Reasons to be Satisfied: Tim Dare and the Limits of Positivist Legal Ethics

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I. Introduction

In *The Counsel of Rogues?*,[1] Tim Dare takes up two concerns that have been central to understanding and defining an ethic of legal representation: the dignity of the office and the honour of lawyers.[2] In this book both the role of the lawyer and the ethical *persona* through which the lawyer might perform that role well are analysed in terms of positivist legal theory. Dare offers a defence of a particular conception of legal ethics by linking it to the justification of the authority of the state and to an ethic of integrity. In my response I focus on the characterisation of legal ethics as an 'instituted' activity, offering a historical contextualisation of Dare's concerns, drawing on traditions of jurisprudence and their associated accounts of the teaching of legal ethics. To draw out and situate Dare's understanding of such an activity, *The Counsel of Rogues?* will be taken back into some of the older traditions of jurisprudence that are concerned with elaborating conducts of life – here the conduct of life of lawyers practicing law within Anglo-Common Law traditions. The approach taken here is not critical in any strong sense. Rather it is intended to mark the way in which an ethic of representation has been drawn out of the repertoires of legal argument and the institutional life of law. This essay draws out some of the ways in which a legal ethic or ethic of representation can itself be understood as a training in the conduct of law.

I will address two points. The first point relates to Dare's characterisation of the 'standard conception' of legal ethics and offers a

† Melbourne Law School; with thanks to Connal Parsley for reminding me of the importance of the 'ethic of representation.'

1 Tim Dare, *The Counsel of Rogues? A defence of the standard conception of the lawyer's role* (2009).

2 The terminology of legal ethics has been pluralised at a number of points as much for variety as for analytical clarity. I have used the term 'ethic of representation' when talking about the general concern with developing accounts of the excellence of conduct in the practice of representing justice, the law, and legal clients. I prefer this to 'legal ethics' because it holds onto the practice of law in a more specific way than the latter term.

reminder that the institutional and jurisprudential inheritance of the ethics of lawyers is mixed and often in conflict. These conflicts relate to both institutions and ideas. The second point is directed to the conduct of lawyers and the Kantian or Rawlsian training in integrity developed by Dare. I will consider how such a training might be understood in terms of rival traditions of jurisprudence. I will conclude by addressing briefly the purpose of Dare's book, which is to give an account of a legal ethics that enables a lawyer to take ethical satisfaction from their office or vocation.

Dare's project

Schematically Dare offers a defence of, and justification for, what he calls a modified version of the 'standard conception' of the lawyer's ethic. According to Dare, the standard conception has three elements, each shaped by the role obligations of the lawyer: the principle of partisanship for the client; the principle of neutrality in relation to the moral merits of the client's case; and the principle of non-accountability for the causes for which a lawyer has acted as an adviser or advocate. As a matter of conduct the lawyer must represent with zeal the interests of their client; they must not allow their own moral judgment to cloud their advocacy or giving of advice; and they are entitled not to be criticised for such acts of representation.[3]

Criticisms and defences of the 'standard conception' have been many and varied. Dare's particular defence links the justification of the obligations or duties of the lawyer's role, to the proper political (and constitutional) functioning of law in a western pluralist political and social order. Dare's first take, then, at an ethic for lawyers is shaped around the commitments of public actors and the ethical requirements of institutional existence.[4] The institutional existence of law also requires the recognition of the plurality of roles or offices of the lawyer including that of advocate, adviser, law reformer, and scholar-critic.

The second part of Dare's defence of the standard conception of legal ethics relates to the figuration of an ethos that is appropriate to such roles. Dare turns to an ethic of integrity formulated in the shadow of the thought of Rawls and Kant.[5] Its aim is to equip the lawyer of sincerity or 'goodwill' with sufficient abilities of critical reflection to achieve coherence and a 'reflective equilibrium' between the differentiated obligations of the lawyer's role and the 'broader morality' of the community. *The Counsel of Rogues?* suggests that the work of critical reflection contains within it a

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3 Dare, *Counsel of Rogues?* 11-14.

4 Ibid 44-47.

5 Ibid ch 7.

form of perfectionism that, if pursued, would allow a lawyer to feel 'a great deal of satisfaction' in their work.[6] Such a commitment might also remedy what is perceived by many to be the dual crisis facing lawyers today: a crisis in morale amongst lawyers themselves and a crisis of confidence amongst citizens caused by the improperly perceived unethical conduct of lawyers. In Kantian fashion, what is to be perfected is not so much the empirical practice of law or civil government, as the *persona* of the lawyer and reformer (or, perhaps, the reformer as critic or scholar-philosopher).

One of the great merits of *the Counsel of Rogues?* is that it puts forward an ethic of role and office by returning an account of legal ethics to positivist legal theory and jurisprudence. It offers a reminder that such jurisprudence links, even if in attenuated fashion, knowledge of law both to a training in conduct of office and to the care of the self. Recent scholars of classical philosophy and classical life, such as Pierre Hadot and John Sellars, have drawn attention again to the ways in which Greek and Roman philosophical schools, particularly those of the Academics, Stoics, and Epicureans, considered questions of knowledge within a broader scheme of 'spiritual' exercises that enabled philosophers to accede to the philosophical life.[7] The same can also be said, in different ways, for the training in religious (and legal) life suggested by Christian educators, theologians, and natural lawyers.[8] Historians and philosophers in the humanities in Australia, such as Ian Hunter, Jeffrey Minson, and David Saunders, have also pointed to the way in which jurisprudence, especially the protestant natural law jurisprudence from Germany and England in the seventeenth and eighteenth centuries, was engaged in the task of fitting out lawyers and citizens for life in a de-sacralised European territorial state.[9] Dare's book can be read as contributing to these engagements by presenting a positivist ethic of legal representation as a distinct mode of the conduct of official life.

II. Standard conceptions

Institutions

In order to draw out Dare's ethic more fully, it is helpful to consider the sorts of ethical commitments that he puts forward in a number of historical

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6 Ibid 4, 159.

7 Pierre Hadot, *Philosophy as a Way of Life: Spiritual Exercises for Socrates to Foucault* (1995); John Sellars, *The Art of Living* (2009). Also in a rather different context Michael Foucault, *Hermeneutics of the Subject: Lectures at the College de France 1981-82* (2006).

8 Peter Browne, *Augustine of Hippo: A Biography* (2000).

9 Ian Hunter, *Rival Enlightenments* (2001); David Saunders, *Anti-Lawyers* (1997); Jeffrey Minson, *Questions of Conduct* (1993).

contexts. In this section and the next I offer a contextualisation of some of the institutional and ideational aspects of Dare's ethic of lawyers. Much of the institutional inheritance of legal ethics in common law jurisdictions has taken the form of polemical engagements between the rival accounts of the conduct of lawyers as it is represented by spiritual and temporal authorities or, more locally, between the law and legal science of the University and the training and practice of the Inns of Court and of the Royal Courts of Justice. So, for example, one of the more abiding ethics of representation depicts advocacy in terms of the work of mercy and the care of the indigent. It was an ethic of spiritual service, and provided one source of what we now call the 'cab-rank' rule.[10] Its mode of training was directed towards the spirit of the advocate, and it was understood as a training in the conduct of a religious or spiritual life. In seventeenth century England the training in conscience of church lawyers was reflected in the jurisdiction and practice of the chancery and ecclesiastical courts, but it was also practised more generally.[11] Such disputes about the character of conscience and how it should be understood became decisive in the formation of the ethos of the lawyer as an official of the crown and then state.[12] Tim Dare sides with those who would exclude conscience from the work of lawyers. However, the spiritual ethic of service is far from exhausted as contemporary lawyers of conscience continue to demonstrate. [13]

The institutions rooted in the church and their spiritual ethic of service can be contrasted with those of the state and empire and their worldly ethic of conduct. The outline of both forms of institutional life is still recognisable today. However, the worldly ethic of conduct developed for court life in the seventeenth century, and then later for offices of government, is not as clearly articulated as the spiritual ethic of service. The worldly ethic of lawyers was largely concerned with how to act successfully

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10 The immediate source of this point is from Jenny Beard (on file with the author). The more general shape of this argument can be found in David Saunders, *Anti-Lawyers* (1997). See also James Brundate, *The Medieval Origins of the Legal Profession* (2008); John Baker, *Monuments of Endless Labours: English Canonists and their Work, 1300-1900* (1998).

11 Dennis Klink, *Conscience, Equity and the Court of Chancery in Early Modern England* (2010) ch 3; Edward Andrew, *Conscience and Its Critics* (2001) ch 4.

12 David Saunders, 'The judicial *persona* in historical context: The case of Matthew Hale' in Conal Condren, Stephen Gaukroger and Ian Hunter (eds), *The Philosopher in Early Modern Europe* (2006); Lawrence Douglas, *The Memory of Judgment* (2001).

13 Javier Martinez-Torron, *Anglo-American Law and Canon Law: Canonical roots of the common law tradition* (1998); Costas Douzinas, *The End of Human Rights* (2001).

as an official subordinate to civil authority.[14] Its mode of training belonged to the rhetorical tradition, and in England, at least, was conducted in the Inns of Court. In rather more complex ways, similar forms of training lie at the foundation of offices of government.[15] Stated at a great level of generality, these institutional accounts of the conduct of lawyers provide rival *ethoi* appropriate to representing law and justice. Dare takes the nineteenth century barrister and Lord Chancellor, Lord Brougham, as an exemplar of the worldy ethic.[16] While Lord Brougham's ethic of office was defined in relation to the work of the court, Dare takes the further step of linking this specific ethic to the justification of a broader range of legal practices and political institutions. In so doing, he takes up an account of law that sides strongly with the institutional history and ethic of the state. On its face at least, this account of law seems pitched against rival accounts that place an independent value on an ethic of law independent of the institutional life of civil authority. But Dare's account of institutional life is more complex than this might suggest.

The institutional histories of the roles of lawyers are important to thinking about Dare's account, since for him it is through institutional role or office that the ethical obligations of the lawyer are shaped. For Dare, the work of a lawyer should be committed to civil order by upholding the role of law as public, reasoned, and visible; by accepting the limits of office of a law practiced between strangers; and by acting with appropriate zeal and courage in their roles. These roles are to be regulated as a matter of external compliance as a concern of the abuse of public office rather than as matters of conscience or of prudence and civility.[17] For Dare, there are also two institutional elements of a legal ethic which draw on the traditions of service that might otherwise be viewed as being shaped by conscience. The first is a preparedness to submit to the 'cab-rank rule', that is, to accept an open-ended obligation to serve the client. Second, a lawyer is to accept their relationship with their client as primarily a fiduciary relation framed in terms of vulnerability and care.[18] Dare treats these formulations as of a kind generalisation of the requirements of public role. Historically, they might be viewed as reflecting a rather specific institutional settlement of the common law where the spiritual jurisdictions of the Church have been

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14 Minson, above n 9 ch 2; Norbert Elias, *Power and Civility* (1983).

15 Conal Condren, *Argument and Authority in Early Modern England: The Presupposition of Oaths and Offices* (2006); Bruno Latour, *The Making of Law* (2009) ch 1.

16 Fred Zacharias and Bruce Green, 'Anything Rather than a Deliberate and Well Considered Opinion' (2006) 19:4 *Georgetown Journal of Legal Ethics* 1221.

17 Dare, *Counsel of Rogues?* 117-123.

18 Ibid 93-94.

folded into a rival jurisdiction of Civil Authority and government. Where a historian of jurisprudence might find in rival accounts of institutional life an ethic of representation that divides according to authority and conscience, Dare, as philosopher, sees correct and incorrect formulations of the conduct of public life (and a public life framed more in terms of right than in terms of empirical institutional ordering).

Ideas

The second aspect of this historical contextualisation of the account of legal ethics offered by Dare is ideational. Jurisprudence brings a mixed intellectual inheritance to the genre of legal ethics. Although as a discipline, legal theory or jurisprudence belongs to the University, its polemics address many of the concerns of the mixed institutional inheritance of legal ethics and the conduct of lawyers. They do so, moreover, in ways that do not directly map the institutional histories of common law jurisdictions or, for that matter, common law thought.[19] To draw out a little what might be at issue in linking the defence of the 'standard conception' of legal ethics to the justification of the authority of the state, it is necessary to follow both the elaboration of the relation of law to state authority and the relation of law to the conduct of the philosopher and citizen. Here the attacks and defences of metaphysical or scholastic jurisprudence in the seventeenth and eighteenth centuries have given shape not just to rival accounts of law, authority, and knowledge, but also to rival accounts of the appropriate *personae* of the jurist, citizen, and subject.[20]

The elaboration of distinct juridical conducts of life can be seen quite clearly in the early modern period with the emergence of a self-conscious anti-metaphysical civil jurisprudence and natural law accounts of political and legal authority in Germany and England. This jurisprudence, a protestant natural law jurisprudence, specifically rejected versions of law that claimed a higher moral authority than that of the state. The anti-metaphysical natural law tradition of civil philosophy initiated in the work of Thomas Hobbes and Samuel Pufendorf found its way into English, and then the jurisprudence of Australia and New Zealand, via Jeremy Bentham and John Salmond. While this jurisprudence has often been pitched against 'religious' natural law thought it also contended against rival secular metaphysical accounts of law in that it also rejected the metaphysical and moral anthropologies that were organised around the form of a *homo*

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19 John G A Pocock, *Barbarism and Religion* (1999) vol 1, 5-10; Michael Lobban, *A History of the Philosophy of Law in the Common Law World, 1600-1900* (2007).

20 See Saunders, above n 12.

duplex, of human being divided between intellectual and sensible being.[21] In Germany the metaphysical tradition was exemplified in the work of Gottfried Leibniz, Christian Wolff, and Immanuel Kant. It has been continued in Kantian and neo-Kantian thought within legal positivism amongst jurists as varied as Hans Kelsen and John Rawls, as well as by critical theorists of law.[22] A defence of a 'standard conception' of legal ethics will, inevitably, be engaged in taking up and refiguring particular historical and regional conceptions of the philosophical *persona* and roles of the lawyer. In developing his eclectic account of *persona* of the ethical lawyer, Dare also takes up a number of longstanding disputes within Kantian forms of legal positivism, albeit one engaged in living with the institutions of the common law.

III. Conduct of life: the persona of the lawyer

The second point addressed in this comment turns directly to the account of the *persona* of the lawyer offered in *The Counsel of Rogues?* Dare defends a positivist account of role, and argues for a firm distinction to be made between the sphere of law with its particular obligations and the sphere of common morality. For Dare, the sphere of common or ordinary morality is plural and without a uniform understanding of the good. Within that sphere, the ethics of the lawyer is to be determined by her role as advocate, adviser, and law reformer.[23] What is of interest here is how such a role can be taken up and occupied. Dare proposes an ethic of integrity shaped by sincere critical reflection on the part of the lawyer, and the fulfilment or perfection of the lawyer's various roles with goodwill and good reason. Without such critical reflection, Dare argues, there can be no ethical occupation or performance of role of office. It is through critical reflection that integrity of office is maintained, and through which the differences between the lawyer's role ethics and the general plurality of ethics are negotiated. Finally, it is through the critical reflection that the obligation to take up law reform is undertaken.

While the specific practice of critical reflection is not given substantial analysis, at two points Dare turns to Kant to elaborate his understanding of role and reflection. The first is in the opening paragraph of

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21 Ian Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* (2002) 20-29.

22 Perhaps this might be warning enough not to link the concerns of twentieth century legal positivism too closely to those of eighteenth and nineteenth century legal theory.

23 This is neatly encapsulated by Dare in his discussion of John Rawls' 'Two Concepts of Rules' (1955) 64 *Philosophical Review* 3: *Counsel of Rogues?* 44-47.

the book where he uses Kant's famous quip from the 'Project for a Perpetual Peace: A Philosophical Essay.' Lawyers, Kant wrote, were tempted to use the sword of justice not merely to protect the scales of justice (right), but also to promote their client's interests more directly: 'since if the scale does not sink the way he wishes [...] he throws a sword in it'.[24] The second reference to Kant is in the chapter on the idea of role obligation, where Dare discusses the 'conflicted pastor' in Kant's essay 'What is Enlightenment?'[25]

Kant's quip about lawyers appears in a supplement to the essay *Towards Perpetual Peace*. There he proposes a 'Secret Article For Perpetual Peace'. It states: 'The opinions of philosophers on the conditions of the possibility of public peace shall be consulted by those states armed for war'.[26] Secrecy is necessary, writes Kant, because the Faculty of Law would be exposed for overvaluing the administrative function of law because it is invested with power. Indeed, lawyers would be exposed for both their corruption by power and their misunderstanding of philosophy. Kant's argument is one for the priority of the free (public) reason of philosophy. Kant makes much the same argument in his essay 'What is Enlightenment?' Kant argues, as does Dare, that a pastor would have an obligation of office to teach the catechism or administer rites even if they harbour some concerns about the truth of 'inner religion'. Such obligations to church and state relate to matters of private reason and should be treated as a use of reason that is 'merely passive' in the service of the Church or State. It is the scholar who makes public use of their freedom before the whole world of readers.[27] The scholar speaks with reason and in his own person.[28] Obligations of office are obligations of private reason, owed to the church and the state, but the larger obligation of the scholar is to public reason.[29] Difficulties will arise if the teaching of the church contradicts 'inner religion' or precludes the possibility of the exercise of the freedom of

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24 Dare, *Counsel of Rogues?* 1; Immanuel Kant, *Project for a Perpetual Peace: A Philosophical Essay* (1796), also published as 'Towards Perpetual Peace: a Philosophical Project' in Mary Gregor (ed), *Immanuel Kant Practical Philosophy* 311.

25 Dare, *Counsel of Rogues?* 55-57; Immanuel Kant, 'What is Enlightenment' in Mary Gregor (ed), *Immanuel Kant Practical Philosophy* (1784) 11.

26 Immanuel Kant, 'Towards Perpetual Peace: a Philosophical Project' in Mary Gregor (ed) *Immanuel Kant Practical Philosophy* 337 (8:369).

27 Immanuel Kant, 'What is Enlightenment' in Mary Gregor (ed), *Immanuel Kant Practical Philosophy* (1784) 18 (8:37).

28 Kant 8:38, 18.

29 In numerous formulations Kant and his heirs draw distinctions between theory and practice, between norm and fact, and between the inner (willed) law of morality and the external law of phenomena. In the domain of practice, fact and institutional freedom are a matter of choice and incentive.

public reason. Critical reflection, in Kantian tones, marks the engagement of the scholar in the intelligible freedom of rational beings. Dare links Kant's scholar-philosopher to that of the law reformer and critic.

Dare's references to Kant are brief and are made to 'occasional' pieces destined for public reception. Such pieces say little of Kant's exacting metaphysics of morality. What Dare does perhaps share with Kant is a concern with the way in which intelligible beings come to occupy office (and the world) with their capacity for critical reflection.[30] Dare, like Kant, directs attention to the education and formation of the critical (or spiritual) self.[31] Here it has been suggested that being 'critically reflective' is not simply a matter of the exercise of reason by an intelligible being, it is part of a training in a conduct of life. This training, as Ian Hunter has argued, has a particular history within and without law that is more closely connected to the spiritual traditions of conduct than the worldly temporal traditions.

Here then, are some historical links between some older concerns of an ethic of service and representation, some newer concerns with the ethical occupation of role and office, and the trajectory of critical reflection that Dare draws through Kant.

IV. Final comments

In *Counsel of Rogues?* Dare suggests that a great deal of satisfaction might be felt by the lawyer adept at critical reflection and capable of finding a suitable equilibrium between their various roles. According to Dare, such an ethic generates a sense of obligation to the office of lawyer, allowing the requirement of critical or public reason to be exercised. As suggested, such a link relies on a training in particular metaphysics of morals to ensure that a lawyer can conduct herself in such a manner.

Two final observations could be made here. The first is brief and practical. Could such an ethical training programme be made available in law? While Kantian forms of education have become common in the humanities, they are far from dominant in legal education. They carry with

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30 Like Habermas, Tim Dare draws out the sense of the importance of aligning (contractual) political agreement with a cognitivist concern with reflection. For Habermas, this formulation is directed to the work of a collective subject seeking rational grounds for agreement in an ideal speech situation in which the freedom of choice of the rational individual is reconciled with the freedom of all in a common will: see Jurgen Habermas, *The Divided West* (2006) ch 8.

31 Ian Hunter, 'The History of Theory' (2006) 33 *Critical Inquiry 78.*

them significant commitments that seem to run against many standard aspects of legal education within common law jurisdictions. A training in conscience or experience of practical reasoning is inadequate to the task of upholding either the requirements of the exercise of public reason or maintaining the obligations of the office of lawyer. This is so not because of possible empirical failures to meet the administrative requirements of office but because such forms of training are insufficient to the task of creating someone who can act as an intelligible (noumenal) being with public reason. In this respect, Dare's defence of the 'standard conception' of legal ethics turns out to be critical in a strong sense.[32]

The second observation turns to the substance of a training in the conduct of a lawful life. It is questionable whether the particular forms of training and critical reflection for which Dare argues can best be characterised in terms of a training for satisfaction. Dare's account of critical reflection and of equilibrium requires constant scrutiny of two positions: the ethic of representation and the broader ethic of common morality. The work of maintaining a 'reflective equilibrium' depends on being able to take up the different roles or offices of lawyers. It also depends on being able to maintain a 'critical' (noumenal) self capable of conducting affairs in a rational manner. This work, following Kant, might better be considered the work of crisis rather than satisfaction. This is so either because the work of perfection of institutions is endless or, more likely, the achievement of critical (noumenal) being is too exacting.[33]

There are, of course, other, and rival, accounts of an ethic of role or office. The Ciceronian ethic of office, for example, was influential in early modern accounts of the office of the advocate and judge. There is at least a plausible interpretation of the Ciceronian ethic that points out that there is no unified critical reflective intelligence that lies behind the varied *personae* of office but rather office is exercised as a matter of training and comportment.[34] Were the reports of depression and psychological suffering not so prevalent in the legal profession, I would be tempted to advocate that a training in a worldly ethic of legal role would not seek to produce a

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32 I think Dare leaves this point open. If the role of law reformer is viewed as a matter of office and private reason then, perhaps, Dare remains within the domain of 'modification' of the 'standard conception'. If, however, the role of reformer is filled as a matter of public office, then Dare is offering an account more closely aligned with Kant.

33 It might also lead to a denigration of empirical institutional life, as it does with Kant in his essay 'Towards Perpetual Peace'. It could also lead to arguments that favour a more fulsome realisation of the community of rational beings, as it does with Jurgen Habermas.

34 David Burchell, 'Civic *Personae:* MacIntyre, Cicero and Moral Personality' (1998) 19:1 *History of Political Thought* 101.

lawyer who is 'satisfied' so much as one who is 'cheerful' in occupying the offices of law – cheerful, perhaps, that the obligations of office are limited.