Justice, Post-Retirement Shame, and the Failure of the Standard Conception of Lawyers' Roles

JUSTIN OAKLEY†

I. Dare's account of the standard conception

Tim Dare's *The Counsel of Rogues?*[1] [*CoR*] is a spirited and robustly-argued elaboration and defence of a 'moderate version' of the standard conception of lawyers' roles, in response to common misunderstandings and recent influential critiques of that conception. Dare believes that by providing a clearer and more systematic moral foundation for lawyers' roles, he can deflect various well-known moral criticisms of lawyers and restore integrity to the lawyer's role. I share the goal of restoring integrity to the lawyer's role,[2] but I do not think the standard conception, even as Dare conceives of it, can deliver that adequately.

Dare characterises various critiques of the standard conception 'as sharing an ambition to weaken the distinction...between professional and general morality'.[3] But while Dare's Rawlsian defence of lawyers' role-differentiated duties helps demonstrate that some common criticisms of the lawyer's role are indeed misguided, this approach raises other concerns. The idea that lawyers have role-differentiated duties and virtues is clearly very plausible, but I will argue that there are important moral limits to lawyers' zealous advocacy of their clients' legal rights that arise from *within* the role morality of lawyers. That is, in certain circumstances lawyers, *qua lawyers*, are morally justified in *not* providing what their clients may have a legal right to. I will also argue that the post-retirement shame expressed by some criminal defence lawyers when looking back at the tactics they used in helping clients secure legal entitlements indicates

---

† Monash University Centre for Human Bioethics, Clayton, Victoria.

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

2 See Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (2001); Dean Cocking and Justin Oakley, 'Professional Interpretation and Judgment, and the Integrity of Lawyers' in Tim Dare and W. Bradley Wendel (eds), *Professional Ethics and Personal Integrity* (2010) 68-78.

3 *CoR* 15.

that we can sometimes properly judge their behaviour as wrong from the perspective of ordinary moral standards, *outside* their role.

As Dare characterises it, on the standard conception of lawyers' roles, the lawyer-client relationship is mediated by three principles: (i) the principle of partisanship, involving loyalty to the client's interests compared with those of others; (ii) the principle of neutrality, whereby lawyers must not let 'their own view of the moral status of the client's objectives or character affect the diligence or zealousness with which they pursue the client's lawful objectives';[4] and (iii) the principle of non-accountability, which dictates that 'a lawyer is not to be judged by the moral status of their client's projects'.[5] For the purposes of this commentary, I will not challenge the second or third principles, but I will argue that there are serious ethical concerns about the principle of partisanship that Dare formulates.

Dare argues that the principle of partisanship requires lawyers to exercise what he calls 'mere-zeal' rather than 'hyper-zeal': 'Merely zealous lawyers are concerned solely with their clients' legal rights [whereas] ... Hyper-zealous lawyers are concerned not merely to secure their clients' legal rights, but instead to pursue any advantage obtainable for the clients through the law. Indeed, they are not really attempting to defend legal rights at all: they are attempting to win'.[6] This distinction helps Dare block some familiar criticisms of the standard conception.

Dare explains that his indirect route makes a 'clean break', whereby 'role-occupants are not entitled to appeal to ordinary morality from within their roles. Rather, they are limited to moral principles and resources "internal" to the role'.[7] These role-obligations can 'require or allow occupants to act in ways which are inconsistent [though not irreconcilable] with ordinary morality'.[8] Thus, to criticise a lawyer's actions on grounds of ordinary morality is to commit a sort of category mistake, but 'we can always judge the institution from the perspective of ordinary morality, perhaps lobbying for a change in the practice...when the practice seems to have come apart from the concerns of ordinary morality which drove its construction'.[9]

---

4 *CoR* 8.

5 *CoR* 10.

6 *CoR* 7. Dare adds 'The difference between the two types of zeal is the *end* towards which zealous advocacy is directed – rights or mere advantages – rather than the degree of zeal with which that end is pursued' (*CoR* 7n17).

7 *CoR* 44.

8 *CoR* 31.

9 *CoR* 46.

Dare's moral rationale for the standard conception seems motivated by two key considerations. First, the need to avoid naïvely moralistic evaluations of lawyers' conduct, where they are judged directly by ordinary or broad-based moral standards (though lawyers should be encouraged to see what they do as serving moral ends). Second, the need to reliably meet the legitimate expectations of clients about their legal rights being upheld, so that clients are not short-changed by lawyers who refuse to adopt forms of advocacy on the grounds that they would be judged wrong by ordinary moral standards, or because they are *personally* opposed to using such tactics.

II. The professional integrity critique of Dare's standard conception

Suppose, for the moment, that we accept Dare's claim that lawyers' duties are role-differentiated in such a way that ordinary morality must not be used directly to judge lawyers' actions in their role. There are still, nevertheless, moral questions that can legitimately be raised *from within* the role of the lawyer and the values distinctive of lawyering as a practice, about what Dare takes lawyers to be obligated to do in particular cases. That is, there remains an important *internal* critique of what Dare's standard conception requires a lawyer, *qua lawyer*, to be required to do in particular cases.

The idea of distinctive professional values has also been defended recently by virtue ethicists in seeking to provide substantive accounts of virtues in, for example, medical and legal practice. A natural way of applying virtue ethics to the professions of medicine and law uses the teleological framework of Aristotelian virtue ethics, and develops accounts of virtues in medical or legal practice by investigating what character-traits enable doctors or lawyers to serve the proper ends of their professions, such as health and justice respectively.[10] This framework can also provide a plausible analysis of the virtue of *professional* integrity, which involves having and acting with a commitment to serve the proper goals of one's profession. For example, doctors who cite professional integrity as a reason for refusing to provide a futile intervention for a dying patient can be understood as holding that such an intervention would be contrary to their overarching professional goal of acting in their patients' best interests. This clearly differs from cases where doctors reject such interventions by appealing to ordinary morality, such as the idea that futile interventions are contrary to human rights or human dignity, and from cases where doctors

10 See Oakley and Cocking, above n 2; Jennifer Radden and John Z. Sadler, *The Virtuous Psychiatrist: Character ethics in psychiatric practice* (2010).

reject a futile intervention because they have a personal, conscientious objection to using it (say, on religious grounds).

The internal critique I have in mind can be put by considering what some practicing criminal defence lawyers say about the sort of advocacy which they understand the principle of partisanship, outlined by Dare, requires them to use in defending clients in sexual assault trials. For example, in reflecting upon his career as a barrister, Howard Nathan explains how he came to realise that certain tactics which he felt the principle of partisanship required him to adopt were gravely unjust, given the manner in which those tactics treated complainants. Looking back on his approach as a young barrister defending a man accused of raping a fourteen-year-old girl, Nathan says of the tactics he used in order to obtain an acquittal for his client:

> In front of a jury ... I say ... 'She didn't complain. Did you think she wasn't provocative...? She was flaunting herself at the baths!' This was the standard defence at the time ... That system, with my skills, allowed the most appalling injustice, as far as that girl was concerned, to go unrequited.[11]

In describing his role in helping perpetrate what he regards as an appalling injustice towards the fourteen-year-old complainant, Nathan does not seem to be appealing to how *ordinary* morality would judge the use of such tactics, nor does he seem to be talking of how his own *personal* moral values would evaluate such advocacy. Rather, Nathan seems to be indicating that it is a special moral failing, *as a lawyer*, to treat another unjustly when acting in that role. That is, certain sorts of injustices seem to be especially egregious when perpetrated by a *lawyer* rather than by a non-lawyer, given that this would be directly opposed to the goal of justice, which lawyers are entrusted to serve. In being directly contrary to the proper goal of their profession, bringing about such injustices could be viewed as a perversion of their professional role and as a violation of their professional integrity.

This professional integrity critique relies precisely on the idea of role-differentiation, whereby lawyers can say in response to clients who expect them to adopt certain tactics that the clients are legally entitled to, 'I cannot with my *lawyer's* hat on (as someone committed to serving justice) do that for you'. Similarly, when doctors refuse to accede to demands by the family of a dying patient to provide life-prolonging interventions that will actually

---

11 Howard Nathan, quoted in Kerri Elgar, 'A Night at the Confessional' (1997) 71/11 *Law Institute Journal* 14.

make the patient's condition worse, a doctor acting with professional integrity can say, 'I cannot with my *doctor's* hat on (as someone committed to serving patient health) do that to the patient'. Doctors and lawyers sometimes walk a fine line between pushing boundaries and acting in the interests of a patient's health or in the interests of justice, but sometimes they can fall off this tightrope and go over the edge towards a moral perversion of their proper goals.

It might be suggested that the injustices and cruelties I have mentioned are simply wrongs by the standards or ordinary morality. However, that response would miss the additional wrongness of such actions being performed by a *lawyer* or a *doctor*. To use an extreme example, consider the egregious experiments carried out by the Nazis on concentration camp inmates during the Second World War. It is undoubtedly immoral by broad-based moral standards for anyone to inflict this sort of torture on inmates, but it seems clearly *worse* for this torture to be carried out by doctors, such as Dr Josef Mengele, as torturing people is a gross perversion of their professed role as a healer.

It might be insisted that the use of the sorts of tactics described by Nathan is ruled out in the first place as hyper-zealous advocacy, which Dare emphasises his version of the standard conception does not endorse. But, in taking himself to be using 'the standard defence' at the time, of persuading the jury that the fourteen-year-old girl acted provocatively towards the accused, Nathan is plausibly interpreted as saying that he was using 'mere zeal' to provide his client with what he was legally entitled to, rather than using 'hyper zeal' to wring from the law every possible advantage.

In these sorts of cases, the client may object to the lawyer abstaining from the use of such tactics, but the broader community would most likely say that the client must accept that. Sometimes client expectations of their lawyers are illegitimate, not only in expecting their lawyer to do things which the client has no legal right to, but also in expecting their lawyer to do things which the client may well have a *legal* right to but which are contrary to the proper goals of the profession, and so contrary to the lawyer's professional integrity. In both of these kinds of situations, client expectations must be overruled by the goals of justice.

But while Dare might concede that lawyers who limit their zeal on account of such considerations are not demonstrating a naïve moralism, he might nonetheless argue that clients and the community are short-changed (in terms of their legal rights) when lawyers limit their partisanship and zeal in these ways. However, lawyers are mandated *by the community* to serve justice, and indeed, lawyers have overriding obligations to the community – the client's ends should not be served at the cost of short-changing the

community, in terms of the sorts of priorities and dispositions to serve justice that lawyers have pledged to have upon joining the profession.

III. Post-retirement shame and the limits of role-differentiation

I now want to return to Dare's fundamental claim that it is inappropriate for lawyers' conduct within their role to be evaluated by the standards of ordinary morality. This claim is open to challenge by an *external* critique of Dare's standard conception of lawyers' roles. Despite Dare's account of this conception, I had not thought it was part of this conception that lawyers' professional roles can *never* be evaluated directly by reference to ordinary morality. Indeed, such an absolutist 'clean break' view of role-differentiation is rather odd, since it does not seem to apply to other professions. For example, it seems inappropriate to advise doctors appealing to ordinary morality in rejecting those 19th century codes of medical ethics which recommended paternalistic behaviour towards patients that they ought nevertheless to follow such codes in their medical practice, but should agitate for change during their time off. Further, lawyers also have generic professional obligations, like all professionals, of transparency and accountability (for example, in relation to possible conflicts of interest) to the community. And these generic professional obligations *are* arguably specifications of ordinary moral standards in a particular context – namely where one has been granted a monopoly of expertise by one's community over the provision of goods that are important to that community. Indeed, the obligation to respect client autonomy may itself be plausibly viewed as a generic professional obligation, specified within a context; whereas the obligation to serve justice is a clearly a specific obligation of *lawyers*.

In any case, a number of highly experienced lawyers do not themselves accept Dare's clean break approach to lawyers' role-differentiation. For example, some criminal defence lawyers, during post-retirement contemplation of their careers, confess to feeling what they seem to regard as justified shame at the impact upon complainants of the tactics they believed their role required them to use in helping to secure their clients' legal rights. For example, Seymour Wishman, in his now-classic account of his excesses as a top New York criminal defence lawyer, tells of his reactions to being angrily confronted by a woman who had been a complainant in a particularly vicious rape trial the previous year, where Wishman had managed to get his client acquitted at the trial:

> This Lewis woman I had humiliated in the sodomy/rape case had changed things for me. A bell had rung for me. Her outrage and pain after the trial had made a joke out

> of my posturing and my claims that there was nothing personal in what I had done. There Goddam well *was* something personal. If she had been telling the truth, I had stripped her of what little dignity she had left after my client had finished with her.
>
> ... Maybe I hadn't done anything unethical – legally unethical. In fact, I might have been doing what I, as a lawyer, was required to do. But 'preserving our criminal justice system,' worthy as that goal might be, was becoming far too narrow and abstract a concept to provide me with any comfort. I had ignored the larger moral and emotional implications of my actions.[12]

In the shame he seems to be expressing at having ignored 'the larger moral and emotional implications' of the tactics he used in humiliating 'this Lewis woman', Wishman appears to be saying that he is ashamed at not having seen the limits that ordinary moral standards would have imposed on his advocacy here. Thus, the shame Wishman seems to be describing was not shame simply at having failed to change the adversarial system itself, or its constitutive rules, as Dare might suggest that Wishman could do. Wishman clearly accepts a form of role-differentiation as applied to lawyers' roles, but he also thinks there are certain things lawyers may be obliged by their professional role to do which are gravely unjust by broad-based moral standards. And shame can be an important signal of this.

But if this interpretation of Wishman's reactions is correct, then Dare's approach would characterise Wishman's shame here as misguided. But is this post-retirement shame necessarily misguided? It seems more plausible to regard such emotions as showing that lawyers, even those motivated by zealously pursuing their clients' legal rights, have more choices than Dare recognises about how far they go in pursuing those rights, what tactics they adopt, and what damage they inflict upon complainants. Shame (and other emotions) can play an indispensable role in alerting lawyers when they are going too far, and they should not have to wait until the institution has been changed for the better before tempering their zeal somewhat. After all, they still feel personally involved in the operations of the adversarial system.

Lawyers in adversarial systems also need to develop their understanding of when they are committing injustices to opposing parties by the tactics adopted. This requires an *emotional* appreciation of what serving justice means on a day-to-day basis. Such an appreciation seems difficult for Dare's right-based approach to accommodate, but is an integral

---

12 Seymour Wishman, *Confessions of a Criminal Lawyer* (1981).

part of virtue ethics' emphasis on lawyers serving proper professional goals from appropriate dispositions and emotions. As the post-retirement shame of some lawyers illustrates, their emotions are crucial to appreciating when they have overstepped the line – indeed, Wishman's apparent shame seemed to suggest that what he did was wrong by the standards of ordinary morality.[13]

The community has given lawyers a brief not only to uphold clients' legal rights, but also to have a character of a certain sort – that is, to have certain dispositions and priorities. And this character is not simply the disposition to dutifully uphold what clients have legal rights to, but more importantly to serve justice. Meeting this goal will sometimes require sympathy and shame for lawyers to realise that clients do not have an overall legal right to what they may appear to have legal rights to (eg. Wishman's tactics), and that even if they do have overall legal rights to certain tactics, only a nonvirtuous (ie. shameful) lawyer would uphold those rights. It is difficult for Dare's conception to accommodate the idea that clients might have legal rights to tactics that it would be *shameful* for a lawyer to use.

IV. Conclusion

The lawyer's role, like any professional role, is, in the end, defined teleologically. So, there needs to be a story told about why lawyers acting with mere zeal are serving justice. As Dare tells this story, lawyers serve justice by acting with concern for their clients' legal rights. However, lawyers themselves sometimes feel that this sole focus on their clients' rights comes apart from the goal of justice, which they have an overriding commitment to serve. That is, lawyers sometimes feel, upon reflection, that the goal of justice is in certain circumstances better served by their refraining from using tactics that their client has a legal right to. And, whether lawyers appeal to moral standards internal or external to their professional role, emotions such as sympathy and shame play a crucial role in alerting lawyers to when their conduct breaches those moral standards.

---

13 The importance of an active capacity for sympathy in providing a brake on an overzealous or mistaken commitment to what one takes to be one's duty is familiar from Jonathan Bennett's well-known discussion of Huckleberry Finn. Huck's growing compassion for the slave Jim helps Huck resist the promptings of his racially-prejudiced morality, which is urging him to return Jim to the slave-owners on the plantation. Huck's sympathy for Jim revealed to Huck that returning Jim to his slave-owners would be *wrong*. See Jonathan Bennett, 'The conscience of Huckleberry Finn' (1974) 49 *Philosophy* 123.