Author's Response to the Commentators

TIM DARE[†]

Reply to Jeanette Kennett

Jeanette Kennett agrees that professionals, such as physicians and lawyers, should not 'treat their professional interactions with clients [and patients] as an opportunity to promote their personal moral views and give unasked for moral advice.' She thinks, however, that I slide between personal morality and common morality, and that physicians and lawyers may properly provide moral counsel where there is overwhelming moral consensus, and where the moral counsel is relevant to the professional role. On this view, doctors may legitimately counsel patients to inform partners of possibly fatal transmissible diseases and to consider the importance of vaccination not just for their own children but for others, and lawyers may legitimately raise moral considerations of fairness and justice ('broadly uncontested goods') where they are appropriately connected with their professional role.

I have some sympathy for this approach, but am less confident than Kennett that professionals will stay on the right side of a cluster of distinctions being deployed in her account. First, as Kennett notes, I think it is all too easy for clients to mistake 'wise counsel' for straightforward professional advice. Doctors and lawyers may think they are simply describing the 'broadly uncontested' moral landscape, but clients will often think that they are being told what, medically or legally, they must do. I am also a bit more sceptical than Kennett about what counts as a 'broadly uncontested' good. Take the vaccination case, for example. I have defended mass immunisation programmes,[1] and, as less compulsory programmes have failed to achieve effective coverage rates, have some sympathy for more compulsion. The simple and (for we pro-immunisers, frustrating) fact, however, is that there is deep disagreement about mass immunisation programmes. Furthermore, it is clear that my government, my health system, and my community have considered increasing compulsion and decided against doing so. That background seems to suggest a number of

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1 Tim Dare, 'Mass Immunisation Programmes: Some philosophical issues' (1998) 12 *Bioethics* 125.

things. First, we should not too readily assume that the goods of vaccination are 'broadly uncontested'. Second, doctors should be very careful to ensure that patients know exactly what sort of advice they are being given.[2] Finally, the example suggests that it will not always be easy to disentangle the goals of particular professions or practices from those of others: the vaccination case is one where the goals of health engage with those of law, insofar as legislating to promote particular health practices is an obvious and in many but not all places obviously rejected option.

I suspect these sorts of difficulties are raised in even more striking fashion by law than medicine, since the point of many legal rights is precisely to settle what we are entitled or required to do where there is ongoing substantive moral dispute about what we ought to do. Given that, the matters upon which lawyers may be tempted to offer counsel are less likely to be the subject of broad moral consensus than those normally encountered by health professionals. More generally, while Kennett is confident that the lawyer in the case of the client legally able to resist an action to repay a just debt would be meeting her two conditions – advising on a matter on which there is broad moral consensus and which is appropriately related to the professional role – if she were to raise moral considerations of fairness and justice, I am less sure. Statutes of limitations have been around for a long time, and there are fairly obvious ways to bring them into line with our moral intuitions in cases such as *Pakel*: the doctrine of laches provides a ready model.[3] Given that, mightn't we think that rights

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2 Kennett gives another example that I think illustrates the difficulty here. Kennett describes a lawyer advising a client who has a legal defence to a just debt and writes '[w]hile lawyers must advise clients of the availability of a legal defence and ensure that such a defence is competently conducted ... might they not also (if this is apparent to them) advise of the justice of the claim against them and of the possible damage to their reputation in resorting to the statute of limitations to avoid payment of a just debt?' It seems to me that there are two quite different sorts of considerations in this list of possible advice. Lawyers may indeed be well placed to advise clients about the reputational risk of relying on a statute of limitations to avoid paying a just debt: that is a matter of fact about which professional experience may have given lawyers insight. But that is a very different matter to advising a client that it would be unjust or unfair for the client to rely upon a lawful defence available to those in the client's position. While such advice might satisfy Kennett's 'role relevance' test, it seems much less clear that this is a matter into which lawyers have particular professional insight. Notice that my own account does not leave lawyers without resources in such cases: the lawyer can point out that legal rights must be understood relative to their purpose, and that it may be improper to rely on them for other purposes.

3 The equitable doctrine provides a defence where there has been an unreasonable lapse of time in asserting a right due to the negligence of the

under statutes of limitations are not mere 'collateral lawful advantages', but instead that they are rights our community has chosen to make available? And now it looks like lawyers who use their professional positions to counsel clients not to assert those rights are not counselling compliance with moral truisms, but instead pressing a preferred view on an issue about which others not only might disagree, but have disagreed.

Kennett's other principal suggestion is that I ought to have allowed room for conscientious objection. 'It is puzzling' she writes, 'that Dare does not consider the possibility of justified disobedience to the rules anywhere in his discussion,' especially since my account is essentially Rawlsian, and 'Rawls explicitly allows a place for disobedience in his political theory.' I agree: I now think I should have given an account of the circumstances under which the good lawyer should refuse to follow the rules, and that I could have done so without giving up too much of my central thesis. Still, substantial disagreement may remain over the scope of legitimate conscientious disobedience. It will do for now to say that I think an adequate account would leave conscientious objection a rare and final resort, properly taken up in in only the clearest of cases. Kennett mentions *Spaulding v Zimmerman* and the Lake Pleasant Bodies Case as instances, but I am inclined to think the moral wrong in the latter case not sufficiently serious or time-crucial to warrant disobedience, and while the former case seems to meet those criteria, the facts are rather murky: there is some reason to think the lawyers never consulted their own client, for instance, who could, of course, have released them from the obligation to withhold the information, and an adequate account of conscientious disobedience had better require them to have done so. More generally, lawyers who find themselves moved to break the rules too often might be in the wrong profession. Still, I do think there are cases in which lawyers should break the rules,[4] and, as Brad Wendel puts it, 'take their lumps', and I should have given an account of the circumstances and scope of such legitimate disobedience.

Reply to Justin Oakley

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claimant and the delay has been to the detriment of the other side.

4 Alton Logan was convicted of killing a security guard in Chicago in 1982. Lawyers Dale Coventry and Jamie Kunz knew Logan was innocent because their client, Andrew Wilson, had confessed to them that he had killed the guard. Coventry and Kunz sat on the information, protecting Wilson's right to confidentiality, until Wilson died, by which time Logan had spent 26. years in jail. See: http://www.cbsnews.com/stories/2008/03/06/60minutes/main3914719.shtml The lawyers should have breached confidentiality and been prepared to pay the price.

Justin Oakley offers both 'internal' and 'external' criticisms of my account, each of which appeals to the phenomenon of post-retirement shame – shame experienced by retired lawyers when they look back at the things they did in their professional roles.

The internal critique relies upon the idea that even if we accept that lawyers' duties are role-differentiated, and so prohibit direct appeal to ordinary morality, still there may be moral questions that can legitimately be raised '*from within* the role of the lawyer and the values distinctive of lawyering as a practice...' Oakley gives the plausible example of a physician refusing futile treatment to a dying patient because 'such an intervention would be contrary to their overarching professional goal of acting in their patients' best interests.' Such a physician, Oakley points out, would be appealing, not to an external obligation of ordinary morality, but to a value internal to her professional role.

The broad strategy echoes Kennett's suggestion that professionals may provide moral counsel 'relevant to the role', and, again, I am broadly sympathetic: my own view relies upon an account of the role or point of law, for instance, to establish limits to legitimate advocacy. I take myself, that is, to be identifying values internal to the practice, in the sense that one needs to understand the role of law and so lawyers in order to understand the role-differentiated obligations and permissions of the roles of the practice.

Oakley's example is certainly morally troubling. He recounts the experience of two lawyers looking back at their cross examination of a sexual assault victim when 'the standard defence of the time' allowed (and perhaps required) them to aggressively raise questions about the victim's conduct. The first lawyer's remark that that defence 'allowed the most appalling injustice ... to go unrequited,' writes Oakley, shows that he was concerned not (or not solely) with the ordinary moral assessment of his conduct, but with its moral standing by the lights of the values internal to law. The lawyer, Oakley writes, 'seems to be indicating that it is a special moral failing, *as a lawyer*, to treat another unjustly when acting in that role.'

Oakley's assessment of the lawyer's view of the internal source of the values at issue may be right. This seems to be a case in which the lawyer judges, albeit with the wisdom of hindsight, that some aspect of the law was not appropriately justified by the values of law itself. Now, candidly, I am not sure what work the sense of shame is doing at this point (other, perhaps, than highlighting to the lawyer his current judgement that the processes he was involved in were not internally justified), but I will come back to the shame issue below.

Putting shame aside, and treating the case as a simple (if troubling) one in which some legal process came apart from the values of law, I think my account could have offered something to the lawyer had he had these doubts when practicing: subject to an existing conflict of interest with his client, he could and perhaps should have taken on the role of law reformer to press to have the law brought into line with its values. Of course his efforts might have failed: his concerns might have been judged by the community of the time not to have been sufficiently weighty to warrant depriving sexual-assault defendants of their rights to certain defences. We know, of course, that eventually the lawyer's views did win the day, perhaps pressed by lawyers cum law reformers a few years after him, and the sort of cross examination of which he now feels ashamed was restricted in most Western legal systems. What are we to think of the lawyers in the period before the rape-shield laws? Oakley wonders whether I might count such advocacy as hyper-zealous, but I do not think it can be so counted. The defences outlawed by the rape-shield were simply too carefully considered, too often upheld, for us to think they were not available to sexual assault defendants as legal rights (rather than mere collateral lawful advantages). This is regrettable – it would have been better had Oakley's lawyer started the campaign which resulted in the rape-shield laws earlier; it would have been better if it was clearer to legislators what the values of law required and how competing interests were to be balanced – but that seems a Herculean dream, and simply pointing out cases in which we once had it wrong doesn't seem to take us very far or help lawyers who must practice under our actual, non-Herculean legal systems.

What of the lawyer's sense of shame? Oakley uses post-retirement shame to motivate his external criticism as well. The second lawyer's shame, Oakley writes, is an important signal that his role-conduct had been 'gravely unjust by [external] broad-based moral standards.' My concerns about Oakley's appeal to post-retirement shame are, I think, relevant to both the internal and external cases, so the following remarks are offered as a response to both. As Oakley anticipates, I think both lawyers' sense of shame is misguided. Of course the law has allowed or even required its officials to do things we now judge, with the wisdom of hindsight, to have been immoral or inimical to the values we now judge central to law. The sort of defences for which Oakley's lawyers now feel shame are just one relatively recent and clear example to be added to slavery, transporting people to Australia for (what seem now) trivial offences, and so on. But even if our current moral judgement of those practices is correct, we seem to need more to warrant a feeling of shame now for our past involvement in such practices. Suppose the conduct was then subject to careful examination and debate, and judged by reasonable people to be legitimate. Even if we now feel, correctly, that that earlier judgement was a mistake, it

seems inappropriate to feel shame for acting on that earlier judgement. In doing so, we appear to be holding ourselves, and perhaps others, to a standard to which we concede it would have been unreasonable to then hold ourselves or others. (Shame might be appropriate if we correctly judge now that we did or should have seen that the law required reform but that we had done nothing, or had acted hyper-zealously when we could have refused).[5]

I remarked earlier that it was regrettable that the law did not track ordinary morality more accurately, that we were not better at identifying its core values and rendering the law coherent around them. And, plausibly, it is that regret that these lawyers should feel toward their former conduct.

Reply to Shaun McVeigh

Shaun McVeigh's commentary caused me to look at my own book in a new light. I confess that many of the connections he draws between *The Counsel of Rogues* and older traditions of jurisprudence in the process of offering a 'historical contextualisation' had not occurred to me prior to reading his wide-ranging commentary. In response, I focus on some aspects that I found particularly challenging, enlightening, or suggestive.

McVeigh characterises my project as containing two parts, one linking the lawyer's obligations 'to the proper political (and constitutional) functioning of the law in a Western pluralist political and social order,' and the other relating to the 'figuration of an ethos that is appropriate to such roles' based on an ethic of integrity grounded in the work of Rawls and Kant. I found this way of parsing my project suggestive and challenging. As McVeigh probably appreciates the latter is very much a 'spandrel' of the former, at least as far as my intentions went. This is not to criticize his more nuanced reading, rather to admit that I began with the political account and more or less accidentally generated the ethos he identifies by responding to likely criticisms of the effects of that account on the individuals who must engage with law as clients or legal officials. Hence the account of integrity I give is largely a *response* to likely challenges to the demands of a robustly role-differentiated conception of professional life, rather than a free standing positive account, and I wonder – and this is the challenge of McVeigh's reading – whether the ethos is the weaker for it. An account of integrity primarily designed to allow individuals to manage the challenge of role-differentiated obligations, one might think, is bound to be rather thin. McVeigh's commentary led me to think of ways that account

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5 It is clear the sense of shame *itself* will not do to justify a current judgement that past conduct was wrong. Plenty of people feel ashamed of their sexual orientation, their taste in television drama, or romance novels, their waistlines, their fondness for tiramisu ....

might be 'thickened up', perhaps by developing the connections he identifies to broader jurisprudential and political theory, to see where one might be led by the thought that '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' and the suggestion that *The Counsel of Rogues?* presents 'a positivist ethic of legal representation as a distinct mode of the conduct of official life.'

Nonetheless, as McVeigh notes in Part II of his commentary, I end up with an account of the persona of the lawyer. For the most part I found McVeigh's critical exposition of my account generous, in the sense, again, in which I think he occasionally portrays the theory rather more richly than it deserves. McVeigh is right that my references to Kant are brief and to occasional pieces – both the opening quip and his account of the priest's position struck me in part because each seemed so 'un-Kant like'[6] – and I certainly do avoid Kant's exacting metaphysics of morality. That is deliberate, and extends to other 'exacting moral theories'. The strategy flows from the idea that the way to generate a professional ethics is to begin with that which lawyers (and physicians, etc.) actually encounter, the role and its accessible justifications, discussing moral theories as they arise and are relevant to, for instance, explaining the deontological nature of rules of confidentiality, or the consequentialist grounding of many policy arguments, or the like, rather than as topics of interest in their own right.

Given this, I do find myself parting company with McVeigh at the point he suggests that the sort of critical reflection I think necessary to integrity 'relies on a training in [a] particular metaphysics of morals to ensure that a lawyer can conduct herself in such a manner.' This characterisation of my project leads McVeigh to ask in closing whether it would be possible to introduce such a training – in a particular Kantian metaphysics of morals – into law schools. I have a much more modest model of critical reflection in mind, one which assumes that moral reasoning is for the most part a fairly mundane affair, relying upon basic skills of inference and argumentation, care and thoroughness, and assuming no particular metaphysic of morals. It is not clear, of course, whether even this more modest model could be taught in law schools, but only because it is not clear it can be taught anywhere. Still, law schools with their capacity to expose students to the rich resources of cases and extended practice and

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6 Though McVeigh's comment that Kant and his heirs often draw distinctions between theory and practice, norm and fact, the inner law of morality and the external world of practice, suggest that what I found a surprisingly 'pragmatic' Kant in the priest's case may be more typical than I appreciated.

instruction in practical reason seem as well placed as any educational forum.[7]

I am also more optimistic than McVeigh about the possibility that lawyers might find satisfaction through the process of critical reflection. The task is, McVeigh suggests, more likely to be one of crisis than satisfaction, 'because the work of perfection of institutions is endless or, more likely, the achievement of critical (noumenal) being is too exacting.' I am more optimistic first, because I think we are seeking something much less than perfection, whether in the derivations and justification of institutional duties, or the construction of a self of integrity, and second because I think the process of critical reflection I have in mind is not terribly complex or exacting. Rather, it is something every competent agent does constantly as they negotiate their way through the world, from role to role, managing competing claims encountered as citizen, friend, spouse, employee, and so on. I think we're good at this sort of thing.

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7 See, for instance, Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993).