

Author's Introduction

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To begin, let me thank the Australian Society of Legal Philosophy for organizing the symposium that gave rise to the commentaries that follow, the Australian Journal of Legal Philosophy for their publication, and, especially, the commentators for their careful engagement with my book *The Counsel of Rogues?* Even where I have disagreed – and that is by no means with everything that has been said – I have found the comments useful and insightful.

I begin with an overview of my book. According to the standard conception [SC] of the lawyer's role, lawyers may be allowed or required to do things properly judged immoral from the perspective of ordinary morality; to zealously represent someone with a lawful but immoral interest (someone legally entitled to resist paying a just debt, for instance), or to withhold information a lay person would be morally obliged to reveal. Despite its name, the standard conception has been the subject of a wide-ranging critique that claims at least that lawyers acting under the standard conception: are alienated from ordinary morality; are invited to deny responsibility for the things they do (and so to deny their status as moral agents, capable of choosing to do otherwise); are rendered morally insensitive in ways which impair their ability both to live a satisfactory life outside of their professional roles and to perform their professional roles adequately; and are likely to find their work deeply unsatisfying because of the sometimes striking discord between the apparently obvious concern of law and lawyers with justice and morality, and the reality of practice under a conception that separates the moral obligations of the lawyer from those of the rest. In the face of that critique, commentators have, in various ways, sought to make the lawyer's role more directly amenable to the demands of ordinary morality. I argue that that is a mistake: that a modified version of the standard conception is essentially the right way of conceiving of the ethical obligations of lawyers.

My overall strategy is straightforward. I argue that lawyers have *moral* grounds for regarding themselves as having duties to their clients which may allow or require them to act in ways which would be immoral were they acting outside of their professional roles. In short I offer two

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moral arguments. One appeals to the nature of client professional relationships. Such relationships, I maintain, are marked by unequal knowledge and power, the importance of the matters at stake, barriers to client assessment of professional diligence and expertise, and a lack of client knowledge of the character of individual professionals. Those factors make it important that clients can relate to their professionals on the basis of publicly accessible role-differentiated obligations and permissions. The other moral argument relies upon an account of the role of law in modern liberal communities according to which its primary function is to mediate between reasonable but inconsistent views about what we ought to do, and in which it does that by allocating rights to settle 'what will we do' questions, without purporting to settle ongoing debate about what we ought to do. If the moral justifications of the lawyer's role can be defended, many of the criticisms of the standard conception fall away. Most generally, if there are moral reasons for taking the standard conception seriously, then we should not too readily accept the claim that the conception alienates lawyers from morality, or overdraw the conception's break between 'personal' or 'ordinary' morality on the one hand and professional morality on the other. An adequate personal or ordinary morality will entail a proper respect for the moral demands and permissions of professional roles.

The moral arguments also suggest a solution to the crisis of morale. I argue that the standard conception recognises the vulnerability of clients within client/professional relationships, and that contemporary liberal communities rely to a considerable extent upon the practice of law as conceived by the standard conception. Law so practiced allows people who are committed to a range of diverse but reasonable views about how we should live to form stable and just communities. The lawyer's role so conceived is one in which lawyers should take a good deal of satisfaction. The crisis of morale that troubles so many commentators is attributable, I suggest, to a failure to appreciate the moral justification for the role rather than to any general licensing of immoral professional conduct.

Further, once the moral arguments for the standard conception are made explicit, those arguments themselves suggest limits to the things lawyers may justifiably do within their professional roles. The moral implications of the standard conception are often mischaracterised. Commentators suggest that the conception requires lawyers to secure any advantage the law can be made to give – to be what I call hyper-zealous – and many of the most trenchant criticism of the SC flow are responses to hyper-zeal. But I argue that the standard conception, understood in light of its proper moral justification, requires no such thing. It justifies a more limited and moderate sphere of professional conduct than is commonly supposed, requiring lawyers to be what I have called mere-zealous,

zealously pursuing only their clients' legal entitlements (as opposed to mere advantages).¹

In addition, I argue, the model I defend allows us to conceptualize an important feature of ethical legal practice. I make use of John Rawls' distinction between constitutive and practice rules to defend the claim that role differentiated obligation are possible, and to show how an institution and the roles it supports might be designed with reference to the resources of broad based morality and yet it be the case that the occupants of those institutional roles are not at liberty to appeal to broad based morality from within their roles. Rawls's model allows us to maintain a 'clean break' between role morality and broad based morality without making it the case that standards of ordinary morality have no place in the evaluation of professional conduct. Conceptualizing the lawyer's role in these Rawlsian terms, this is to say, contributes to the argument, alluded to in the previous paragraph, that the break between role morality and ordinary morality should not be overdrawn.

It also has another function. According to the model, a lawyer noticing, for instance, that a statute of limitations or current rules or practices of cross examination have produced results regrettable from the perspective of ordinary morality cannot act, *qua* advocate, other than the existing rules of the practice recognize. The role is constituted by those rules and the actions available to her are settled by the role. I have argued however, that the model allows us to see more clearly than we otherwise might, how role occupants are able to move between roles. The relevant move here is between the roles of advocate and 'reformer'. The Rawlsian model makes very clear how and why we might conceive of lawyers as subject to an obligation to work to improve the fit between role and ordinary morality where, in some respect, the institution, built with reference to the resources of ordinary morality, has come apart from ordinary morality. *Qua* advocate, lawyers confronted with such a case will normally have to stick with their clients, helping the client secure their rights under the law. When the client's case is complete, however, the

¹ It may seem that this feature of the model requires a theory of interpretation, to explain how lawyers are to know when an advantage offered by a rule is a 'right' or a 'mere advantage'. For the moment, I am inclined to think the objection is not too troubling. I offer the analogy of the jurisdiction to prevent 'abuse of process'. Abuse of process is defined functionally: an abuse is the use of legal proceedings for purposes other than those for which those processes were intended. Identifying abuses requires just the sort of reasoning through the point of laws and legal processes which I argue underpins the distinction between 'legal rights' and 'mere advantages'. So, for the moment at least, I offer an ostensive response to the interpretative objection: 'How do we draw the distinction? Like that!'

lawyer may well bear a responsibility to take on the role of law-reformer, arguing for reform the need for which their legal expertise and familiarity with the particular case may have made especially clear.

Some of the most troubling strands of the critique of the standard conception raise concerns about the ways in which the conception calls upon professionals to distance themselves from their lay-persona, from the claims of ordinary morality, from the circumstances in which they act, from the people they engage with when acting as role-occupants, and so sacrifice their integrity. I attempt to address these concerns about integrity on a number of fronts. As a conceptual matter, I defend an account of integrity according to which it rests on a commitment to critical reflection upon one's role(s) and a readiness to follow the implications of that reflection. I attempt to tie this account of integrity to my substantive account of the lawyer's role by suggesting that the reflective lawyer should accept some such account. The account addresses the substantive threats to integrity in a number of ways: it seeks to minimize the conflict between the demands of role morality and those of ordinary or broad based morality by limiting the excesses of advocacy; it offers a model of professional roles which, while insisting on a 'clean break' between role morality and broad based morality, nonetheless recognizes the contribution of ordinary morality at the point of institutional design; it offers a moral argument for the particular role differentiated demands of the lawyer's role, suggesting that there are reasons of ordinary morality to take those demands seriously; and it shows that lawyers have a professional moral obligation to engage in a constant process of law reform, aimed at promoting fit between the lawyer's role morality and broad based morality.