 (1996) (pointing out the tension between pragmatic and dignitary claims in justifying the right against self-incrimination), with Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 170-89 (1990) (reviewing LUBAN, *LAWYERS AND JUSTICE*, *supra* note 5) (discussing the principle of client control in political lawyering).

¹¹⁰ DAVID LUBAN, *Natural Law as Professional Ethics: A Reading of Fuller*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 4, at 99, 100 [hereinafter LUBAN, *Natural Law*].

¹¹¹ *Id.* at 105.

¹¹² DAVID LUBAN, *The Torture Lawyers of Washington*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 4, at 198 [hereinafter LUBAN, *Torture Lawyers*].

¹¹³ DAVID LUBAN, *A Different Nightmare and a Different Dream*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 4, at 131, 159-60 [hereinafter LUBAN, *Nightmare and Dream*].

¹¹⁴ See DAVID LUBAN, *The Adversary System Excuse*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 4, at 19, 23-24 [hereinafter LUBAN, *Adversary System Excuse*]; see also Stephen McG. Bundy & Einer Richard Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and its Regulation*, 79 CAL. L. REV. 313, 320-35 (1991).

¹¹⁵ See David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1757-58 (1993).

¹¹⁶ David Luban, *Lawyers Rule: A Comment on Patterson's Theories of Truth*, 50 SMU L. REV. 1613, 1625 (1997).

mental role in enhancing and assaulting human dignity.¹¹⁷ He relates dignity to an individual's right to have "a story of one's own"¹¹⁸ and to have one's story heard.¹¹⁹ To be heard through legal representation is to have one's "subjectivity" acknowledged.¹²⁰ At bottom, individual subjectivity lies at the core of Luban's concern for human dignity.¹²¹

For the Jena Six offenders and for the communities of color in LaSalle Parish, race poses a "chronic threat[]" to relationships defined by law, legal agents, and sociolegal institutions, and to the very experience of subjectivity.¹²² Luban asserts that subjectivity encompasses the perceptions of individuals and communities as well as "their passions and sufferings, their reflections, their relationships and commitments, what they care about."¹²³ Everyone, he stresses, "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."¹²⁴ To deny dignity is to treat a person's story "as if it doesn't exist."¹²⁵ That is, to deny dignity is to discount a "point of view as if it were literally beneath contempt."¹²⁶ Good lawyers uphold client dignity by "telling the client's story and interpreting the law from the client's viewpoint"¹²⁷ and "by giving the client voice and sparing the client the humiliation of being silenced and ignored."¹²⁸

The extension of Luban's vision of lawyering as a dignifying-process to the prosecution function entangles prosecutors in victim-offender and offender-community conflicts. Unsurprisingly, Luban recognizes that the dignity of one individual may conflict with the dignity of another individual.¹²⁹ Mediating the clash of interests in prose-

¹¹⁷ Susan D. Carle, *Structure and Integrity*, 93 CORNELL L. REV. 1311, 1312 (2008) (addressing "'structural' concerns" in Luban's work, namely, "how lawyers' locations within institutions that organize access to power shape or should shape those lawyers' conduct"); W. Bradley Wendel, *Legal Ethics as "Political Moralism or the Morality of Politics*, 93 CORNELL L. REV. 1413, 1417 (2008).

¹¹⁸ LUBAN, *Upholders of Human Dignity*, *supra* note 7, at 70.

¹¹⁹ *See id.* at 71.

¹²⁰ *Id.*

¹²¹ *Id.* at 70–71.

¹²² *See* David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1028–29 (1990) [hereinafter Luban, *A Reply to Stephen Ellmann*] (urging the protection of individuals against public and private institutions that "pose chronic threats to their well-being").

¹²³ LUBAN, *Upholders of Human Dignity*, *supra* note 7, at 76.

¹²⁴ *Id.* at 89.

¹²⁵ *Id.* at 69.

¹²⁶ *Id.*

¹²⁷ *Id.* at 70; *see also* W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1169 (2005).

¹²⁸ LUBAN, *Upholders of Human Dignity*, *supra* note 7, at 72.

¹²⁹ *See* Luban, *A Reply to Stephen Ellmann*, *supra* note 122, at 1033–34 (describing the challenge that arises when a rape defendant's attorney must choose how harshly to cross-examine a rape victim); *see also* Katherine R. Kruse, *The Human Dignity of Clients*, 93 CORNELL L. REV. 1343, 1346 (2008).

cutting black-on-white cases of racial violence requires manageable conflict resolution procedures. Professor Kate Kruse points to Luban's lack of clarity in directing lawyers how "to resolve conflicts when upholding the client's human dignity by giving voice to the client's subjectivity amounts to an assault on the human dignity of another."¹³⁰ That vagueness burdens prosecutors in accommodating an identity-tailored and community-empowering rule of law in the criminal justice system.

Because the rule of law is a necessary condition for both human rights and human dignity,¹³¹ prosecutors play a vital role in securing these goods and in preserving the ethical character of the legal profession. Luban's interwoven analysis of the rule of law, human dignity, and ethical character suggests that prosecutors, defenders, and civil rights lawyers all share the common language, techniques, and texts of an interpretive community rooted in the criminal justice system. Crucial to the uniformity and stability of law, that common community casts prosecutors in the role of "architects of social structure"¹³² who ensure regularity, rationality, and safety. Prosecutors honor the concept of human dignity when they engage in relationships with offenders and offender communities that do not humiliate those individuals or groups.¹³³ Prosecutors assault human dignity and betray their own craft values when they divide their moral responsibility by racial affiliation and when they abet racial segregation.¹³⁴

Complicity in racial bias under the pretense of neutral partisanship converts prosecutors into state proxies for Jim Crow segregation. To Luban, neutral partisanship is grievously non-accountable.¹³⁵ Denouncing aggressive claims of neutral partisanship, he rejects lawyers' efforts to disclaim moral accountability on the pragmatic ground of adversarial zeal.¹³⁶ For Luban, the adversarial strengths of robust de-

¹³⁰ Kruse, *supra* note 129, at 1346. *See also id.* at 1357–58 ("The relational morality at the heart of Luban's human dignity framework problematically creates an intractable dilemma when one person's story competes head-on with that of another: the law cannot recognize and honor one story without silencing and dismissing the other.").

¹³¹ LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 4, at 1.

¹³² Lon L. Fuller, *The Lawyer as an Architect of Social Structures*, in THE PRINCIPLES OF SOCIAL ORDER 264 (Kenneth I. Winston ed., 1981).

¹³³ *See* LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 4, at 6 (citing AVISHAI MARGALIT, THE DECENT SOCIETY I (Naomi Goldblum trans., 1996)).

¹³⁴ For example, Luban examines "the work of the 'torture lawyers'—U.S. government lawyers whose secret memoranda loopholed the law to provide cover for the torture of War on Terror prisoners . . . [,] one of the most egregious cases in recent memory of lawyers twisting law to assault human dignity." *Id.*; *see also* David Luban, *Making Sense of Moral Meltdowns*, in MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT, AND POLICY 57, 57–75 (Deborah L. Rhode ed., 2006).

¹³⁵ *See* LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 4, at 9 ("Moral accountability is not something we can put on and take off like a barrister's wig.").

¹³⁶ *See generally* LUBAN, *Adversary System Excuse*, *supra* note 114, at 19 (reviewing various arguments defending the adversarial system).

bate and rational discussion fail to counterbalance the systemic weaknesses of evidence-obscuring incentives and morally cabined role differentiation.¹³⁷

Yet, rather than approve the “stripped-down, simplified moral code” that traditionally excuses neutral partisanship, Luban endorses “the messy, dilemma-ridden, ambiguous moral world” inhabited by “everyone else,” lawyer and non-lawyer alike.¹³⁸ Borrowing from Anthony Trollope’s *Orley Farm*, he investigates “situations of intense moral ambiguity” where noble and base motivations mix with good faith and self-deception for complex and sometimes indecipherable reasons.¹³⁹ The purpose of harnessing Luban’s vision of “moral judgment in a messy world”¹⁴⁰ is to resolve the “hard practical dilemmas”¹⁴¹ facing ordinary lawyers like District Attorney Walters. The content of this vision flows from the “ideal of moral activism” applicable to all lawyers—from small town prosecutors to large firm partners.¹⁴² Moral activism, Luban explains, “means accepting rather than denying moral responsibility for law practice, and therefore embracing the prospect that sometimes lawyers must confront their clients about the injustice of their causes.”¹⁴³

Even though routine, Walters’s work representing the people of LaSalle Parish, Louisiana in prosecuting young black offenders under conditions of de facto segregation demands the moral responsibility of good judgment. To pass muster under Luban’s vision of moral judgment, Walters’s prosecution “must somehow integrate, or at least alternate between, the outsider’s and insider’s perspectives.”¹⁴⁴ Role morality defines Walters’s insider, prosecutorial perspective. Common morality infuses the outsider, difference-based perspective of the Jena Six offenders, parents, and protesters. To maintain role coherence and to mitigate professional dissonance, Luban concedes “some presumption or priority to the demands of the [lawyer’s] role.”¹⁴⁵

¹³⁷ LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 4, at 9 (“Neutral partisanship sees lawyers as hired guns, whose duty of loyalty to their clients means they must, if necessary, do everything the law permits to advance their clients’ interests—regardless of whether those interests are worthy or base, and regardless of how much collateral damage the lawyer inflicts on third parties.”). On complicity, see generally CHRISTOPHER L. KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* (2000) (explaining the difficulties that complicity poses for theories of individual responsibility and collective action); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323 (1985) (describing complicity as a derivative form of liability).

¹³⁸ LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 4, at 11.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 12.

¹⁴² *Id.*

¹⁴³ *Id.* at 12.

¹⁴⁴ *Id.* at 13.

¹⁴⁵ *Id.* at 13–14 n.20.

However, that baseline presumption, he allows, “can be overridden by strong moral reasons to break the role.”¹⁴⁶

IV

A RACE-CONSCIOUS OUTSIDER CONCEPTION

“[P]ray for healing and unity for our community.”¹⁴⁷

A race-conscious outsider conception—deduced from the civil rights movement and critical theories of race—reshapes Walters’s prosecutorial discretion in the Jena Six case. Specifically, an outsider conception reshapes Walters’s discretion in charging Bell with more serious offenses, demanding Bell’s trial as an adult, selecting an all-white jury, declining prosecution of the school noose incident, and rejecting alternative rehabilitative sentencing. Race-conscious shifts in these discretionary acts stem from a repudiation of neutrality, a reintegration of law and politics, a recognition of legal possibility in criminal law and procedure, and a commitment to address race in historical context.

In contrast, when framed by neutral partisanship, Walters’s discretion hinges on the separation of law and politics, legal positivism, and colorblind decontextualization. Luban’s dignitary vision challenges these basic premises, recasting the criminal justice system in a dignity-protecting context and the prosecutorial role as a dignity-restoring relation. Engrafting this extrapolated vision on the prosecution of the Jena Six reveals the “moral properties”¹⁴⁸ of legal institutions like district attorneys’ offices. Such moral properties call for the treatment of offenders and offender communities as identity-bearing moral agents, and moreover, call for a moral relation between the state’s interests and a minority community’s interests. By reconceiving the role-specific duties of prosecutors and by heightening the countervailing moral obligation to recognize and value identity-based differences, Luban’s vision gives meaning to two historically overlooked categories of humiliating relationships within the criminal justice system: identity-degrading¹⁴⁹ relations between prosecutors and offenders, and community-disempowering relations between prosecutors and offender communities.

¹⁴⁶ *Id.*; see also David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424, 434–52 (1990) [hereinafter Luban, *Freedom and Constraint*]; David Wasserman, *Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation*, 49 MD. L. REV. 392, 395–404 (1990).

¹⁴⁷ *Chronological Order of Events Concerning the “Jena Six,” supra* note 20, at 17 (quoting Midway Baptist Church Pastor Rick Feazell).

¹⁴⁸ See LUBAN, *Natural Law, supra* note 110, at 118.

¹⁴⁹ For Luban’s treatment of the role of systematic degradation, see LUBAN, *Torture Lawyers, supra* note 112, at 190–92.

A. Identity-Degrading Relations

Identity-degrading relations emanate from Walters's prosecutorial decision to charge Bell with conspiracy and attempted second-degree murder, to demand Bell's trial as an adult, and to reject rehabilitative sentencing for Bell. Charging decisions, trial strategies, and sentencing recommendations all constitute acts of naming.¹⁵⁰ Walters attributed these discretionary acts to Bell's "role as the instigator of the attack" and to "his prior criminal record."¹⁵¹ Luban observes that the legal plausibility of such attribution "is a matter for case-by-case judgment by the interpretive community."¹⁵² He adds, however, that judgments of law "on the books" often benefit the "numerical or power majority in the community"¹⁵³ and disadvantage the powerless in the minority. Like Bell, Jena's minority community stands "legally mute,"¹⁵⁴ consigned to "the humiliation of being silenced and ignored"¹⁵⁵ because of postbellum racial degradation.

Postbellum, identity-degrading relations equate color—blackness—with natural inferiority, innate immorality, and pathological violence. The prosecution of the Jena Six degrades both individual offenders and the offenders' communities. Degradation occurs in story. Walters's story of black-on-white violence at Jena High School¹⁵⁶ acknowledges only Barker's individual subjectivity, ignoring Bell and the other participants. This omission discounts the passions and sufferings, reflections, relationships, and commitments of Bell and the other participants in town and at school. Central to personality, a story supplies a means to express client voice and a view for interpreting the law.¹⁵⁷ A story that ignores the voice of the offender and the offender's community in protesting the racially constructed meaning of an alleged "instigator" role, an imposed "adult" status, and a "prior criminal record" silences individual and collective claims to subjectivity. This silencing results in humiliation.¹⁵⁸

Walters's postbellum correlation of race and pathology in prosecuting the Jena Six demonstrates a lack of reflective judgment in pursuing the criminal justice goals of legality and justice.¹⁵⁹ His presumptive correspondence between race and criminal violence of-

150 See LUBAN, *Nightmare and Dream*, *supra* note 113, at 147–48.

151 Walters, *supra* note 8, at A27.

152 LUBAN, *Torture Lawyers*, *supra* note 112, at 193.

153 LUBAN, *Natural Law*, *supra* note 110, at 129.

154 LUBAN, *Upholders of Human Dignity*, *supra* note 7, at 69.

155 *Id.* at 72.

156 See Walters, *supra* note 8, at A27.

157 See LUBAN, *Upholders of Human Dignity*, *supra* note 7, at 70.

158 See *id.* at 72.

159 See LUBAN, *Nightmare and Dream*, *supra* note 113, at 135 (remarking that good judgment "requires sympathetic identification with alternatives") (citing Anthony T. Kronman, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 66–74 (1993)).

fers no assessment of the relative merits of Louisiana's state criminal justice goals and no consideration that the state's claims may favor different racial groups and outcomes. Furthermore, his association does not advance victim-offender conciliation goals such as encouraging forgiveness; nor does it advance integration goals such as promoting white-black cooperation. Instead, his correlative judgment fosters separation, preserves unequal relations, and retrenches interracial conflict.

Walters's identity-denigrating judgment finds safe harbor in the adversary system. Critics of the adversary system admit the presence of incidental errors in the performance of law enforcement, advocacy, and adjudication functions.¹⁶⁰ They also acknowledge systemic deficiencies in the structure of these functions.¹⁶¹ But confessing incidental and systemic error, however recurrent, understates the virulence of race in the criminal justice system. The grave normative consequences of denigrating racial identity in prosecuting black offenders relate not only to the experience of public humiliation, but also to the tendency to assign collective responsibility for lawbreaking to the black community as a whole.¹⁶² None of the Jena Six offenders stand apart from their identity-based community or escape the racial character of that community. Accordingly, the call for vengeance, sounded by the reprisal norms of adversarial justice against the Jena Six, reverberates throughout Jena's black community and reinforces white-black polarization.

Walters's adversarial pretense of neutrality relies on standard claims of lawyer partisanship and moral non-accountability. Prosecutorial claims of partisanship and moral non-accountability excuse color-coded discourse that degrades difference-based identity. Such claims serve the retributive interests of victims and majority communities; yet, they do little to redeem individual lawbreaking or to advance collective healing. They merely reinforce the divisions of postbellum racial partition, preserving invidious status distinctions without public endorsement. This coded, dissembling process violates prosecutorial norms of candor.¹⁶³

¹⁶⁰ See generally LUBAN, *Adversary System Excuse*, supra note 114 (detailing the problems with "neutral partisanship").

¹⁶¹ See, e.g., *id.* at 24-25 (discussing the recurring problem in an adversary system that "the zealous advocate" must "press the client's interests . . . regardless of the 'torments or destruction' this wreaks on others").

¹⁶² See, e.g., 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., 2000) ("[L]awless behavior by some blacks stigmatizes all and impedes collective progress.").

¹⁶³ See MODEL RULES OF PROF'L CONDUCT R. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.").

Candor in charging, trial strategy, and sentencing opens the prosecution of black-on-white violence to public debate. Situated against the backdrop of historical violence, that debate affords an opportunity to trace the sources of racial violence, to test its motivations, to experiment with restorative policies of redemption and reparation, and to contemplate reconciliation through cross-racial community dialogue. The prosecutorial *opportunity* to reconcile the competing merits of criminal justice goals and claims springs from the particularized circumstance of offenders and offender communities. These circumstances lay the groundwork for the day-to-day reformulation of the norms of legality and justice. Equality norms, manifested in even-handed treatment and a fair balance of public and private interests, rise prominently out of this groundwork.

During the Jena Six prosecution, for example, black high school parent Tracey Bowen remarked: “We’re all equal and we only want what is right. . . . What goes for one goes for all.”¹⁶⁴ Fulfilling equality norms requires the reframing of state goals and claims toward greater formal protection for minority groups under criminal and civil rights laws. Careful reframing better encompasses the identities, relationships, and social circumstances of offenders and offender communities.¹⁶⁵ Notions of conciliation, independence, and inclusive deliberation help guide the process of reframing. Constitutional values, such as due process and equal protection, link this process to the common good. That linkage works to restore the dignity of black offenders and offender communities, a relation integral to the reciprocal morality of citizenship.¹⁶⁶

B. Community-Disempowering Relations

Community-disempowering relations arise from Walters’s prosecutorial decision to select an all-white jury and to decline prosecution of the school noose incident. Luban mentions the often “cata-

¹⁶⁴ *Chronological Order of Events Concerning the “Jena Six,”* *supra* note 20, at 7 (quoting Jena High School black parent Tracey Bowen).

¹⁶⁵ See Simon, *supra* note 107, at 1107–08 (“If we define an issue narrowly in terms of a small number of characteristics of the parties and their dispute, it will often look different than if we define it to encompass the parties’ identities, relationship, and social circumstances.”); see also WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* 149, 150–56 (1998) (“An important aspect of ethical reflection is the description, or framing, of the issue.”).

¹⁶⁶ See generally Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465 (2002) (exploring the history, normative foundation, criticism, and application of community prosecution); Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809 (2000) (analyzing the relationship between race, lawyers, and the criminal justice system by looking at two recent and high-profile criminal trials); Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141, 1171–87 (2003) [hereinafter Alfieri, *Retrying Race*] (assessing prosecutorial discretion in the revival of cases involving white-on-black racially motivated violence during the 1950s and 60s).

strophic asymmetry between whom the law binds and whom the law helps.”¹⁶⁷ Noting “histories of slavery or legally explicit ethnic subjugation,”¹⁶⁸ he points out “pockets of oppressiveness”¹⁶⁹ in law and society. Walters’s selection of an all-white jury deepens the pocket of racial oppressiveness in LaSalle Parish, Louisiana. The asymmetry of a black offender and an all-white jury undermines community norms of equal protection and fair representation. Walters’s refusal to prosecute the school noose incident similarly wounds LaSalle Parish.¹⁷⁰ The asymmetry of punishing black-on-white violence and excusing white-on-black threats of violence undercuts norms of even-handed fairness.

Walters’s facially neutral decisions in jury selection and initial charging result in racially disparate consequences for LaSalle Parish’s black and white communities. These consequences curtail the value of difference-based dignity and equality interests. The selection of an all-white jury, for example, deprives black offenders and black offender communities of an opportunity to tell and to hear stories of racial passion and suffering, to evaluate racial relationships, and to judge racial commitments. The refusal to prosecute the school noose incident likewise deprives black communities of an opportunity to tell and hear stories of covert and overt white-on-black violence and threats of violence. Ignoring or silencing stories of historical indignity and inequality permits a culture of white-on-black intimidation to flourish.¹⁷¹ Louisiana’s historic failure to punish white violence and threats of violence preserves asymmetrical relationships of black socioeconomic inequality and political powerlessness.

Preventing white violence and threats of violence, and restoring black dignity in LaSalle Parish, requires the race-conscious regulation of public space. Prosecutors provide victims, offenders, and jurors access to public space at arraignment, trial, and sentencing. In trial stories, victims and offenders regain their sense of dignity through cultural and social narratives of empowerment. The civil rights movement demonstrates the strength of narratives of empowerment in combating public and private humiliation. The organization and mo-

¹⁶⁷ LUBAN, *Natural Law*, *supra* note 110, at 128.

¹⁶⁸ *Id.* at 127.

¹⁶⁹ LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 4, at 5.

¹⁷⁰ Potential grounds for prosecution available under Louisiana criminal law include inciting a felony, LA. REV. STAT. ANN. § 14:28 (2007), criminal trespass, § 14:63, disturbing the peace, § 14:103, and intimidation and interference in the operation of schools, §14:122.1.

¹⁷¹ See LUBAN, *Upholders of Human Dignity*, *supra* note 7, at 72 (mentioning “the humiliation of being silenced and ignored”).

bilization of a grassroots protest movement around the Jena Six shows the continuing force of such narratives.¹⁷²

C. Dignity-Restoring Relations

Dignity-restoring relations invoke the narratives of civil rights struggles to “break” from traditional conceptions of the prosecutorial role and function.¹⁷³ That break tempers the partisan zeal of prosecutors in charging, trial strategy, jury selection, and sentencing. The key to restoration is the incorporation of difference-based community into the prosecution process.¹⁷⁴ Incorporating the voices and stories of black offenders and offender communities within the public forums of law enforcement agencies, courts, and legislatures opens up the process of prosecutorial decision making to race-conscious civic participation.

Community participation in the formulation of prosecutorial goals and claims in cases of black-on-white and white-on-black violence challenges conventional theories of criminal justice.¹⁷⁵ Instead of simple punishment, participation may give rise to the consideration of alternative sanctions and prosecutorial strategies garnered from restorative and transitional justice experiments.¹⁷⁶ Restorative justice involves redemption and reconciliation.¹⁷⁷ Redemption demands contrition and atonement. Reconciliation compels forgiveness and mercy.¹⁷⁸ Both approaches integrate offenders, victims, and their adjoining communities through narratives of empathy.¹⁷⁹ Restorative narratives promote empathic understanding by telling stories of commonplace dignity and humiliation. At their best, the stories generate cross-racial dialogue in law, culture, and society.¹⁸⁰

The task of dignity-restoring relations is to foster dialogue between black and white communities about their mutual interests in redemptive forms of criminal justice. To that end, prosecutors like Walters must engage offenders, victims, and their joint communities

¹⁷² See Alfieri, *Retrying Race*, *supra* note 166, at 1185–99.

¹⁷³ Luban, *Freedom and Constraint*, *supra* note 146, at 451–52.

¹⁷⁴ See Alfieri, *Retrying Race*, *supra* note 166, at 1195–97.

¹⁷⁵ See *id.*, at 1196 (citing Kathleen Daly, *Revisiting the Relationship Between Retributive and Restorative Justice*, in *RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE* 33 (Heather Strang & John Braithwaite eds., 2000)).

¹⁷⁶ See *id.* (citing Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001); Dieter Rossner, *Mediation as a Basic Element of Crime Control: Theoretical and Empirical Comments*, 3 BUFF. CRIM. L. REV. 211 (1999)).

¹⁷⁷ See Alfieri, *Retrying Race*, *supra* note 166, at 1197.

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*

in a moral conversation about the meaning of human dignity in charging, trial strategy, jury selection, and sentencing. The multiplicity of difference-based identity enriches that conversation. In the same way, a diversity of cultural and social resources enlivens that conversation. Together they build common ground for sociolegal alliances in spite of historical status distinctions.

In segregated precincts, such as LaSalle Parish, individual and collective struggles to resist cultural, social, and political forms of subordination often translate into stories of racial violence. Likewise, the prosecutorial restoration of dignity in the offender-community relationships shaped by law and legal institutions turns on the spirit of resistance captured in stories. Restorative discretion searches out and affirms the core dignity behind those stories. That prosecutor-guided search is a practical and painful enterprise. It is practical because it unfolds in the ordinary course of routine criminal investigations, indictments, and trials. It is painful because it exposes the brutality of violence and the failure of law. To succeed, it must bring candor, collaboration, and a race-conscious conversation to communities accustomed to the silence of postbellum segregation.¹⁸¹

CONCLUSION

“This is not a social problem, but a spiritual problem that can only be solved by God.”¹⁸²

The prosecution of the Jena Six raises troubling questions about race within the professional norms, practice traditions, and ethics rules of the criminal justice system. This Essay addresses those questions broadly in the context of de facto racial segregation. Studies of the legal profession in the contexts of antebellum and postbellum segregation confront both colorblind and color-coded rules of ethics. Historical embrace and tolerance of such Jim Crow rules by federal and state prosecutors underscore the importance of Luban’s call for the preservation of dignity in the relationships defined by law, legal agents, and sociolegal institutions. Evaluating multiple conceptions of the prosecutorial function in terms of racial dignity and humiliation widens that call. When applied to the contemporary civil rights movement and integrated with critical theories of race, Luban’s call condemns the identity-degrading and community-disempowering relationships of prosecutors with black offenders and offender communities.

¹⁸¹ See *id.* at 1185–99.

¹⁸² *Chronological Order of Events Concerning the “Jena Six,” supra* note 20, at 14 (quoting Midway Baptist Church Pastor Rick Feazell).

Equally significant, Luban's call invites elaboration of a difference-based, anti-subordination account of legal ethics and lawyer roles, which 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. Elaboration 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. Resolving the hard dilemmas wrought by the self-deceptions, mixed motives, and good intentions of race pushes lawyers outside the facile role of neutral partisanship into the moral complexity of ethical judgment.¹⁸³

Luban's invocation of the theological tradition of Jewish ethics reinstalls the ideal of moral activism into the ordinary work of lawyers, including that of small town Southern prosecutors like District Attorney Walters. That ideal locates moral responsibility for injustice in the daily practice of law—in charging, jury selection, and sentencing. By placing greater emphasis on the work of lawyers in ordinary practice, Luban reveals how Walters and other prosecutors exercise good and bad judgment based on insider's and outsider's perspectives of moral obligation.¹⁸⁴ Although Luban gives some priority to role obligation for reasons of moral psychology and professional coherence, he treats role obligation as a baseline presumption that may be rebutted and overridden by strong moral reasons,¹⁸⁵ including, for example, the common morality of racial identity and community empowerment discussed here.

To break role in pursuit of common morality signifies an act of faith. Luban reopens the dialogue of faith and spirituality in law, society, and the legal profession. The prosecution of the Jena Six rekindles that dialogue among the grassroots ministries of Southern churches and lay activists. Heard in prayer and protest, the dialogue links spirituality to the practical resolution of the sociolegal dilemmas of race. As Pastor Dominick DiCarlo of Jena's First Baptist Church explained: "We're not here to talk about what has happened, but rather what we can do to address those issues from a spiritual basis."¹⁸⁶ Like his theological predecessors in legal ethics, Tom Shaffer and Mil-

¹⁸³ See LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 4, at 11.

¹⁸⁴ See *id.* at 13

¹⁸⁵ *Id.* at 13–14 n.20.

¹⁸⁶ *Chronological Order of Events Concerning the "Jena Six," supra* note 20, at 14. Pastor DiCarlo added: "This is a spiritual problem and there is no other institution appointed by God to deal with the heart problem of man other than His church." *Id.*

ner Ball,¹⁸⁷ Luban's turn to spirituality may be the only redemptive turn left in Jena, Louisiana.

¹⁸⁷ See Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319, 329 (1987) (asserting that a client "is capable of being and of becoming a good person"). See generally MILNER S. BALL, CALLED BY STORIES: BIBLICAL SAGAS AND THEIR CHALLENGE FOR LAW (2000) (explicating biblical stories in terms of their significance to the practice of law).