Roles, Rules and Rawls

JEANETTE KENNETT †

In this book Tim Dare mounts a compelling and carefully reasoned defence of the standard conception of the lawyer's role. This conception, as presented by Dare, has much to recommend it. In this brief commentary I shall suggest, however, that the Rawlsian argument mounted by Dare does not establish so clean a break between role obligations and the obligations of ordinary morality as he thinks. Ordinary morality, as distinct from private morality, has a legitimate, though restricted, input into the kind of advice a good lawyer acting within his or her role might give to a client, and may help mark the line between merely zealous and hyper-zealous advocacy in some circumstances. In addition, I will argue that Dare omits to consider the scope that a Rawlsian view allows for conscience to override role obligations. While the good lawyer must usually set aside broader moral considerations in the course of their professional duties, acts of what I shall call professional disobedience which are conceived of as analogous to civil disobedience, do not threaten this separation and may sometimes be morally required.

I. A clean break: Rawls' two levels of justification applied to role morality

It is a commonplace that professionals acting within their roles may sometimes do what would be wrong if done by the person in the street. To the extent that lawyers acting within their role sometimes facilitate the immoral ends of clients or frustrate the morally justified claims of their opponents, they behave in such ways, and are often criticised for it by those who think they should be more directly responsive to ordinary moral considerations.

Dare argues for what he calls 'a clean break' between ordinary morality and role morality by appeal to Rawls' classic distinction between two levels of justification. If this model is correct, then 'the appropriate justifications for conduct within the practice ... differ dramatically from the justifications of the practice itself' (Dare at 45). 'The roles and role obligations established by the justified institutions function as independent

† Department of Philosophy, Macquarie University.

sources of moral obligation for those acting within them.'. (46) According to this view: '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'. (44) This, Dare argues, is the only model that can secure role-differentiated obligation and so secure the very goods which serve to justify the practice or institution as a whole. Any approach to professional obligation which permits direct or indirect recourse to ordinary morality will result in the collapse of role morality. He defends himself against the claim that this would make ordinary morality wholly irrelevant to the evaluation of professional conduct since, even on the conception he favours, 'ordinary morality bears upon the justification of the institutions that generate professional roles'.(47)

On the Rawlsian liberal conception endorsed by Dare, the role of law is to provide decision procedures that are fair to all and neutral between opposing views. This is what allows us to live together in a pluralist society. While we each cannot help but believe that the moral views we endorse are correct, we must acknowledge that a great many matters on which decisions must be made admit of good faith disagreement. It seems then, that it is especially important for lawyers to refrain from allowing their private moral judgments to influence their professional conduct, since their role is precisely to facilitate their clients' access to these procedures to test or secure their legal rights. Lawyers may privately disapprove of the substantive ends of their clients, but they frustrate the system their role is meant to serve if they substitute their private judgment for that of the law. As W. Bradley Wendel argues, lawyers' deference to governing legal norms ensures that 'legal institutions can fulfil their distinctive function of resolving disagreement'.[1]

The good lawyer is bound by the rules governing professional practice, even in cases where s/he conscientiously disagrees, so as not to unilaterally disadvantage clients who rely on her to act in their legal interests and provide them with accurate and neutral information upon which to base their decisions. In cases where a lawyer believes a law or a rule governing professional practice leads to substantive injustice, Dare points out that her recourse and perhaps her duty is to advocate within the forums provided by the system for reform of the rules – for changes in the institutional framework. This is how the good lawyer, acting within their role, is constrained and influenced by ordinary morality.

II. Refusal of service

1 W Bradley Wendel, 'Civil Obedience' (2004) 104 *Columbia Law Review* 363, 375.

A consideration of refusal of service in the medical profession adds considerable intuitive support to Dare's argument for a clean break but also suggests some limitations. Refusal of service by professionals on moral grounds regularly happens in the medical profession, sometimes publicised, sometimes not, but it is not subject to professional sanction. I recently saw the following notice posted in a medical practice in a small country town:

> *Dr X does not prescribe opiates*
>
> This kind of notice is not uncommon. Here is another:
>
> *This practice does not refer women for termination of pregnancy*

In these cases and others like them the doctor refuses, as a matter of conscience, to provide certain legally available treatments or to offer treatment to certain categories of patients.[2] But the ethics of drug use and drug policy, and the moral permissibility of abortion are not issues on which doctors have special or exclusive moral expertise. The lack of broad consensus on these issues in the community is reflected in the medical profession itself. The medical cases seem to be clear cases of private morality overriding the professional obligation to treat and are so in matters where there is *no consensus* on the moral question. Reasonable people disagree on issues of abortion and addiction. Given the vulnerability of the patient and the imbalance of power between patients and doctors it is all the more important that doctors not be in the business of overriding patient autonomy and substituting their own moral judgment for that of their patient. Denial of service violates the entitlements of patients in such cases, especially when there is no readily available alternative practitioner. Doctors with insuperable moral objections to those aspects of their work should consider changing jobs.[3] Their surgery is not a forum for disseminating their private views. Kant's analysis of the conflicted priest's obligations to his flock, cited by Dare (55-6), seems perfectly apt here. Likewise then, lawyers should not treat their professional interactions with clients as an opportunity to promote their personal moral views and give

---

2 Of course, some doctors may not be permitted to prescribe opiates, but others adopt a moral stance to managing heroin addiction or pain in this way. They see addiction as intrinsically morally bad. In these cases the doctors concerned at least advertise their views openly, in other cases it guides their advice to patients in the consultation itself. Such advice may be dressed up as medical advice but where it gives patients a false impression of medical risks it doubly violates the doctor's role obligations.

3 As should pharmacists who refuse to dispense contraceptive pills.

unasked for moral advice, or to allow these views to restrict the kind of advice they provide to their clients on what courses of action are legally available to them in the pursuit of their legal ends.

III. Is the Rawlsian argument for the clean break completely convincing? Ordinary morality and role-relevant moral considerations

One reason for objecting to the clean break, outlined by Dare (22-4), is that the standard conception of the lawyers role and its reliance on the principles of partisanship, neutrality, and non-accountability may paradoxically render lawyers *less* capable of serving their client's interests, since clients may often require advice, e.g., on the disposition of their estate, which refers to what is fair or decent and not simply to what is legally permitted or required. Lawyers *need* recourse to the resources of ordinary morality in order to provide such advice.

Dare's apparent response (54-5) is to argue that while the perspective of ordinary morality always remains available to reflective role occupants any such moral advice could not be provided *qua* lawyer, and a lawyer who does so must make it clear that he is offering such advice as a friend or in some other non-legal capacity. Dare's reason is that there are no grounds to suppose that lawyers in general have any special moral or counselling expertise and that failure to be explicit about boundary crossings may confuse the client about the nature of the advice being offered. One might add that given the imbalance of power and expertise and the vulnerability of the client that Dare highlights in Chapter 5 it is all the more important that lawyers focus their attention to their client's legal rights and interests.

Dare's argument is persuasive but not wholly so. I will argue that there is carefully restricted scope for the good lawyer to provide advice to their clients which is informed by common morality. First, I suspect that there is a slide in Dare's argument between the notions of private morality and ordinary or common morality. It is improper, for the reasons given above, for a practitioner to introduce considerations of *private* morality into their dealings with clients. But it is not so clear that there must be such a clean break between *common* morality and role morality. The Rawlsian justification for the lawyer's role and the departures from ordinary or common morality that it licenses rests, in significant part, on the crucial role a system of law plays in adjudicating between different interests and on the notion of reasonable disagreement about the good. But while many moral issues are contested, and even widely held moral views may be mistaken, there are some issues on which there is overwhelming moral consensus and where we have strong reason to think that the common view is not

mistaken. These are cases where it is not plausible to think that a common and core moral view is simply a reflection of existing power structures which could not survive a Rawlsian veil of ignorance test. The considerations adduced by Dare, therefore, do not seem to me to rule out a limited place for some considerations of ordinary morality on which there is a broad consensus from entering into the advice that a good lawyer might give a client. They might, defensibly, see this as a legitimate part of their role. There is, however, a further requirement that such considerations be *role- relevant.*

Consider again two medical examples. A doctor counsels her patient to inform their partner of a possibly fatal transmissible disease and offers them assistance to do something which is no doubt difficult and perhaps not in the patient's perceived interests, medical or otherwise. She, in effect, represents to the patient the interests of the affected other in good health. Similarly, a doctor, in counselling a mother who is concerned about the possible effects of vaccination on her child, may carefully explain not just the benefits to *her* child in gaining protection from devastating illnesses but the benefits of 'herd immunity' for the population at large and the increased danger to babies too young for vaccination if large numbers of parents take the decision not to vaccinate.

The doctor raises inescapably moral considerations in the course of giving such advice, but I would argue that she does not step outside her role here or impermissibly allow her private moral views to sway her professional judgment (as she would, say, if she expressed moral condemnation of the patient's sexual orientation or religious beliefs). In such cases she is guided by, and appeals directly to, the major moral justification for her profession, and those justifications as Dare acknowledges ultimately derive from common morality and the uncontested good of health. She has a justified professional moral concern to bring the health risks to those who might be affected by her patient's negligence, to the patient's attention.

The extent to which ordinary morality is at the doctor's disposal is thus clearly delimited by the requirements of role relevance. It must be relevant to the medical issue at hand. It is no part of the doctor's role to offer moral advice about, say, the patients' tax return or to morally exhort them to take part in some unrelated public health campaign, however noble. Nor does it override the doctor's role -specific obligations to provide skilled diagnosis and appropriate respectful treatment or referral to the patient, including in the case where her advice is not accepted.

Similarly, it seems to me, that the good lawyer may sometimes properly and from within their role have occasion to raise moral

considerations of fairness and justice (which are likewise broadly uncontested goods) with clients and may be especially well equipped by their experience in legal practice to advise their clients of the extra legal costs and consequences of legal action. It is not therefore, outside the good lawyer's role to recommend settlement of the debt in the case of *Zabella v Pakel* that Dare discusses, on both moral and prudential grounds. The lawyer here would not be urging or imposing a private and contestable moral view. While lawyers must advise clients of the availability of a legal defence and ensure that such a defence is competently conducted if required, 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? If lawyers do not have any morally-informed expertise to offer their clients on the justice of a claim, then they are simply technicians.

Moreover, to deny clients the benefit of their relevant professional experience because it might stray too directly into ordinary morality would often do the client a disservice. In family law disputes it may behove the good lawyer to gently urge the benefits of a fairer settlement than the client initially wants, or to point out the damage that such bitter legal disputes do to the children of a relationship and to the desirability of negotiation rather than litigation. A lawyer might go so far as to recommend counselling to re-establish a civilised working relationship with the estranged spouse. The lawyer who restricts their advice in these cases to narrow issues of legal rights and the likelihood of the success of legal action in securing the client's expressed wishes may not, on balance, be doing the best thing by them. It is an odd code of ethics that assumes that the interests of one's clients can best be defended by excluding consideration of 'any unpleasant consequences ... to any other person'.(6) A partisan defence of one's client's interests may include a broader view of those interests.[4]

At issue here is perhaps not whether such advice *may* be given by a lawyer but whether in doing so they act within their role. I suggest, contra Dare, that they do, provided that any moral or prudential advice offered is appropriately role- relevant and that it is clear that the moral considerations adduced in providing such advice do not override the other professional obligations that govern the relationship. In doing so, however, they have more direct recourse to ordinary morality than Dare appears to allow.

---

4 Of course, it may become clear, as it may have been in *Pakel,* that the client is intrinsically greedy or callous and is not amenable to a more generous interpretation of their interests.

IV. Are there any cases in which the reasons of ordinary morality directly override role obligations? Excluded reasons and role reasons

A more difficult question is whether good lawyers may ever allow moral considerations to *override* standard professional obligations. Can they ever be justified in refusal of service, breaking confidentiality, or failure to provide comprehensive advice and zealous advocacy? On Dare's account they could not. On the account suggested above, a restricted set of role-relevant reasons arising from common morality may be taken into account but do not supplant or override the other rules governing legal practice. If reasons of ordinary morality compete on equal terms with role reasons, then the distinctive goods that the role is constructed to provide will be lost.

Dare argues that the reasons which justify a role are distinct from the reasons generated by the role, just as the reasons for making a promise and the reasons for keeping a promise once it is made are distinct. The making of a promise creates a new obligation. I may have made a promise in order to secure an advantage but I am not entitled to reconsider my promise when the advantage no longer seems so attractive. The reasons I had for making my promise have been superseded by the reasons established by the promise.

In professional settings, the reasons of ordinary morality are in Kadish and Kadish's terminology 'excluded reasons'.[5] However, competition on equal terms or exclusion of ordinary moral considerations from professional deliberation may not be the only alternatives. Perhaps we could secure the distinctive goods made available through the professional role by requiring the excluded reason to carry significantly greater weight in order to enter into deliberation.[6] This is problematic. If we systematically allow or encourage lawyers to check whether the reasons of ordinary morality carry this sufficient extra weight, we may encourage the view that the professional rules and principles have only prima facie authority. Moreover, it might be excessively demanding and distract lawyers from their role responsibilities. Either way, anything approaching a standing requirement might dilute the role of lawyer and weaken the system the role serves.

---

5 Mortimer R Kadish and Sanford H Kadish, *Discretion to Disobey: A Study of Lawful Departures from Legal Rules* (1973) 27.

6 As suggested by Kadish and Kadish.

Nonetheless, the demands of ordinary morality may be so compelling on occasion that they force themselves – or should force themselves – onto the attention of the lawyer. Wendel suggests that we need a 'carefully crafted exception for catastrophic moral horrors'.[7] He points to the case of Zimmerman and Spaulding, in which an independent medical examination ordered by a defence attorney discovered a potentially life threatening condition that, if revealed to the victim, would substantially increase the damages to be paid by his client beyond what is covered by insurance.

The Lake Pleasant case discussed by Dare is another where an exception for catastrophic moral horrors might be invoked. There lawyers for a client charged with a gruesome murder had knowledge of three further murders and had verified the location of two of the bodies – even photographing them. They believed it might harm their planned insanity defence if the other murders were revealed before the trial. They maintained their silence in the face of desperate pleas from the missing girls' parents to tell what they knew about the location of the bodies. Clearly, to reveal the existence and location of the bodies would have constituted a breach of confidentiality. Equally clearly, the first order moral considerations involved are not ones about which there could be any reasonable disagreement and they are powerful. The lengthy period of fear and uncertainty endured by the parents was a catastrophic moral horror that could have been avoided. Should it have been? Or could such horrors have been mitigated by lawyers acting from within the rules?

Certainly some of the actions undertaken by the lawyers in the Lake Pleasant case may have breached the line Dare draws between merely zealous and hyper-zealous advocacy. He wryly notes David Luban's 'sanguine inclusion of "photographing the bodies" among the lawyers' role obligations' (note 27, at 39). Surely it can be asked if the lawyers went too far in acting as they did (including moving one of the bodies for a better shot) and then claiming privilege for their actions. And since there was already overwhelming evidence of guilt for the murder with which the client, Garrow, was charged, and he was a strong suspect in the other murders, the lawyers may have done better by their client in encouraging him to confess and reveal the location of the bodies in exchange for leniency. While such a strategy would not be certain of success it may strike the right balance between professional responsibilities and broader moral considerations.

I think it is unlikely that such catastrophic moral horrors will inevitably fall to the distinction between merely-zealous and hyper-zealous advocacy as outlined by Dare. Dare argues that 'merely-zealous lawyers are

---

7 Wendel, above n 1, 389.

concerned solely with their client's legal interests' (76) – that is, those that are protected by law. Lawyers who do not zealously pursue those rights display the vice of arrogance. But lawyers are not obliged to secure for their clients any advantage obtainable through the law. They must determine the difference between mere and hyper-zeal by reflection on the (Rawlsian) point of law and on their role in the institution. Dare's remarks would seem to rule out the possibility of disclosure in the Lake Pleasant case and also in Zimmerman and Spaulding. It seems to me however, that a case could be made that the question of whether a particular line or style of cross examination crosses the line between zealous and hyper-zealous advocacy depends in part upon situational moral factors such as the vulnerability of the witness and the undeserved harm an aggressive cross examination may cause to the reputation or mental state of an innocent victim. While it is no part of the lawyer's role to pursue benefits for those who are not their clients, ordinary morality might properly act as a side constraint on the *manner* in which they pursue their client's interests. But whether this view of ordinary morality as a side constraint on hyper-zealous advocacy would succeed in preserving the distinctiveness of the lawyer's role is something that requires a more detailed examination than can be offered here.

V. Disobedience

If the distinction between merely-zealous and hyper-zealous advocacy cannot do the work of protecting some who might otherwise be grievously harmed in the course of the lawyer's work, it leaves outright disobedience as the only available option for thwarting catastrophic moral horrors. It is puzzling that Dare does not consider the possibility of justified disobedience to the rules anywhere in his discussion. He acknowledges that 'single breaches are rarely sufficient to thwart institutional goals' (40) but does not take up the issue of whether a good lawyer can conscientiously commit such a breach. Perhaps he accepts even the extreme harms in the Lake Pleasant and Spaulding cases as the price we pay for an overall justified legal system and the important roles it generates.

I argue that his Rawlsian view does not commit him to this stance. Rawls explicitly allows a place for disobedience in his political theory. Civil disobedience 'expresses disobedience to the law within the limits of fidelity to law'.[8] It is defined as 'a public, non-violent and conscientious breach of law undertaken with the aim of bringing about a change in laws or government policies. On this account, the persons who practice civil disobedience are willing to accept the legal consequences of their actions, as this shows their fidelity to the rule of law'.[9] In line with this view, I

8 John Rawls, *A Theory of Justice* (1971) 366, n 103.

9 Kimberley Brownlee, 'Civil Disobedience' (Edward N Zalta ed, Spring

argue that sometimes a good lawyer or other role occupant might justifiably act in a professionally disobedient way in response to weighty excluded reasons in order to prevent or alleviate catastrophic moral harm and then submit themselves to the judgment of the relevant association.

Wendel agrees. In the Spaulding case, where a man's life is at stake, he thinks the lawyer should disclose but that such disclosure comes at a moral cost. The lawyer does something wrong. The second- order (role based) considerations are still in force even when the first-order moral considerations carry such great weight that they override. And because the role reasons retain their force 'the lawyer must be prepared to accept justified legal punishment for disobedience'.[10]

Conscientious objection, as practiced in medicine, is without formal sanction. It thus licenses doctors to place their private moral views ahead of the views and medical entitlements of their patients. Dare is right to object to the elevation of the professional's private conscience to the role of arbiter of what services will be offered to clients. He is right to note the threat this would pose to the practice of law and to the valuable role performed by lawyers. But professional disobedience does not pose a threat to the standard conception of the lawyer's role defended by Dare, since the person who undertakes it does not display any lack of respect for the relevant professional rules and standards. The requirement to submit oneself to judgment and punishment ensures that individuals will not routinely flout the rules but will do so only when the countervailing reasons from ordinary morality are especially weighty and urgent. While the deliberative break between role reasons and ordinary moral reasons is not as clean as Dare might wish, the conceptual distinction remains. Role reasons may be overridden in special cases but they are never silenced. Thus it is an amendment to his theory that he should accept. Not to do so would be to expose lawyers to some of the threats he discusses in the remainder of his book, including moral insensitivity and alienation. But these are topics for another time.

2010) *The Stanford Encyclopedia of Philosophy* <http://plato.stanford.edu/archives/spr2010/entries/civil-disobedience/>.

10 Wendel, above n 1, 404.