

ESSAY

LEGAL ETHICS AS “POLITICAL MORALISM” OR THE MORALITY OF POLITICS

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INTRODUCTION

As a law student with some background in moral philosophy and applied ethics, naturally I was drawn to thinking about the big ethical questions facing lawyers. “Read *Lawyers and Justice*, by David Luban,”¹ my legal ethics seminar professor suggested. I did, and I was immediately hooked. *Lawyers and Justice* was a powerfully argued, elegant, and persuasive refutation of the view that the obligation of zealous client representation alone exhausts a lawyer’s moral obligations. Professor Luban insisted that lawyers remain moral agents, fully subject to the requirements of ordinary morality, even when acting in a professional role.² If there is no moral justification for action taken in a professional capacity, such as withholding information that could save a person’s life if disclosed, then the lawyer must accept the criticism that would be leveled against a similarly situated nonprofessional.³ When I entered law teaching several years later, I decided that legal ethics was my scholarly calling, but Professor Luban’s work created a problem for me: What was left to say? Professor Luban and others had devastatingly criticized the “neutral partisanship” conception, that lawyers’ “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,”⁴ leaving it with no plausible philosophical underpinning. Lawyers continued to adhere to neutral partisanship, but the conventional wisdom among legal ethics theorists was that Professor Luban’s “moral activism” conception was the best way to understand the relationship between ordinary morality and legal ethics.

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¹ DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988) [hereinafter LUBAN, *LAWYERS AND JUSTICE*].

² *See id.* at 125.

³ *See id.* at 186, 233.

⁴ DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 9 (2007) [hereinafter LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*].

Professor Luban's outstanding new book *Legal Ethics and Human Dignity* nicely reflects the debate in academic legal ethics since the publication of *Lawyers and Justice*. *Legal Ethics and Human Dignity* preserves the core insight, that professionals remain subject to moral criticism unless they can muster a powerful moral justification for their actions.⁵ The new book also reflects a difference in emphasis in the legal ethics debate, by shifting focus from individual lawyers to lawyers working in organizations,⁶ and also clearly differentiating between two quite different theoretical problems. *Lawyers and Justice* addressed the first theoretical issue: The law governing lawyers and the positive morality of the profession require a lawyer to do something that would, for a non-lawyer, violate ordinary morality.⁷ The second problem arises in a case in which the law and professional norms pretty clearly prohibit some action, but lawyers violate the law because of various pressures. Professor Luban considers several examples, including the OPM frauds,⁸ lawyer misconduct in the *Berkey-Kodak* antitrust litigation,⁹ and the "torture memos" written by U.S. government lawyers in the Office of Legal Counsel (OLC), which supplied a bogus legal imprimatur for the commission of war crimes by the military and the CIA.¹⁰

Drawing from cognitive and behavioral psychology, and from the emerging literature on moral philosophy and psychology, the discipline of legal ethics has begun to take the second problem much more seriously.¹¹ Rejecting the facile explanation that lawyers engage in unethical conduct because they are bad people, scholars have attempted to understand: (1) The psychological mechanisms by which

⁵ See *id.* at 9–11.

⁶ See *id.* at 7–8.

⁷ See *id.* at xix–xx, xxii.

⁸ See DAVID LUBAN, *Contrived Ignorance*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 4, at 209, 209 [hereinafter LUBAN, *Contrived Ignorance*].

⁹ See DAVID LUBAN, *The Ethics of Wrongful Obedience*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 4, at 237, 238–39 [hereinafter LUBAN, *Wrongful Obedience*].

¹⁰ See DAVID LUBAN, *The Torture Lawyers of Washington*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 4, at 162, 162, 172–73 [hereinafter LUBAN, *Torture Lawyers*].

¹¹ See, e.g., MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004); Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 *VAND. L. REV.* 75 (1993); Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 *FORDHAM L. REV.* 773 (1998); William H. Simon, *Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct*, 22 *YALE J. ON REG.* 1 (2005). For moral philosophers considering the implications of experimental psychology for ethics, see, for example, JOHN M. DORIS, *LACK OF CHARACTER: PERSONALITY AND MORAL BEHAVIOR* (2002); OWEN FLANAGAN, *VARIETIES OF MORAL PERSONALITY: ETHICS AND PSYCHOLOGICAL REALISM* (1991); JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY* (1999); Gilbert Harman, *Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error*, 99 *PROC. ARISTOTELIAN SOC'Y* 315 (1999).

good people come to do bad things;¹² and (2) the incentives organizations create—often inadvertently—which make it more likely that otherwise conscientious people will do the wrong thing.¹³ The three essays comprising Part III of *Legal Ethics and Human Dignity* masterfully bring the psychological and philosophical literature to bear on the ethical problems lawyers face.

For the most part, I agree with the book’s discussion of “organizational evil.”¹⁴ Therefore, I will focus instead on the arguments in the remainder of the book, where Professor Luban addresses the same theoretical issues he took up in *Lawyers and Justice*—namely, the moral justification for the ethic of neutral partisanship. This Essay argues that Professor Luban never quite settles on one of two competing, and potentially incompatible, conceptions of the relationship between public ethics and ordinary morality.¹⁵ In a posthumously published paper, Bernard Williams distinguishes between “political moralism” and what might be called the inner morality of politics.¹⁶ Political moralism is the claim that principles of public ethics—that is, the conduct of government officials and the relationship between citizens and the state—are derivable from moral considerations that are prior to politics.¹⁷ The alternative is to work within the realm of “distinctively political thought,” relying on values and principles that are “inherent in there being such a thing as politics.”¹⁸ For example, in ordinary

¹² See, e.g., LUBAN, *Contrived Ignorance*, *supra* note 8, at 254, 259–60 (explaining that various factors may undermine an actor’s judgment in ways that mitigate the blameworthiness of the actor’s conduct).

¹³ See LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 4, at 7–8.

¹⁴ See *id.*

¹⁵ Professor Luban cites an anonymous reviewer’s negative comment that the book should take a clearer stance on the lawyer’s proper role. *Id.* at 12. I am not chiding Professor Luban for inconsistency, as this reviewer seems to be doing. The point I develop here is that there are political implications for Professor Luban’s belief that moral philosophy has difficulty delivering “crisp principles to resolve difficult moral dilemmas in ambiguous situations where values collide.” *Id.* I very much share the belief that moral life, particularly in public roles, is necessarily messy and requires sensitivity and judgment rather than the algorithmic application of bright-line principles. I would go further than Professor Luban, however, and orient legal ethics around distinctively political values that recognize the complexity of moral decision making.

¹⁶ See BERNARD WILLIAMS, *Realism and Moralism in Political Theory*, in *IN THE BEGINNING WAS THE DEED: REALISM AND MORALISM IN POLITICAL ARGUMENT* 1, 1–2, 5 (Geoffrey Hawthorn ed., 2005). I am using the phrase “inner morality of politics” to invoke Fuller’s “inner morality of law” and connect this critique with Professor Luban’s discussion of Fuller in *Legal Ethics and Human Dignity*. See LON L. FULLER, *THE MORALITY OF LAW* 42–43 (2d ed. 1969) [hereinafter FULLER, *MORALITY OF LAW*]. The expression “fidelity to law” also comes from Fuller. See Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630, 632, 642–43 (1957). As the remainder of this Essay should make clear, the Fullerian discussions in *Legal Ethics and Human Dignity* are some of the most interesting parts of the book.

¹⁷ See WILLIAMS, *supra* note 16, at 2–3.

¹⁸ *Id.* at 3, 5.

morality one may reason in a “protestant” mode, with rational acceptability being the only authority respecting questions of moral truth. In politics, on the other hand, one must take as a given the existence of others, their claims to equal dignity and respect, and inevitable disagreement about moral questions. This means, necessarily, that the protestant mode is inappropriate in political ethics. It is insufficient simply to assert one’s (sincere, good faith) belief that something is a requirement of morality. Instead, one must take account of others who disagree, and who (again, sincerely) believe that morality requires something else entirely. In a political community characterized by moral pluralism, public ethics must proceed in a mode that acknowledges both the moral agency of others and their competing beliefs about what morality demands in a given case.

Moral pluralism is the claim that human experience, and the goods and values associated with it, is sufficiently complex that one cannot reduce all of these ethical considerations to some higher-order synthesizing value that can be used to rank and prioritize competing principles.¹⁹ As Isaiah Berlin argued, there are many different ends people may pursue and still be recognized as fully rational and fully human; there are multiple *objectively valuable* things that individuals and cultures may regard as fulfilling and worthy objects of attainment.²⁰ Attaining one of these ideals often requires the subordination or abandonment of others.²¹ There is no possibility of a life that embodies certain goods or virtues without excluding others.²²

[W]e are faced with choices between ends equally ultimate, and claims equally absolute, the realisation of some of which must inevitably involve the sacrifice of others.

. . . [I]t seems to me that the belief that some single formula can in principle be found whereby all the diverse ends of men can be harmoniously realised is demonstrably false. If, as I believe, the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict—and of tragedy—can never wholly be eliminated from human life, either personal or social.²³

¹⁹ See, e.g., CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* 131–34 (1987); JEREMY WALDRON, *LAW AND DISAGREEMENT* 112 (1999) (“On any plausible account, human life engages multiple values and it is natural that people will disagree about how to balance or prioritize them.”); THOMAS NAGEL, *The Fragmentation of Value*, in *MORTAL QUESTIONS* 128, 131, 138 (1979).

²⁰ See, e.g., ISALAH BERLIN, *The Pursuit of the Ideal*, in *THE CROOKED TIMBER OF HUMANITY* 1, 10–11 (Henry Hardy ed., 1990).

²¹ See STUART HAMPSHIRE, *MORALITY AND CONFLICT* 146–47 (1983).

²² See *id.*

²³ ISALAH BERLIN, *Two Concepts of Liberty*, in *THE PROPER STUDY OF MANKIND* 191, 239 (Henry Hardy & Roger Hausheer eds., Farrar Straus & Giroux 1998) (1997).

Political moralism does not fit well with the fact of moral pluralism. If the ethics of public officials, including lawyers, are calibrated to what really are moral truths, then it seems that the "underlying uniformity and stability of official behavior," which is the hallmark of the rule of law,²⁴ will be difficult to attain.

In the first two essays, which develop themes from *Lawyers and Justice*, Professor Luban argues for a model of legal ethics grounded on ordinary moral values, particularly human dignity. However, succeeding essays subtly shift the focus from ordinary morality to the law and the legal system. In these latter essays, Professor Luban says several things that strike me as important and correct. First, "the rule of law relies on the professional ethics of lawyers."²⁵ Second, the law and the practice of lawyering are purposive activities that carry with them the possibility of an internal evaluative standpoint—"to identify an object purposively is implicitly to specify a standard of success and failure."²⁶ From this perspective of professionalism as a craft, "lawyers can sin against the enterprise in which they are engaged."²⁷ Third, one of the requirements of their craft is that lawyers must accurately identify the law, using the implicit interpretive norms of an interpretive community of reasonable lawyers, and advise their clients to comply with it.²⁸ Thus, one of the principal ways lawyers can sin against their enterprise is to twist the law out of recognition in the service of

²⁴ LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 4, at 3.

²⁵ 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*]; see also DAVID LUBAN, *A Different Nightmare and a Different Dream*, in LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 4, at 131, 131 [hereinafter LUBAN, *Nightmare and Dream*] ("The lawyer-client consultation is the primary point of intersection between 'The Law' and the people it governs . . .").

²⁶ LUBAN, *Natural Law*, *supra* note 25, at 108.

²⁷ *Id.* at 105.

²⁸ See LUBAN, *Nightmare and Dream*, *supra* note 25, at 132 ("[T]heir obligation is simply to explain the law in books. . . . as mediated through the interpretive community of lawyers."); LUBAN, *Torture Lawyers*, *supra* note 10, at 193 ("No formula or algorithm exists for sorting out the plausible-but-wrong arguments from the silly Legal plausibility is a matter for case-by-case judgment by the interpretive community . . ."). I have argued that the craft of lawyering requires lawyers to base their advice to clients on legal positions that they could, in principle, defend before an interpretive community of their peers. See W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1169–70, 1210 (2005). The tricky part of reliance on the tacit norms of an interpretive community is that one must specify the makeup of the community. See *id.* at 1215–16. In the text I used the term "reasonable" lawyers, aware that reasonableness must be fleshed out with respect to criteria external to the community. Otherwise the argument will become a vicious circle. See *id.* at 1216–17. Professor Luban avoids circularity by appealing to consensus: "[T]he legal mainstream defines the concept of plausibility." LUBAN, *Torture Lawyers*, *supra* note 10, at 194. I believe, on the other hand, that reliance on the notion of a legal mainstream raises the problem of plural, competing interpretive communities. See Wendel, *supra* at 1216. This is familiar in constitutional law, in the form of the debate among textualists, originalists, interpretivists, popular constitutionalists, and so on. Each of these theoretical approaches to constitutional interpretation has attracted a substantial community of ad-

their clients' interests with "creative" interpretations²⁹ that are perhaps appropriate as in-court advocacy,³⁰ but improper support for the conclusion, reached by a lawyer acting as an out-of-court counselor, that the client's preferred course of action is lawful.³¹ Because the standards of excellence implicit in a craft are public, other lawyers can observe and criticize these professional failures on the grounds of "the violation of craft values common to all legal interpretive communities."³² Lawyers who write "cover your ass" memos purporting to excuse their clients' legal wrongdoing act unethically according to the standards of lawyering craft—the most important of which is fidelity to the law, as opposed to the zealous defense of client interests.³³

This sounds exactly right to me, but the connection to the moral value of human dignity gets lost in all the talk of craft and the internal normativity of practices. Just as Williams suggests there is a morality inherent in there being such a thing as politics,³⁴ I think there is a morality inherent in there being such a thing as a legal system, and in the role of the lawyer. However, that is a separate kind of morality, conceptually distinct from the sorts of ordinary moral values that inform our everyday lives. This "morality" (maybe that term should be in scare quotes to distinguish it from ordinary morality) is what one grasps when considering a practice and its associated norms from the internal point of view—that is, from the perspective of someone who regards the practice as creating genuine obligations.³⁵ There is no doubt that many practices carry internal evaluative standards with

herents among lawyers, judges, and scholars. A fractured Supreme Court decision is likely to divide along exactly these lines separating different interpretive communities.

²⁹ See LUBAN, *Torture Lawyers*, *supra* note 10, at 193 ("Moving further out on the bell curve [of plausibility], we find the kind of arguments that lawyers euphemistically call 'creative' . . .").

³⁰ See *id.* at 198, 201.

³¹ See *id.* at 197–98, 200–02.

³² *Id.* at 198.

³³ *Id.* at 200–02.

³⁴ See *supra* text accompanying notes 16–18.

³⁵ The notion of the internal point of view is central to Hart's jurisprudence. See H.L.A. HART, *THE CONCEPT OF LAW* 88–89 (2d ed. 1994). According to Hart, law creates reasons for action that are acknowledged by citizens using the language of obligation, such as "ought, must, and should, and right and wrong." *Id.* at 57 (internal quotation marks omitted). In order for there to be a legal system, it is conceptually necessary that certain officials (namely, judges) regard the law from the internal point of view when deliberating. See *id.* at 102–03. If judges did not acknowledge the rule of recognition as a legitimate reason for deciding cases on some grounds and not others, then there would be no way to differentiate an authoritative legal command from the demand of a mugger. See *id.* at 116. Professor Luban takes up the interesting question of whether lawyers are also required to adopt the internal point of view toward the rule of recognition and concludes that this, too, is a requirement of a rule-of-law regime. See LUBAN, *Nightmare and Dream*, *supra* note 25, at 140–42.

them.³⁶ We could not understand the concept of a game or a sport without a notion of obligatory rules, which become obligatory because the person playing has opted into the practice in question.³⁷ Therefore, the practice is a freestanding normative domain in which an act is permissible if and only if the rules of the practice permit it.

A freestanding normative domain may be connected with ordinary morality if its central concepts are those that have moral salience—that is, if there is a legitimation that can be offered for the practice that speaks in terms of reasons that make sense to us as part of a whole cluster of “political, moral, social, interpretive, and other concepts.”³⁸ For example, the political-moral notion of an individual as a *citizen* implies reciprocity and rough equality in the way one is treated by state actors and institutions. The political theory of John Rawls begins with this kind of distinctive political idea: “The philosophical conception of the person,” Rawls writes, “is replaced in political liberalism by the political conception of citizens as free and equal.”³⁹ Similarly, legality, or the rule of law, suggests a number of evaluative criteria, including impartiality and the government’s commitment to be bound by generally applicable rules.⁴⁰ “Citizen,” “political freedom,” and “legality” are not really categories in ordinary morality because they presuppose the existence of a state. We can see how these concepts do evaluative work in the political domain and make sense in terms of ordinary moral commitments (among other things); significantly, these concepts are not reducible to ordinary moral ones. Joseph Raz, discussing the rule of law, understands it as an aspect of bureaucratic justice, and essentially as a requirement of public reason-giving, with a view toward “breed[ing] a common understanding of the legal culture of the country, to which in turn [public decisions] are responsive and responsible.”⁴¹ There is an irreducible aspect of public-ness to this way of understanding the rule of law. The same can be said for Professor Luban’s recommendation that we see legal ethics as a craft, inextricably bound up with interpreting and applying the law, subject to the tacit regulatory standards of a professional community of lawyers.⁴² This approach is morally attrac-

³⁶ See ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 187 (Univ. Notre Dame Press 3d ed. 2007) (1981) (defining a practice as “any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity”).

³⁷ See John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 16, 24–26 (1955).

³⁸ WILLIAMS, *supra* note 16, at 11.

³⁹ JOHN RAWLS, *Reply to Habermas*, in *POLITICAL LIBERALISM* 372, 380 (1996).

⁴⁰ See JOSEPH RAZ, *The Politics of the Rule of Law*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 354, 354 (1994).

⁴¹ *Id.* at 358.

⁴² See LUBAN, *Natural Law*, *supra* note 25, at 100–02.

tive, but that does not mean it can be translated straightforwardly into ordinary moral terms.

The remainder of this Essay will consider this claim, first by briefly setting out the background of the debate over role-differentiated morality, to which Professor Luban's work has significantly contributed. I then take up the connection between the moral value of human dignity and the justification it provides, if any, for the lawyer's role-specific duties. Professor Luban is committed to the view that one's moral agency persists when acting in a professional capacity and, as a result, that actions taken within a professional role must be justified in ordinary moral terms.⁴³ It may be possible for the legal system and the role of "lawyer" to supply an institutional excuse for what would otherwise be moral wrongdoing, but the threshold for establishing such an excuse is quite high.⁴⁴ Thus, most of what appear to be duties within professional ethics are not real duties at all but merely pragmatically grounded norms, representing nothing more than customs or traditions.⁴⁵ Professor Luban seems uncomfortable with this conclusion, however, and in places resists the implication of his position, which is that the lawyer's role is fully informed by ordinary moral considerations, not values specific to the professional role. I therefore argue that a better way to understand the connection between legal ethics and human dignity will be indirect, via a freestanding political conception of human dignity.

I

NEUTRAL PARTISANSHIP AND THE CRITIQUE FROM THE STANDPOINT OF ORDINARY MORALITY

For most practicing lawyers, "legal ethics" means the positive law of lawyering, including the state bar disciplinary rules; tort, agency, and procedural law; and so on. The academic discipline of theoretical legal ethics, however, has been primarily concerned with one problem that can be boiled down concisely to, "Can a good lawyer be a good person?"⁴⁶ Debates in legal ethics theory are often structured around dramatic cases, illustrating a fundamental tension between the obligations incumbent upon lawyers as occupants of institutional roles and what would otherwise be the duties of ordinary moral agents. Consider a classic example: A lawyer learns from his client the location of the hidden bodies of two teenagers who had disappeared on a camp-

⁴³ See DAVID LUBAN, *The Adversary System Excuse*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 4, at 19, 63 [hereinafter LUBAN, *Adversary System Excuse*].

⁴⁴ See *id.* at 23, 57-62.

⁴⁵ See *id.* at 61-62.

⁴⁶ Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060, 1060 (1976).

ing trip—murdered, as it turns out, by the lawyer's client.⁴⁷ An entire community is living in terror of further attacks, and the parents of the missing children are anguished; the lawyer, nevertheless, keeps both the location of the bodies and his client's involvement secret.⁴⁸ From the standpoint of professional obligations, it is an easy case: A lawyer must keep secret anything she learns in the course of representing her client, even if disclosure of confidential information would alleviate great suffering.⁴⁹ On the other hand, as a matter of ordinary morality, surely a decent person would feel troubled to be causing so much harm by keeping the secret of a dangerous murderer. One of the lawyers in the Hidden Bodies Case admitted as much, saying of the parents: "I caused them pain, I prolonged their pain. . . . There's nothing I can say to justify that in their minds. You couldn't justify it to me."⁵⁰

On the so-called neutral partisanship (NP) conception of legal ethics,⁵¹ lawyers have a duty of *partisanship*—to act competently to protect the legal interests of clients without regard to the harms that may befall others.⁵² Lawyers must respect the principle of *neutrality*, which requires them to set aside the moral qualms they may otherwise have, and not refuse to represent clients or carry out their clients' objectives by lawful means because of these moral reasons.⁵³ Lawyers who are neutral partisans are entitled to a kind of free pass from the moral criticism of others through the principle of *nonaccountability*.⁵⁴ The lawyers in the Hidden Bodies Case followed the prescriptions of NP to the letter, representing their client effectively despite believing he was "a piece of scum."⁵⁵ They received plenty of moral criticism from

⁴⁷ The Hidden Bodies Case, also known as the Lake Pleasant Bodies Case, is a staple of professional responsibility casebooks and academic scholarship. For excellent summaries of the case, see LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 121–28 (2005), and RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER, AND GREED* 7–26 (1999).

⁴⁸ See ZITRIN & LANGFORD, *supra* note 47, at 13.

⁴⁹ As a statement about the duty of confidentiality, this is incomplete; lawyers in most jurisdictions have discretion to disclose confidential information to prevent, rectify, or mitigate certain types of harm. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2007). In the Hidden Bodies Case, however, it remains an accurate statement to say that the lawyer had no discretion to reveal the location of the bodies to the authorities or the parents.

⁵⁰ ZITRIN & LANGFORD, *supra* note 47, at 19 (quoting an interview by PBS with Frank Armani, one of the lawyers in the Hidden Bodies Case).

⁵¹ Professor Luban formerly referred to neutral partisanship as the "standard conception," LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 4, at 9, and that term continues to be widely used in the legal ethics literature. See W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 364 n.4 (2004) [hereinafter Wendel, *Civil Obedience*].

⁵² See LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 4, at 9.

⁵³ See *id.*

⁵⁴ For this formulation of the standard conception, see Murray L. Schwartz, *The Zeal of the Civil Advocate*, in *THE GOOD LAWYER* 150, 151 (David Luban ed., 1984); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73–81 (1980).

⁵⁵ ZITRIN & LANGFORD, *supra* note 47, at 19.

other members of their community, and in fact were socially and professionally ostracized for their work on the case.⁵⁶ However, they believed they were justified in their actions, and the opprobrium unwarranted⁵⁷—hence, others mistakenly failed to respect the principle of nonaccountability. While NP offers an institutional excuse from the demands of ordinary morality,⁵⁸ simply citing NP is not enough. NP is what lawyers say their role requires, but the role and its associated requirements still stand in need of a justification. To offer the obvious (if clichéd) counterexample, the social role of “wiseguy” has its own conception of the role’s normative demands. Wiseguys do not snitch on each other, they respond to even trivial insults with violence, and they protect members of their “family” from harm.⁵⁹ This sort of incident is perfectly understandable in terms of wiseguy norms:

Jimmy once killed his best friend, Remo, because he found out that Remo set up one of his cigarette loads for a pinch. They were so close. They went on vacations together with their wives. But when one of Remo’s small loads got busted, he told the cops about a trailer truckload Jimmy was putting together. . . . Remo had ratted the load out in return for his freedom.

Remo was dead within a week.⁶⁰

However, as a moral justification for the killing of Remo, this clearly leaves something to be desired. The role of wiseguy does not offer an institutional excuse from the demands of ordinary morality. Lawyers hope to do better than wiseguys, however, and believe that NP does legitimately justify what would otherwise be immoral conduct.

The question of whether a good lawyer can be a good person is meant to highlight the fact that a person remains a moral agent even when acting in a role, and that role is accordingly subject to moral evaluation. Early in *Legal Ethics and Human Dignity*, Professor Luban quotes William Whewell (author of a widely used nineteenth century treatise on ethics) as insisting that “[e]very man is . . . by being a moral agent, a Judge of right and wrong This general character of a moral agent, he cannot put off, by putting on any professional character.”⁶¹

The quote from Whewell is a statement about the relationship between one’s personhood and the various social roles that mediate one’s interactions with others. Being a person *simpliciter* is prior to

⁵⁶ See *id.* at 17–18.

⁵⁷ See *id.* at 19 (quoting Frank Armani, one of the lawyers in the Hidden Bodies Case, as saying that “if a principle doesn’t belong to the worst of us, then it can’t belong to the best” (internal quotation marks omitted)).

⁵⁸ See LUBAN, *Adversary System Excuse*, *supra* note 43, at 23.

⁵⁹ See NICHOLAS PILEGGI, *WISEGUY: LIFE IN A MAFIA FAMILY* 36–37 (1985).

⁶⁰ See *id.* at 128 (quoting Henry Hill, an ex-Lucchese-crime-family member).

⁶¹ See LUBAN, *Adversary System Excuse*, *supra* note 43, at 19.

being a person-in-role; one's moral agency persists, notwithstanding the potentially competing demands of social roles. As a matter of the metaethics, the persistence of moral agency is rooted in the essential subjectivity of persons. Professor Luban argues that "our own subjectivity lies at the very core of our concern for human dignity."⁶² Persons should not be understood as bearers or instantiations of impartial value, but as sources of value in their own right. Because we regard ourselves as intrinsically valuable and would object to being used merely as a means to some impartially justified end, we acknowledge that others are similarly valuable.

On this conception of value, however, social roles can arguably never be more than a "shorthand for a nexus of obligations, values, and goods that have moral weight without appeal to role as a moral category."⁶³ We must always evaluate role-specific obligations from the perspective of a "pure" moral agent, unencumbered by roles, except to the extent there is a good moral reason for occupying roles and accepting their associated responsibilities. The alternative is to acquiesce in a terrifying, alienating vision of social life as "a Goffmanesque world where there are no selves, only selves-in-roles, selves who slide frictionlessly from role to role."⁶⁴ Avoiding this existential abyss, in which behind all the masks there is only a vacuum,⁶⁵ requires insisting on the persistence of moral agency. The persistence of agency implies, in turn, that roles are *transparent* to moral analysis and can never be understood as excluding ordinary moral reasons from consideration. The transparency of roles demands that a moral justification for an action taken within a role must be given all the way down, until it rests on some basic moral value. "Professional duties must originate somewhere; they are not dark ancestral mysteries that command our reverence because their origins are lost in the depths of time."⁶⁶ Professor Luban's reference here to the reverential, quasi-religious attitude toward professional duties may sound like hyperbole to someone who has not spent much time discussing legal ethics with

⁶² 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, 71 [hereinafter LUBAN, *Upholders of Human Dignity*].

⁶³ ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* 45 (1999). Professor Luban has previously endorsed this "nexus" or "shorthand" view of the normative status of roles. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 1, at 125 ("[T]he appeal to a role in moral justification is simply a shorthand method of appealing to the moral reasons incorporated in that role."). He has modified some aspects of his position, while reaffirming the "shorthand" view. See David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424, 434 (1990) [hereinafter Luban, *Freedom and Constraint*].

⁶⁴ DAVID LUBAN, *Integrity: Its Causes and Cures*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 4, at 267, 281 [hereinafter LUBAN, *Integrity*].

⁶⁵ See *id.*

⁶⁶ Luban, *Freedom and Constraint*, *supra* note 63, at 427.

lawyers, but anyone who is familiar with the typical pattern of justifying arguments given by lawyers will know that the duty of “zealous advocacy within the bounds of the law” is repeated like a sacred incantation, as if it were self-evident that this obligation can be backed up with a moral justification. The mere mention of a role-specific professional obligation leaves unaddressed the connection between that obligation and moral values such as autonomy or dignity. Therefore, the task of a theory of legal ethics is to somehow connect obligations of a role with sources of moral value.

In *Lawyers and Justice*, Professor Luban argued that any appeal to role-specific obligations as an excuse from criticism in ordinary moral terms must satisfy a four-step process of justification.⁶⁷ This is the so-called fourfold root argument: First, the act in question must be required by duties specific to the role; Second, those role obligations must be justified functionally, as necessary to carry out the broader ends of the role within an institution; Third, it must be shown that the role is necessary for the effective functioning of the institution; Finally, the institution itself must be justified on the grounds of a moral good it secures.⁶⁸ Failure of justification at any step in the fourfold root process vitiates the institutional excuse.⁶⁹

To take an easy case, Jimmy’s killing of Remo cannot be justified because the institution itself, an organized crime family, does not contribute a moral good to society.⁷⁰ While the Hidden Bodies Case is more difficult (which is why it is a classic hypothetical in legal ethics), ultimately the lawyers are justified in keeping the location of the bodies secret from the parents.⁷¹ The first step in the fourfold root argument is satisfied because keeping confidences is an obligation of the

⁶⁷ LUBAN, *LAWYERS AND JUSTICE*, *supra* note 1, at 129–33.

⁶⁸ *Id.* The fourfold root argument gets boiled down to two steps in the first essay of the present book. Justification of role-acts requires both that the institution as a whole be justified and that the institution require a role-actor to do the act. See LUBAN, *Adversary System Excuse*, *supra* note 43, at 57.

⁶⁹ LUBAN, *LAWYERS AND JUSTICE*, *supra* note 1, at 132.

⁷⁰ See *supra* notes 59–60 and accompanying text. Note, however, that the first three steps of the justification may hold: (1) the duties of wiseguys may require whacking Remo; (2) imposing obligations of violent retribution on wiseguys may be necessary in order to instill fear in those of them who might be tempted to rat a money-making scheme out to the police; and (3) the role of wiseguy may be necessary for the effective functioning of the family. Conversely, within an otherwise-justified institutional context, the moral excuse promised by the role and its associated obligations may fail at an earlier step in the fourfold root process. For example, one might argue that a lawyer may not assert a genuine role obligation to resist legitimate requests for discoverable information. A purported obligation to play hide-the-ball in discovery is inconsistent with the ends of the discovery regime and the civil litigation system generally. A great advantage of the fourfold root argument is its ability to structure this kind of fine-grained analysis of institutional excuses.

⁷¹ Professor Luban reaches the same conclusion, albeit with some reservations. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 1, at 149; LUBAN, *Adversary System Excuse*, *supra* note 43, at 59; Luban, *Freedom and Constraint*, *supra* note 63, at 428.

role of criminal defense lawyer. The second step, showing that the strict obligation of confidentiality is essential to the role, is almost certainly satisfied in the context of criminal defense practice. Without the ability to give their clients ironclad assurances of confidentiality, criminal defense lawyers would find it difficult to build trust and rapport with their clients and to learn the facts necessary to provide a competent defense. The third step is probably the most controversial: Is the role of partisan advocate necessary for the effective functioning of the criminal justice system? As Professor Luban notes in connection with the pragmatic justification he gives in the first essay in *Legal Ethics and Human Dignity*, an adversary system is not a necessary condition of a well-functioning criminal justice system; France and Germany operate without one, although there are elements of adversarial lawyering in those systems that often go unacknowledged.⁷² However, the fourfold analysis may proceed while holding certain variables constant—that is, we can ask whether the role of partisan advocate is necessary for the functioning of *this* criminal justice system, taking as a given its generally adversarial character. It would be asking too much to demand that an institutional actor show that her role is necessary for the functioning of every conceivable institutional mechanism with a particular end.

The modal term “necessary” is important here because it shows how Professor Luban thinks the initial burden of proof ought to be allocated in legal ethics. The transparency of roles to moral evaluation means that role-specific obligations must be shown to be not only a good thing, but also better than the alternative of following the prescriptions of ordinary morality—what Professor Luban has called the “moral activism” conception of lawyering.⁷³ This is why Professor Luban ultimately concludes that in most cases NP can be justified only pragmatically: “[T]he adversary system, despite its imperfections, irrationalities, loopholes, and perversities, seems to do as good a job as any at finding truth and protecting legal rights. . . . [E]ven if one of the other systems were slightly better, the human costs . . . would outweigh reasons for replacing the existing system.”⁷⁴ I would call this a conservative rather than a pragmatic argument because it appears to give a great deal of *prima facie* legitimacy to the status quo. The argument also tends to underwrite a certain attitude of reluctance to recommend reforms that would unsettle the expectations of citizens who have grown accustomed to the irrationalities and perversities of the

⁷² LUBAN, *Adversary System Excuse*, *supra* note 43, at 56. For a comparative analysis of adversarial practices in the German and American legal systems, see David Luban, *The Sources of Legal Ethics: A German-American Comparison of Lawyers' Professional Duties*, 48 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 245 (1984).

⁷³ See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 1, at 160–61, 173–74.

⁷⁴ LUBAN, *Adversary System Excuse*, *supra* note 43, at 56.

adversary system.⁷⁵ This argument is remarkably different in temperament from William Simon's approach to legal ethics, which is to seek to eradicate or reform practices that cannot be justified as making a contribution to the realization of substantive justice.⁷⁶ Ironically, given his chosen label, Professor Luban's approach is less of a morally activist stance than Simon's position. And Professor Luban is certainly a long way from the radicalism of Thomas Shaffer's position, which takes the Christian ideal of ministry as central to legal ethics.⁷⁷ What is pragmatic and not conservative about Professor Luban's position, however, is the attitude by which one should be led to his argument. We should merely endure NP, not endorse it.⁷⁸ Presumably this means that a lawyer should not feel pride in her role, or believe herself to be contributing to a worthwhile endeavor. If we retain the adversary system and endure NP because of "nothing more than social lethargy and our inability to come up with a better idea,"⁷⁹ is it any wonder that lawyers frequently feel demoralized and unhappy in their professional lives?

II

FREESTANDING POLITICAL MORALITY AND PROFESSIONAL ROLES

I think we can, and should, do better than this. Professor Luban rightly notes that if we can only justify an institution and the obligations associated with it pragmatically, that institution can support only weak, *prima facie*, easily overridden duties.⁸⁰ The reason, "because

⁷⁵ Professor Luban does not disagree with the characterization of the argument as conservative but prefers the term "pragmatic" because his argument proceeds "in a piecemeal, nonideological way." *Id.* at 57. In the present political climate I suppose it is wise to distinguish small-c-conservatism from the highly ideological Conservatism of the religious right or foreign policy neoconservatives. In political theory terms, the more important distinction is between piecemeal, pragmatic conservatism and a Burkean defense of the adversary system as an integral part of our public culture. Professor Luban disclaims any Burkean basis for NP, rightly noting that even wholesale abolition of NP would amount to only marginal tinkering with the overall political culture of the United States. *See id.* at 54-55.

⁷⁶ *See, e.g.*, WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998); William H. Simon, *Moral Pluck: Legal Ethics in Popular Culture*, 101 COLUM. L. REV. 421 (2001).

⁷⁷ *See* DAVID LUBAN, *A Midrash on Rabbi Shaffer and Rabbi Trollope*, in LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 4, at 301, 307 [hereinafter LUBAN, *Shaffer and Trollope*] ("I read Shaffer's language about the thief on the cross with his advocate hanging at his side quite seriously and literally. It means, I think, that if ministering to the client requires a lawyer to break a Model Rule, or a law, and undergo punishment for it, then the Christian who is a lawyer will break the Model Rule and the law—not because doing so is in the larger public interest, but because doing so is what faithful ministry demands.").

⁷⁸ LUBAN, *Adversary System Excuse*, *supra* note 43, at 56.

⁷⁹ *Id.* at 57.

⁸⁰ *Id.* at 59.

this is the way we've always done things," might suffice to justify an action that does not affect important interests of others or to explain the solution to a morally arbitrary coordination problem. "Rules" of etiquette, for example, are explained in this way. However, the normative weight of a pragmatically grounded norm vanishes when the competing interests are morally significant.⁸¹ In the Hidden Bodies Case, for example, it is hard to imagine a lawyer responding in good faith with a weak pragmatic argument to the parents' anguish and the town's fears. "You see," the lawyers would say, "we've always kept clients' secrets, and we're going to keep them on this occasion, too. We could imagine a different system, in which we could tell you what we know about your children, but it would be expensive and confusing to switch to it, so we're going to go on as we always have." This is facially insufficient as a justification of the obligation of confidentiality and slights the very real moral values underlying the duty of confidentiality. If what lawyers have been told are sacred obligations are, in fact, nothing more than local customs, on a par with rules of etiquette, it is no wonder they feel demoralized.

Recognizing this, Professor Luban tries to preserve some space for role-specific duties that really are *duties*, not just pragmatically grounded norms.⁸² Despite his call for lawyers to be moral activists, he is not calling on them to act directly on what they perceive to be truth or moral rectitude. Professor Luban endorses the ambivalence Anthony Trollope feels for a conception of legal ethics in which the law is all about the truth. In his novel *Orley Farm*, Trollope embodies the concern for truth above all else in the young barrister Felix Graham, "the English Von Bauhr." Only, it turns out, the real Von Bauhr is an ass:

Von Bauhr is a German legal scholar, a stupifyingly tedious proceduralist who criticizes the British legal system in a three-hour speech at a conference on law reform. . . . Von Bauhr's views amount to a rejection of adversarial ethics: "Let every lawyer go into court with a mind resolved to make conspicuous to the light of day that which seems to him to be the truth."

. . . . Trollope is gentle, but he leaves little doubt that Von Bauhr is ridiculous. All his reforms, summarized in the dry, unintelligible pamphlet with which he anesthetizes the law-reform congress, are the product of pure theory untouched by human life and

⁸¹ *Id.* at 61 ("An institution anchors a moral excuse only to the extent that it has moral heft. If the institution is justified only because it is there, it possesses only the minutest quantum of force to excuse an otherwise immoral act.").

⁸² *See id.* at 59 (analyzing the Hidden Bodies Case as an instance of a strong institutional justification and a genuine role-specific duty); *cf.* Luban, *Freedom and Constraint*, *supra* note 63, at 445 ("[W]e cannot resolve all conflicts between common morality and role morality in favor of the former.").

untempered by human judgment. In *Orley Farm*, we must realize, Germany represents a kind of theory-besotted Cloud Cuckooland, the antipodes of sound British judgment. . . .

. . . [Trollope] has no sympathy for Graham's legal ethics of truthfulness, because it comes from a theory that has nothing to do with the world in which real people actually live. . . . He dislikes the way lawyers defeat truth, and he rejects their rationalizations, but he grudgingly admits that the job they do is an important one and that the way they do it may sometimes be what the job requires.⁸³

Thus, one must be wary of a pure theory of legal ethics that begins with some basic moral value such as truth, which is too lofty and detached from the real world in which things are not so simple. Politics and political institutions are better suited to the real world if they do not aim to make the officials who work within them morally pure. It is essential to understanding Professor Luban's theory to realize that he shares Trollope's unease with conventional legal ethics. He acknowledges the moral worth of the legal system ("the job they do is an important one"), concedes the necessity of certain role-specific duties ("the way they do it may sometimes be what the job requires"), but is also keen not to simply accept the rote rationalizations offered for NP.⁸⁴ He is sympathetic to nonideal morality, admitting that "the best of all possible worlds may not be available" to lawyers and clients in particular cases and that lawyers should consider whether their job is to "practice the art of the possible."⁸⁵ At the same time, however, Professor Luban is acutely aware of the processes of adaptive belief-formation and diffusion of responsibility that may lure lawyers into believing that the obligations of their roles are justified moral obligations and should be unreflectively obeyed.⁸⁶

This ambivalence reflects the exceedingly small conceptual space in which we can both recognize the moral worth of institutions and their associated roles and also claim to be guided primarily by considerations of ordinary morality. Metaphorically, imagine a lawyer perched on the peak of a steeply pitched roof, trying not to fall either in the direction of blind obedience to role obligations or toward a conception of role that is completely transparent to ordinary moral evaluation. One lawyerly way to mitigate the instability of this position

⁸³ LUBAN, *Shaffer and Trollope*, *supra* note 77, at 326–27.

⁸⁴ *Id.*

⁸⁵ *Id.* at 329.

⁸⁶ LUBAN, *Integrity*, *supra* note 64, at 269–81; *see also id.* at 288–89 ("It seems very likely that before too long you will find yourself believing that a special professional morality, distinct from the morality of your extra-professional life, justifies what you do—and this belief will be no transitory thing, but rather a fixed part of your moral personality.").

would be to tinker with burdens of proof and presumptions.⁸⁷ The more moral worth we recognize in the legal system, the stronger the presumption would be in favor of role-specific duties. If we thought the legal system deserved our moral allegiance in most cases, we might even go as far as to adopt a conception of legal ethics that relies on all-but-conclusive duties.⁸⁸ On the other hand, if the legal system and its associated roles and duties do not deserve our respect in moral terms, and we explain our commitment to it only in pragmatic terms, there would be very little weight to role-specific duties, and legal ethics would essentially be coextensive with ordinary morality.

Professor Luban tries to keep the lawyer balanced on the roof by regarding role-specific duties as defeasible presumptions, which should not be overridden routinely whenever there are good competing moral reasons, but only in exceptional cases.⁸⁹ Note that this is not really a pragmatic position, but a frank defense, in moral terms, of the lawyer's role morality. Role obligations would be relatively robust—that is, subject to being overridden only in a limited set of circumstances—only if there were some genuine moral value to the legal system and the obligations it imposes on lawyers. Given the overall structure of the argument in this book, that value must be related to human dignity, understood as rooted in the subjectivity of all persons. For example, in the essay on the moral value of human dignity, Professor Luban gives a sophisticated defense of criminal-defense advocacy as the best way to permit the accused to tell his own story in his own words and to take seriously the defendant's commitments and concerns.⁹⁰ Taking human dignity as the fundamental value at play in criminal-defense representation is helpful in explaining a number of features of the criminal-defense system. The presumption of innocence forces the trier of fact to entertain seriously the possibility that

⁸⁷ LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 4, at 13 n.20 ("It is simply impossible to maintain coherency in the role without giving some, defeasible, priority to its demands." (citing Luban, *Freedom and Constraint*, *supra* note 63, at 434–52)).

⁸⁸ See Wendel, *Civil Obedience*, *supra* note 51.

⁸⁹ LUBAN, *Adversary System Excuse*, *supra* note 43, at 63 (concluding that the normative situation facing lawyers is "a presumption in favor of professional obligation, but one that any serious and countervailing moral obligation rebuts"); *cf.* Luban, *Freedom and Constraint*, *supra* note 63, at 451 ("If . . . we regard the demands of role morality . . . as defeasible presumptions, then stability becomes possible once more. . . . [O]nly in exceptional circumstances concerning the distress of others should we step out of the duties of our station . . .").

⁹⁰ See, e.g., LUBAN, *Upholders of Human Dignity*, *supra* note 62, at 68 ("[O]ne fails to respect [a person's] 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.") (quoting Alan Donagan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER*, *supra* note 54, at 130)); *id.* at 79 (criticizing the lawyers who represented the Unabomber, Ted Kaczynski, for using evidence of his mental status that "made nonsense of his deepest commitments").

the defendant has a story to tell in good faith.⁹¹ Along these same lines, Professor Luban offers an extremely interesting justification of the stringent duty of confidentiality. The lawyer's professional obligation of confidentiality is related to the privilege against self-incrimination because, if the lawyer were not bound by a strict duty of confidentiality, the client would not be able to tell his story without fear of disclosure to the court.⁹² The wrong involved in forcing someone to testify against himself is humiliation—"enlisting a person's own will in the process of punishing her, splitting her against herself."⁹³ Thus, our system of criminal defense advocacy, with its associated role-specific obligations, is amply justified on the basis of the moral value of human dignity.

The trouble with this argument is that it works very well in one context, but it leaves much of the rest of legal practice unjustified, or at least only pragmatically tolerated. For one thing, dignity is a property of actual human persons, not entities such as corporations and government agencies.⁹⁴ It is unclear what it would mean to treat a bank or the Environmental Protection Agency with dignity.⁹⁵ Furthermore, while the value of dignity works well as an explanation and justification of several existing practices within adversarial litigation, particularly criminal defense, it is less useful in an account of non-litigation representation. Taking the subjectivity of a client seriously is well and good as a trial principle of trial advocacy, where an impartial trier of fact has to decide which of several competing stories represents the truth about something.⁹⁶ However, when lawyers are counseling clients about compliance with the law, the client's subjectivity is less important than the obligation created by the law. A client may believe, in sincere, subjective good faith, that the law is wrongheaded, but the lawyer's job is nevertheless to bring the client into compliance with legal requirements. Finally, even within litigation, respecting the dignity of one's client may mean interfering with the dignity of others. Professor Luban discusses the notorious Dalkon Shield litigation, in which lawyers for the manufacturer of a contraceptive device asked humiliating questions about the sexual practices of the plaintiffs during depositions.⁹⁷ Granting that, in this case, the lawyers went too far in asking very specific, graphic questions, it nevertheless may be neces-

⁹¹ *Id.* at 73.

⁹² *See id.* at 80–88.

⁹³ *Id.* at 83.

⁹⁴ *See* LUBAN, *LAWYERS AND JUSTICE*, *supra* note 1, at 232.

⁹⁵ *See id.* at 220–33. Professor Luban has made this argument in connection with the corporate attorney-client privilege, and he has concluded that the value of human dignity does not justify the privilege in an organizational context. *See id.*

⁹⁶ *See* LUBAN, *Adversary System Excuse*, *supra* note 43, at 34–35.

⁹⁷ *See id.* at 35–36.

sary in some similar litigation to ask legitimate questions that will result in the violation of the opposing party's dignity. Whether this tactic is morally justified is not a simple matter of referring to the value of dignity because there are dignitary interests on both sides (at least if the corporate manufacturer can be regarded as a bearer of dignity). Some other value or ranking principle is necessary to resolve a dignity-versus-dignity conflict.

Even if we assume that a role-specific obligation is *prima facie* justified, it may still be overridden by "any serious and countervailing moral obligation."⁹⁸ If the role obligation itself is justified by some important moral value, such as human dignity, then it remains an obligation and is not overridden. This is why Professor Luban agrees that the lawyers in the Hidden Bodies Case did the right thing.⁹⁹ Ordinarily, one would have good reasons to inform the parents of the death of their children and provide information that could lead to the incapacitation of a killer. However, these reasons do not outweigh the dignitary values embodied in the criminal justice system, in which a partisan advocate ensures that the defendant will be treated with respect even while being prosecuted for serious crimes.¹⁰⁰ On the other hand, the balance of reasons may go the other way, outside of the special dignity-protecting context of criminal defense representation, unless it were the case that there was a dignity-based justification for the legal system generally.¹⁰¹

In his essay on Fuller, Professor Luban suggests a way that the value of dignity might infuse the legal system as a whole.¹⁰² In Fuller's jurisprudence, legal validity depends on more than just the pedigree of a norm.¹⁰³ Professor Luban notices something interesting in Fuller's well-known definition that law is "the enterprise of subjecting human conduct to the governance of rules,"¹⁰⁴ namely that Fuller is defining law in terms of an activity, not truth conditions for a legal proposition.¹⁰⁵ This activity is the job of various officials and quasi-officials, including judges and lawyers.¹⁰⁶ Moreover, as noted above, it

⁹⁸ *Id.* at 63.

⁹⁹ *See id.* at 59.

¹⁰⁰ *See id.*

¹⁰¹ *See* LUBAN, *Natural Law*, *supra* note 25, at 120 ("[S]trongly differentiated role-obligations . . . can be defended only within narrow contexts such as criminal defense.").

¹⁰² *See id.* at 99–130.

¹⁰³ "Pedigree" is Dworkin's term. *See* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 40 (1977). Raz articulates the same point in terms of the "social thesis"—that is, "what is law and what is not is a matter of social fact . . ." JOSEPH RAZ, *Legal Positivism and the Sources of Law*, in *THE AUTHORITY OF LAW* 37, 37 (1979).

¹⁰⁴ LUBAN, *Natural Law*, *supra* note 25, at 102 (quoting FULLER, *MORALITY OF LAW*, *supra* note 16, at 91).

¹⁰⁵ *See id.* at 102–03.

¹⁰⁶ *See id.*

is a *purposive* activity that carries along with it standards of excellence and criteria of success and failure.¹⁰⁷ What is the purpose of doing law, that is, subjecting human conduct to the governance of rules? Fuller's answer is that proceeding in this way reflects a moral decision to treat citizens with dignity insofar as one governs their activities.¹⁰⁸ There are, accordingly, moral constraints on the activities of lawmakers and law interpreters.¹⁰⁹ "[I]nstitutions, particularly legal institutions, although they are entirely human creations, have moral properties of their own . . . that are connected only indirectly to general morality."¹¹⁰

The idea that an institution might have moral properties of its own, but be connected only indirectly to ordinary morality, is exactly what Williams, Rawls, and others mean by a freestanding political evaluative domain.¹¹¹ In that domain there may be a political value of dignity (call it D_{Pol}), which is related, but only indirectly, to the ordinary moral value of dignity (call it D_{Moral}). Let's say the content of D_{Moral} is as Professor Luban suggests and supports certain duties within ordinary morality. It may then be possible to derive duties for lawyers on the fourfold root structure, as long as each step in the process—institution, role, role-obligation, and so on—is necessary to protect the value of D_{Moral} . On the other hand, it may be possible to derive role obligations for lawyers directly on the basis of D_{Pol} . Depending on how we understand the content of D_{Pol} , these role obligations may look very different from those justified by the fourfold root argument. Professor Luban's discussion of Fuller suggests that D_{Pol} may entail certain evaluative criteria, by which a legal system can be judged as a success or failure.¹¹² Simply issuing orders or directives—governing people by "managerial direction," as Fuller puts it—is one way to organize society, but it fails to manifest respect for the human dignity of the subjects of governance.¹¹³ On the other hand, governing through

¹⁰⁷ See *id.* at 106–09. In a very nice passage, Professor Luban gives as clear and concise an explanation of the Aristotelian idea of the internal normativity of some object or practice as I have seen:

[T]o recognize something as a steam engine or a light switch is already to recognize what it ought to do, to recognize a built-in standard of success or failure. Success or failure at what? At being a steam engine or a light switch—at being what it is, one might say. Purposive concepts are *aspirational* concepts—and now we recognize that Fuller's morality of aspiration is intimately connected with his analysis of purposive concepts, and hence with the is/ought distinction.

Id. at 109.

¹⁰⁸ See *id.* at 110, 112.

¹⁰⁹ See *id.* at 118.

¹¹⁰ *Id.*

¹¹¹ See *infra* pp. 1418–19.

¹¹² See LUBAN, *Natural Law*, *supra* note 25, at 109–10.

¹¹³ *Id.* (quoting FULLER, *MORALITY OF LAW*, *supra* note 16, at 207).

the means of generally applicable rules treats people as self-determining agents and as citizens of a political community in which all are entitled to be treated as equals. Remember Professor Luban's subjectivity-based explanation of the value of dignity: People are sources of intrinsic value (and not just placeholders for impartial values like social welfare) because they are self-reflective rational creatures capable of recognizing themselves, and therefore others, as being ends in themselves.¹¹⁴

An understanding of D_{Pol} may therefore emerge from reflection on the question, "What would it mean to establish a *community* among such beings?" A community, and the institutions by which it governs itself, must take account of the intrinsic value of all its members, their capacity for reflection, and the need to establish grounds upon which competing claims to scarce resources can be evaluated.¹¹⁵ A regime of legality, in contrast with tyranny or even benevolent managerial direction, manifests respect for citizens as autonomous agents, as well as trust in their capacity for self-governance.¹¹⁶ As Jeremy Waldron has observed, "The identification of someone as a right-bearer expresses a measure of confidence in that person's moral capacities—in particular his capacity to think responsibly about the moral relation between his interests and the interests of others."¹¹⁷ Thinking responsibly about one's moral relation to others is a distinctive process when one is situated in a community. Treating someone within a community with dignity, which is to say respecting D_{Pol} , means giving significant weight to political institutions that have been set up to regulate rival conceptions of the moral relations between individuals.¹¹⁸ Because of moral pluralism and disagreement, the kind of impartial rule-based governance favored by Fuller may be the exclusive source of ethical principles for officials, and quasi-officials such as lawyers. These principles must necessarily displace ordinary moral reasons, such as D_{Moral} , in the practical reasoning of lawyers. Legal ethics would still be grounded in human dignity—a freestanding political conception of dignity that responds to the need of people to live together in communities with those with whom they disagree.

To make this concrete, and conclude this Essay, consider the extended case study in *Legal Ethics and Human Dignity* entitled *The Torture Lawyers of Washington*.¹¹⁹ For the sake of argument, we can assume that the lawyers in question are acting in good faith, engaged in a serious effort to determine how the government ought to act within

114 See *supra* note 62 and accompanying text.

115 See LUBAN, *Natural Law*, *supra* note 25, at 110–12.

116 See *id.*

117 WALDRON, *supra* note 19, at 282.

118 See *id.*

119 See LUBAN, *Torture Lawyers*, *supra* note 10, at 162–206.

the law in order to protect the security of the American people. As former OLC head Jack Goldsmith reports, lawyers at high levels within the Executive Branch must work in the shadow of the ever-present threat of a massive-casualties attack on the United States,¹²⁰ reading a constant flow of reports about plans for nuclear and biological attacks, yet lacking sufficient intelligence to respond in a targeted way to these threats.¹²¹ The enemy is not a nation-state, but a loosely organized global network of highly dedicated, ideologically motivated, uniformless soldiers.¹²² Whether or not it is appropriate to characterize it as a state of war, the threat is real. As a result of American military and covert action, a number of suspected Taliban and al-Qaeda fighters have been captured in Afghanistan, Iraq, and elsewhere.¹²³ Line-level military, intelligence, and law enforcement officers are therefore seeking guidance with respect to the treatment of these detainees.¹²⁴ How long may they be detained, and on what basis? What sort of procedural rights do they have to challenge the grounds for their detention? How far can interrogators go in using aggressive techniques to extract information, particularly if there is reason to believe that a detainee has information that can be used to disrupt terrorist plots?

Professor Luban's response is that the answer to all of these questions is given by existing domestic and international law. The infliction of severe physical or mental pain or suffering, and "cruel, inhuman, or degrading" treatment are prohibited.¹²⁵ Nevertheless, OLC lawyers labored mightily to find loopholes permitting the indefinite detention, without trial, of suspected terrorists at the U.S. naval base at Guantanamo Bay, Cuba,¹²⁶ and the use of "enhanced interrogation techniques," such as waterboarding, sleep deprivation, and the use of stress positions, that would generally be recognized as torture or cruel, inhuman, or degrading treatment.¹²⁷ It is impossible to summarize briefly the arguments of the OLC memos and Professor Luban's criticism of them,¹²⁸ but in any event, the important theoretical point to underscore is that Professor Luban and the Administration lawyers are engaged in an extended *ethical* argument about the substance of the *law*. The problem with the OLC lawyers' conduct, from an ethical point of view, is that the lawyers' advice is not based on "an analysis of the law as mainstream lawyers and judges under-

¹²⁰ See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 72–76 (2007).

¹²¹ See *id.*

¹²² See *id.* at 103–08.

¹²³ See *id.* at 106–07.

¹²⁴ See *id.* at 106–09.

¹²⁵ LUBAN, *Torture Lawyers*, *supra* note 10, at 165–68, 190–92.

¹²⁶ See *id.* at 169–92.

¹²⁷ See *id.*

¹²⁸ See *id.* at 172–92.

stand it."¹²⁹ The obligation of a government lawyer—or any lawyer, I would argue—is to manifest fidelity to the law, not to the interests of clients.¹³⁰ This ethical critique seems to have little to do with the value of dignity. As Professor Luban admits, "Honest opinion-writing by no means guarantees that lawyers will be on the side of human dignity."¹³¹ That may be so with respect to D_{Moral} , but it may be that honest opinion-writing is sufficient to satisfy the requirements of D_{Pol} . The value of human dignity, understood in the context of pluralist political communities (D_{Pol}), requires that the activities of citizens be governed by laws that are enacted through tolerably fair procedures and administered impartially by officials with due regard for their actual meaning. By twisting the law beyond all recognition, the OLC lawyers violated this special, political conception of human dignity.

The straightforwardly moral-activist lawyer would be tempted to criticize the OLC memos for legitimating torture, which is as clear a violation of human dignity (D_{Moral}) as can be imagined. However, that avenue is not a promising one because of the indeterminacy of the application of D_{Moral} to specific cases. That lawyer would have to decide whether it is a violation of D_{Moral} to force a detainee to stand for hours, to play Nancy Sinatra songs on an endless loop in detainees' cells, or to trick him into believing that he has been "rendered" to an ally in the Middle East whose secret police are not particularly concerned about human rights. The lawyer would have to make similar judgments about whether procedures satisfied D_{Moral} : Are military commissions enough, or must procedures be used that approximate the domestic criminal justice system? May hearsay evidence be used? What about keeping evidence secret if its disclosure might compromise national security? So it goes. These are questions about which reasonable, morally conscientious lawyers may disagree. However, reasonable, *professionally* conscientious lawyers may be able to reach agreement on the content of the law establishing procedural due process rights and setting limits on permissible interrogation techniques. In that case, and again appropriating an idea from Fuller, lawyers may be criticized in specifically legal-ethics terms for "sin[ning] against the enterprise in which they are engaged,"¹³² by purporting to counsel their client on the law, when in fact they are creating a pseudo-legal smokescreen to cover their clients' law-breaking.

129 *Id.* at 198.

130 *See id.* at 203.

131 *Id.* at 205.

132 LUBAN, *Natural Law*, *supra* note 25, at 105.

CONCLUSION

The possibility of good-faith disagreement over the application of all ordinary moral values is a problem for a conception of legal ethics in which professional roles are transparent to moral analysis. It probably does mean, as Professor Luban argues, that role-specific obligations can seldom be more than pragmatically justified. If this is the case, however, legal ethics will not be very well suited to the real world of moral pluralism and disagreement. On the other hand, freestanding political conceptions of value may be understood in a way that makes room for moral pluralism. Professor Luban is attracted to Fuller's idea that we treat people with dignity by managing their affairs through impartial laws, not managerial direction. But that necessarily means the connection between human dignity and the role-specific duties of lawyers is indirect at best. As Professor Luban admits in the introduction to *Legal Ethics and Human Dignity*, the experience of viewing the legal system from the internal, participant's point of view is one in which "[e]thical questions that seemed straightforward from the spectator's point of view suddenly seem[] far more difficult and ambiguous."¹³³ The reliance on freestanding political values is not an attempt to oversimplify this complexity, but rather a shift to a normative foundation in which moral pluralism, complexity, and ambiguity are taken as given. This may mean abandoning, or at least drastically scaling back, the moral activist conception of lawyering, but this is the implication of following out the implications of Fuller's jurisprudence for legal ethics.

¹³³ LUBAN, LEGAL ETHICS AND HUMAN DIGNITY, *supra* note 4, at 13.