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Robust Role-Obligation: How Do Roles Make a Moral Difference?

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It is easy to motivate the intuition that roles generate obligations, but harder to say just how they do so. How could it be right, Macaulay asked, "that a man should, with a wig on his head and a band around his neck, do for a guinea what, without these appendages, he would think it wicked and infamous to do for an empire?"[1] How can a role make a moral difference? Following a brief account of roles and role obligations I sketch considerations that appear to support the starting intuition that roles do indeed make a moral difference before considering three accounts of how they do so. Two of these accounts, the direct and less direct routes, portray roles as social or institutional structures that bring ordinary or background morality to bear on role occupants. According to the direct route, role-obligations are essentially "complex instances of ordinary morality".[2] Discussing the possibility that lawyers might have distinct, role-differentiated permissions to bluster from time to time, David Luban insists that "if a lawyer is permitted to puff, bluff or threaten on certain occasions this is … because in such circumstances anyone would be permitted to do these things".[3] According to the less direct route, role-occupants are constrained by role-specific obligations, but those obligations are themselves subject to ordinary morality. Such obligations, writes Luban (having moved from the direct to the less direct route) may always "be overridden in exigent circumstances, and thus [role-occupants] must always be ready to scrutinize particular acts to determine

[1] Lord Macaulay, 'Lord Bacon' (1837), in Thomas Babington, Lord Macaulay, *Critical and Historical Essays contributed to the Edinburgh Review*, 5th ed. in 3 vols. (London, 1848) vol. 2, pp. 280–429, p. 318.

[2] Judith Andre, 'Role Morality as a Complex Instance of Ordinary Morality' *American Philosophical Quarterly* 28 (1991) 73–79, p. 73.

[3] David Luban, *Lawyers and Justice* (Princeton: Princeton University Press, 1988), pp. 154–155.

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if the circumstances are exigent."[4] Neither account, I contend, can explain the moral significance of roles. If roles are to make a moral difference, they must be conceived of more robustly, as themselves the source of obligations for role occupants. Of course, it is easy to see the attraction of the direct and less direct routes. They go some way toward meeting the strong intuition that there are roles and role-obligations, while also providing for the oversight and authority of ordinary morality. I will argue, however, that there is a better, indirect route to role-obligation (the "Clean Break" strategy) that gives us both robust role-obligation and access to the resources of ordinary morality. I make use of John Rawls's distinction between constitutive and practice rules to show how a practice or 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.[5] 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 the conduct of role-occupants.

1 What are Roles and Role-Obligations?

I shall take a role to be a position in a social network constituted by a distinctive set of normative statuses – rights, duties, powers, permissions, and the like – that attach to a role-occupant by virtue of her occupation of that role. The identity and normative force of the statuses that constitute a given role depend upon the function and moral significance of the role itself.[6] Doctors' and lawyers' roles include obligations of confidentiality, for instance, because that obligation is required to create the conditions in which patients and clients are likely to provide information those professionals need in order to fulfill their respective functions and, because the roles of the doctor and the lawyer are socially significant, the obligation of confidentiality as it arises in those roles has considerable normative force. My role as a member of the Auckland MG Drivers' club is also constituted by a cluster of normative statuses, but that role, and hence the normative statuses which attach to me by virtue of my occupation of it, is relatively trivial. They do not count for much if in conflict with competing obligations and permissions. Nor are the statuses which constitute a role of equal normative weight: teachers have significant permissions and obligations essential to their pedagogical role (the permission to read and comment on their students' work; the obligation to keep up to date in the areas in which they teach) but they also have others which are more peripheral (the right to access the staff-room

[4] David Luban, 'Freedom and Constraint in Legal Ethics: some Mid-Course Corrections to *Lawyers and Justice*', *Maryland Law Review* 49 (1990) 424–459, p. 442.

[5] See John Rawls, 'Two Concepts of Rules' (1955) 64 *Philosophical Review* 3–32.

[6] See Michael O. Hardimon, 'Role Obligations' *Journal of Philosophy*, Vol. 91.7 (1994), pp. 333–363, p. 334: "[A] role obligation is a moral requirement … whose content is fixed by the function of the role, and whose normative force flows from the role."

perhaps[7]) which attach to the individual via the role but carry less normative weight than those essential to fulfilling the teacher's function.

Michael Hardimon has this sort of model in mind when he defines a roles as a "constellations of institutionally specified rights and duties organized around an institutionally specified social function."[8] A role obligation, he continues, "is a moral requirement, which attaches to an institutional role".[9] Many significant roles are institutional in this sense: the role of the lawyer, the physician, the policeman, and so on. Such roles are the product of deliberate institutional design guided by desired functional outcomes. But many important roles are not. When I describe myself as a father, if I mean to say more than that I am a male biological parent, I place myself in a social role. My description generates a range of expectations about how I ought to behave in those who know what the role "father" is my community. If they know what "father" means they will have views about what I may and must do to be a good or bad father. The cluster of normative statuses which constitute the role of the father are the product not of deliberate institutional design, but of social expectation in turn produced by widespread beliefs about the function of father: "[T]hose who hold [these] position[s] are expected to act, and perhaps feel in certain ways. Deviations generate surprise, uneasiness, disappointment, or disapproval."[10]

There are important differences between socially and institutionally generated roles. Perhaps most importantly, institutional roles are likely to be more transparent and amenable to explicit review and amendment: medical associations can decide that doctors should henceforth report suspected child maltreatment and make it so. Changing the expectations that constitute social roles – and so changing those roles themselves – is much harder, as we see in the long and continuing struggle to change gender roles. So long as there are widespread expectations that women will be subordinate, modest, reserved, chaste, and so on, those who act inconsistently with those expectations will generate surprise, uneasiness, disappointment, and disapproval. The role, being constituted by such expectations, can only be changed by changing social expectations and there is no society-level analogue of the medical association who can make that so.

The idea that expectations "constitute" roles may seem troubling. One might think that (at least many) roles are constituted by their functions, and that the function of, for example, the "father" role is independent of anyone's expectations about how fathers should behave. To those familiar with functional accounts in biology, for instance, talk of "expectations constituting roles" may seem unnecessary and complicating if not downright confused. We can talk of the function of the heart – to pump blood – without talking about anyone's beliefs about that function. Indeed the function of the heart properly understood gives us a useful corrective to mistaken beliefs about what makes a heart a good heart. For the biologist, we might say, function itself introduces normativity, allowing us to say whether a particular heart is good or bad. Why not deploy functions the same way in

[7] I owe the example to Jack Larsen, a schoolboy of my acquaintance.

[8] Hardimon, 'Role Obligations', op. cit., p. 334.

[9] Ibid.

[10] Andre, 'Role Morality as a Complex Instance of Ordinary Morality', p. 78.

talk of roles? We could give an account of the function of fathers, wives, lawyers, doctors, and so on, derive appropriate role descriptions from those accounts, and use them to specify which expectations or institutional structures we ought to have. Here, we might say, the role of the father would be constituted by the best account we could give of the father's function, not by the expectations, which we might hope would track that account.[11]

Such an approach would solve a troubling feature of the account of social roles such as the gender roles "man" and "woman". If on the one hand these gender roles are constituted by expectations about how men and women will act, then it seems that those who don't act consistently with those expectations are bad men or women. But that seems troubling. We want to be able to regret that these gender roles, which sprang from implausible and now largely abandoned views about the proper social functions of men and women, still have at least some social currency. In fact, however, roles *are* constituted either by institutionally specified normative statuses or by social expectations. The role of the lawyer is not simply the proper function of the lawyer. It is the set of normative statuses put in place by authoritative institutions guided, one hopes, by that function. The role "father" consists in the expectations triggered by the perception that I am in that role, not by the function of fathers understood from the perspective of the ideal observer. In both the social and the institutional case functions and roles can and do come apart. Roles are functional insofar as the institutional structures and social expectation flow from a view of proper function, but it is the specification of that function through formal or informal processes that create roles, not direct appeal to functions themselves.

We should not make too much of the differences between social and institutional roles. Roles are *clusters* of normative statuses and many – perhaps most – will include both socially and institutionally generated examples. Professional roles may be the product of deliberate institutional design, prompted by a view about the proper function of the role, but presenting oneself as a lawyer (or a teacher, or an accountant, or …) also triggers expectations about how one should behave and feel, deviation from which generates surprise, uneasiness, disappointment, and disapproval.[12] There is, furthermore, an important common core that, for current purposes, will matter more than the differences. The normative statuses that attach to roles – whether understood explicitly and directly as clusters of rights and duties or less directly as grounds for expectation, disappointment, and disapproval – are there, ready and waiting, for those identified as role occupants. The expectations arise because of the nature of the role rather than because of anything about the role-occupant as an individual. The cluster of normative phenomena which constitute the role define and adhere to the role that is donned by an individual, like a suit of clothes already tailored and sewn.[13]

[11] Andre, 'Role Morality as a Complex Instance of Ordinary Morality', p. 78.

[12] This is presumably one possible source of 'peripheral' role obligations and permissions, such as the teacher's right to go into the staff-room: they may be added to a role constituted by those essential to the role's function.

[13] See Kazuo Ishiguro's Mr Stevens: "The great butlers are great by virtue of their ability to inhabit their professional role and inhabit it to the utmost…. They wear their professionalism as a decent gentleman will wear his suit…." Ishiguro, *The Remains of the Day* (London: Faber and Faber, 1989) pp. 42–43.

We can add a little more detail by way of response to sociological critics who have maintained that functional role theories must be able to "prescribe and predict, with certainty and precision, what behavior would and would not conform to role expectation".[14] Role theory as an explanatory model of human behavior, writes Richard Hilbert, "depends upon the possibility of literal role prescription".[15] If sound, the criticism would scupper role theory, for plainly no role description – no list of the normative statuses that constitute a role – could possibly meet the literal prescription standard. But the difficulty is with the standard and not the account of roles. The most detailed account of the normative statuses that constitute the roles "father" and "lawyer" allow for variation in the performance of those roles: the functions those roles serve, we might say, are, often *multiply realizable*. That does not show the role descriptions to be inadequate. The key question is whether the normative expectations of those engaging with role-occupants are in fact prompted by the judgement that the person with whom they engage is a role-occupant. If the self- or other-description of me as a father does generate a set of expectations that I can disappoint, then the role analysis seems to have traction. It is no doubt true that, for most roles, there is a *range* of activity that competent users of role descriptions will accept as meeting the expectations that constitute the role, but there are also limits. There are many ways of being a good lawyer or a good father, but not just any way will do. Though the limits of a social role may only be discoverable by observing which conduct does in fact elicit surprise, uneasiness, disappointment, or disapproval, there is a point at which competent users of the role-name "father" decline to see someone as a role occupant. We are likely to be reluctant to regard the man who has never engaged with his offspring as a "father" other than in the biological sense, and sufficiently new and alien activities of a (supposed) role occupant may demand either the re-description of the function of a role, or the acceptance of a new role altogether.[16] So roles are not "literally and precisely prescriptive": they allow for original and creative activity but within bounds that preserve the normative and semantic content of roles. That seems to be a strength rather than a weakness of functional role theory, at least as it is deployed by philosophers.[17]

2 Do Roles Make a Moral Difference?

I have placed a good deal of weight on the claim that roles are in fact an important part of the moral landscape. Our answer to the sociological critics of functional role theory, for instance, is in essence that it can't be true that roles must meet the literal

[14] Richard A. Hilbert 'Toward An Improved Understanding Of "Role"' *Theory And Society*, 1981, 10:2, 207–226, p. 209.

[15] Ibid.

[16] Current battles to understand the duties of parties to surrogacy arrangements seem a case in point.

[17] One might make the point by reference to theatrical roles. The role Romeo is multiply realizable: contrast Lurhman's DiCaprio with Zeffirelli's Whiting. Still, knowing that I am watching a performance of Romeo gives me a lot of information, and a sense of the limits of the role. If the actor really doesn't care for Juliet, I'll know he (or she) is not playing Romeo at all.

prescription standard because they don't, and yet the perception that someone occupies a particular role does generate the expectations that ground the normative statuses accompanying that role. The claim that roles do in fact generate these normative statuses appears to be sociological or empirical. Exploring that empirical claim is beyond the scope of the current paper. For now I offer a much more "armchair" case in favor of role-obligations, essentially consulting readers' intuitions about our common understandings of roles, the ubiquity of roles in our own lives, and cases in which it seems we must appeal to roles to make common moral assessments. My aim is to establish at least a *prima facie* case that roles do make a moral difference.

The previous section may have already done some of this work. We can begin by simply pointing out, as noted there, the extent to which our understanding of roles incorporates normative terms. Roles are standardly defined as "clusters of rights and duties"; as placing "normative demands" on role-occupants; as being "complex instances of ordinary morality". Departures from roles are portrayed as warranting "disapproval". These understandings of what roles *are* suggest that role-obligations may simply be part of the "role-package"; that one cannot acknowledge the existence of distinct social roles without also acknowledging role-differentiated normative statuses that constitute them: "[A] role relation in a social situation has some notion of conduct as appropriate or inappropriate *built into its description* ...."[18]

We can add a little detail to this discussion be returning to the sociological critique of functional role theory again, one strand of which argues that not all social roles are associated with "deontic notions", a subset of what I have termed normative statuses. The analysis of a role "as set of rights and duties", write Masolo et al, "seems to suffer from some limitations ... for ... it is not clear how it is possible to define [e.g.] a 'musician' in terms of rights and duties".[19] Robert Hunt suggests the class clown – "the student who specialises in making jokes and generating distractions in the classroom" as another example: "The role is so culturally well-acknowledged in some parts of the world that students in American high schools hold referenda on who occupies this role most fittingly. But it would be a mistake to cash that role out in terms of deontic powers".[20] Both examples do appear to support the idea that it would be a mistake to think that roles consisted only of rights and duties. But they seem less plausibly counterexamples to the functional thesis if we take a broader view of the normative statuses which might comprise a role, for both the musician and the class clown do have functions: the function of the musician is to produce music, the function of the class clown is to entertain, to amuse, to subvert. Those functions generate expectations which constitute the roles and ground normative judgements about role occupants, allowing us to say that the musician who plays badly is a poor musician, to be

[18] Dorothy Emmet, *Rules, Roles, and Relations* (London: MacMillan, 1966) p. 15.

[19] Masolo, C., Vieu, L., Bottazzi, E., et al. 'Social Roles and their Descriptions' in D. Dubois, C. Welty, M.A. Williams (eds.), *Proceedings of the Ninth International Conference on the Principles of Knowledge Representation and Reasoning* (Whistler, Canada, 2004), 267–277, p. 268.

[20] Robert Hunt, 'A Place for Role Theory', unpublished, 2014.

puzzled by performances which push the boundaries of the function (John Cage's 4.33, for instance), or to say "He's the class clown" rather than "What on earth was up with Robert today? He's normally a hard working student".

We might also note the ubiquity of roles and, apparently at least, of role-differentiated obligations. Like most people, I occupy many different roles. I am a parent, a son, a brother, a friend, a university lecturer, head of my department, and so on. As I move between these roles – as I put on different hats in the common parlance – the obligations and permissions to which I am subject change. Contrast the normative statuses to which I am subject as parent and university lecturer. As a parent I am entitled to prefer the interests of my children over those of other children.[21] One of my daughters has also been my student. As her lecturer I was required to allocate my professional effort and assess academic performance without regard to our familial ties. This everyday contrast between the normative statuses which constitute the roles of parent and university lecturer seems at least *prima facie* evidence that role-differentiated obligations do indeed exist. Michael Hardimon goes further, writing that:

> Abandoning the idea that we have … role obligations would … require a radical transformation in the way in which we live our lives, for relating to family members and citizens as family members and citizens, something that is central to our lives, essentially involves acting in accordance with a conception of ourselves as occupants of these roles.[22]

Finally, consider the many occasions upon which we are called to make moral assessments in which knowledge of the roles of those involved is crucial. We cannot judge whether a man asking a woman intrusive personal questions has acted well or badly without knowing whether they are on a first date, a doctor and patient in a professional consultation, a lawyer preparing a female client to face hostile cross-examination, a social scientist conducting research on female sexuality and a fully informed and consenting participant, and so on. We cannot judge whether a man reported to have struck another person violently on the back has acted well or badly without knowing whether they were a quarrelling couple or a waiter and a choking diner. We cannot judge whether someone who shoots and kills another has acted well or badly without knowing whether the shooter was a soldier acting within appropriate rules of engagement, someone acting in self-defense, or a would-be beneficiary trying to hasten their enjoyment of the victim's estate. These everyday and more dramatic cases suggest that roles and the normative statuses associated with them are fundamental to moral discourse and evaluation: we simply cannot make the sorts of moral assessments we do on an everyday basis without knowledge of the roles people occupy and the normative statuses which constitute those roles.

My suggestion is that the our common understandings of roles, the ubiquity of roles in our own lives, and cases in which it seems we must appeal to roles to make

[21] For other commentators who appeal to the example of the family to illustrate the idea of role differentiation, see Wasserstrom, 'Lawyers as Professionals', p. 2; Hardimon, 'Role Obligation', p. 342; and Alan Goldman, *The Moral Foundations of Professional Ethics* (Totowa, NJ; 1980) p. 4.

[22] Hardimon, 'Role Obligations', op. cit., p. 346.

common moral assessments support a *prima facie* case in favor role-obligations. At best, however, the *prima facie* case suggests that we should take role-differentiated obligations seriously: it leaves untouched the question of just how roles could establish such obligations. I now turn to that question.

3 How Do Roles Make A Moral Difference?

If they are to make a moral difference, I will argue, roles must be conceived of as themselves the source of obligation for role occupants. Others have attempted to derive role-obligations more directly from ordinary morality than this picture allows. In the next two sections I examine these more direct derivations of role-morality before turning to the account that proposes distinct, role-specific obligations and permissions. I begin with the most direct route: the attempt to secure role-morality by direct appeal to ordinary morality.

4 The Direct Route: Role-Obligations as Obligations of Ordinary Morality

According to the direct route, role-obligation is generated by applying ordinary morality to the circumstances that confront particular role-occupants. If roles generate obligations, the claim goes, it is only because "one has reasons – reasons of ordinary morality – to act as one's role requires."[23] The idea is an old one and it receives its most eloquent statement from the early utilitarians. On the face of it, utilitarianism does not preserve the parent's role-permission to prefer the interests of their own children over the children of others, since it seems unlikely that the uneven distribution of benefits and burdens allowed by that permission would normally meet the theory's "greatest happiness for the greatest number" principle. Classical utilitarians, such as John Stuart Mill and Henry Sidgwick, responded by arguing that the role-permission was consistent with the principle, since the proximity and the greater knowledge we have of our nearest and dearest mean that efforts to benefit them are more likely to be successful than efforts to benefit strangers.[24] It is easy to see this as an attempt to derive the parent's role-permission directly from ordinary morality. There are, on this account, no special role-differentiated principles that attach to the parent's role. It is simply that principles of ordinary – in this case utilitarian – morality, correctly applied to the particular circumstances that mark familial relationships, recommend something that at least looks normatively equivalent to a role-differentiated permission. Generalised, the idea is that the obligations of the lawyer differ from those of the parent only because the same principles applied with sensitivity to the different problems encountered by the lawyer and the parent require different responses. In each case the relevant

[23] Andre, 'Role Morality', op. cit., p. 75.

[24] See John Stuart Mill, *Utilitarianism* (1863) (Indianapolis, Hackett, 1979) p. 59; Henry Sidgwick, *The Methods of Ethics* (1874) (Indianapolis, Hackett, 1962) pp. 241ff.

obligations and permissions are properly identified by working out what a common set of moral principles requires in the face of the facts confronted by the occupants of the two roles. The "particular facts" will no doubt differ, and roles might create new reasons relevant to ethical deliberation, such as the particular expectations and reliance of clients or children, but there will be no point in someone pointing to their role as, in and of itself, a morally determinative factor.

So read, however, the classical utilitarian's argument that their theory can preserve agent-relative permissions faces at least two difficulties, difficulties which are significant not merely for them, but also for the broader project of attempting to derive role-obligations directly from ordinary morality. First, the moral arithmetic is quite likely to tell parents that they should *not* prefer the interests of their own to children to those of others, and so will not after all support the parent's child-centric permission. It might be true that I am more familiar with my children's interests than I am with the interests of strangers, but often that familiarity will be irrelevant or make too little difference to carry the day: no amount of inside information can disguise the fact that the satisfaction of most of my children's preferences would do less to satisfy the greatest happiness principle than meeting more fundamental and unmet interests of strangers. Second, and more generally, no matter how the moral arithmetic turned out, the version of the permission which depends upon it being endorsed by ordinary morality – utilitarian or otherwise – is not the *same* as the role-differentiated child-centric permission, since that permission occasionally allows parents to prefer their children *even when ordinary morality would have them do otherwise*.[25] And all of this seems likely to hold, *mutatis mutandi*, for a range of role differentiated obligations and permissions. Often, ordinary morality would not allow lawyers to prefer the interests of their clients over the interests of others, or doctors to maintain confidentiality, and, no matter whether it did or not, the idea that lawyers and doctors were entitled to determine case by case by direct appeal to ordinary moral theory whether they were entitled to maintain confidentiality or to "protect and promote the interests of [their clients] to the exclusion of the interests of third parties"[26] would already be to give up key role-differentiated obligations and permissions of those roles.

David Luban's influential *Lawyers and Justice*[27] is a contemporary illustration both of the direct route and its weaknesses. Luban begins by arguing that the adversarial system which generates the obligations and permissions of the lawyer's role is only rather weakly justified. The best to be said for it is that we need some adjudicatory system and it is not demonstrably worse than alternatives.[28] Next, he argues that the strength of a role permission to act contrary to ordinary morality – an institutional excuse – is dependent upon the strength of the justification of the

[25] See Charles Fried, 'The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation' *Yale Law Journal* 85 (1976) pp. 1060–1089, p. 1067: "[I]t is just my point that *this* is an inquiry we are not required, indeed sometimes not even authorised, to make. When we decide to care for our children … we do not do so as a result of a cost-benefit inquiry….".

[26] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (New Zealand), Chapter 6, rule 6.

[27] Luban, *Lawyers and Justice*, op. cit.

[28] Ibid., p. 92.

institution: "the institution creating the role passes along its moral cachet to the requirements of the role …. [T]he weaker the justification of the institution, the slighter the moral significance of special institutional duties."[29] And now, since the adversarial system is only weakly justified, it passes only a weak justification to acts performed by the occupants of the roles within the system. Where an adversary system role – say that of the lawyer – calls upon the occupant to do something which conflicts with the demands of ordinary morality, the fact the lawyer acts in a role is not itself a very weighty consideration. Hence the institutional excuse provided by the weakly justified adversarial system cannot justify very dramatic departures from non-role morality. Notice how this is a version of the direct route. Luban requires role-occupants to "balance the moral reasons incorporated in [a] role … against the moral reasons for breaking the role expressed in common morality."[30] In doing so he is quite explicit that ordinary morality determines the moral obligations of role-occupants. "[T]he appeal to a role in moral justification", he writes, "… is simply a shorthand method of appealing to the moral reasons incorporated in that role."[31]

Translated from the "shorthand method", the process of reasoning Luban suggests looks complicated. Lawyers are to balance ordinary and role obligation by working through a four-step derivation. The first step is to justify the institution to which the role belongs "by demonstrating its moral goodness"; the second step shows that the role is required if the good of the institution is to be achieved; the third step justifies the role-obligation by showing that it is essential to the role; and the fourth and final step justifies a particular action by showing that it is required by the role-obligation. The role-act will be justified, according to Luban, if the combined force of these justifications for the role-act, outweigh the moral reasons for acting according to ordinary morality. But this complex derivation should not disguise the fact that it is primarily a device for transmitting the justification of the institution – a justification to be carried out by direct appeal to ordinary morality – through the role and role-obligation to the particular act.

Ultimately, however, Luban concludes that the direct route cannot preserve the balance he seeks between ordinary and role-obligation. He abandons the model (we will briefly consider the new version in the next section) in response to a version of the "moral arithmetic" problem deployed against the general version of the argument above, conceding that "the marginal harms to the system that result from violating one's professional duty typically are slight in a single case" while "[o]n the other side of the ledger, the marginal benefits of following common morality rather than professional duty may be great. Thus when common morality clashes with role morality … role morality usually loses."[32] We might however, also, raise the second problem, asking whether ordinary morality would have given "considerations of role morality their proper weight",[33] even if it had endorsed the same

[29] Ibid., p. 129.

[30] Ibid., p. 125.

[31] Ibid.

[32] Luban, 'Freedom and Constraint in Legal Ethics', op. cit., p. 431.

[33] Luban, *Lawyers and Justice*, op. cit., p. 128.

conduct as (in the lawyer's case) the client-centric role permission. For if it were true that the lawyer was justified in acting as the client-centric role permission allows, it would on this account not be *because* of the role-permission, but because of ordinary morality. As Luban himself says, "if a lawyer is permitted to puff, bluff or threaten on certain occasions this is … because in such circumstances anyone would be permitted to do these things".[34]

5 A Less Direct Route: Role Obligations as Dependent Rules

Luban attributes the failure of the approach in *Lawyers and Justice* to the fact that it is really a "sophisticated act consequentialism".[35] And he proposes to avoid the criticisms of the approach by recasting it in rule-utilitarian terms. Rule-utilitarianism establishes rules by appeal to the underlying moral theory, but the obligations of those subject to the rules are specified by the rules and not by the underlying moral theory. If role-obligations could be specified by rule-utilitarian rules, then, it seems genuine role-differentiated obligations could be secured, this time by a less direct route. Unfortunately, however, rule-utilitarianism is widely thought to have delivered less than it promised. The most general problem is this: Rule-utilitarians regard rules as authoritative because they promote utility. But if this is their ground for regarding rules as authoritative, it seems that they must be sensitive to whether or not a rule *does* promote utility on a particular occasion. And if it transpires that it does not do so, then they seem forced to the conclusion that it would be wrong to follow the rule on that occasion. And now rule-utilitarians face a dilemma: they must either abandon sensitivity to utility and stick with their rules, or they must assess the utility of compliance with a rule on each occasion. If they take the first option, they abandon utilitarianism altogether. If they take the second, they are act-utilitarians after all, and – in the terms of the current debate – all of the problems of the direct route re-surface.

Luban is of course familiar with this well-trodden argumentative path. Indeed in *Lawyers and Justice* he offers a criticism of rule-utilitarianism as part support for his core idea that the strength of role-obligations depends upon the strength of the justification of the institutions or practices which generate them. "I shall argue", he writes, "… that the weaker the justification of the institution, the slighter the moral significance of special institutional duties", before continuing:

> The same is true, I believe, for utilitarianism. Rule-utilitarianism tells us that if a rule is justified (no matter how marginally) we must perform the acts it requires. On my view, this cannot be right: the question of whether the rule is strongly or weakly justified must affect its ability to require acts….[36]

Luban's subsequent endorsement of rule-utilitarianism, then, seems inconsistent both with his explicit remarks and with the general structure of his position. He offers

[34] Ibid, pp. 154–155.

[35] Luban, 'Freedom and Constraint in Legal Ethics', op. cit., p. 431, quoting David Wasserman, 'Should a good lawyer do the right thing? David Luban on the morality of adversary representation', *Maryland Law Review*, vol. 49.2 (1990), pp. 392–423.

[36] Luban, Lawyers and Justice, op. cit., p. 129.

two grounds for thinking that "the contradiction … is merely apparent".[37] First, he maintains that rule-utilitarianism establishes merely *prima facie* duties. Such duties may always "be overridden in exigent circumstances, and thus we must always be ready to scrutinize particular acts to determine if the circumstances are exigent." Second, he claims that his criticism of rule-utilitarianism in *Lawyers and Justice* was motivated by the idea that the approach ignores "the fact that duties differ in their strength".[38] The problem with rule-utilitarianism, according to this criticism, is that once a rule is found to be justified on utilitarian grounds, it settles what ought to be done. Luban thinks that the rules which specify role-obligations should not be "on or off" in this fashion. Rather they should reflect the fact that some rules are strongly justified while others only just make the required utility threshold.[39]

But these arguments turn upon the very considerations that led critics to claim that rule-utilitarianism collapsed into act-utilitarianism: If the utilitarian must always check for "exigencies warranting an exception", or always determine the strength of the justification for applying a rule in a particular case, then they are act- and not rule-utilitarians. If Luban's rule-utilitarian role-occupant must "always be ready to scrutinize particular acts to determine if the circumstances are exigent", then she is appealing to utility on a case-by-case basis: she is an act- and not a rule-utilitarian and is vulnerable to all the criticisms of that position.

The act-rule-utilitarianism debate may seem terribly old hat. Note however, that Luban's version of rule-utilitarianism is especially vulnerable to the familiar claim that rule utilitarianism collapses into its act variant precisely because he insists that role-occupants remain sensitive to the exigencies and strength of justifications in particular cases: he is undone, that is, by the "directness" of his derivation of role-obligation. He gets himself into difficulty at this point because he wants to hold on to his central idea that institutions and roles "transmit" the justifications of ordinary morality on to role-occupants and role-acts. By doing so he creates his own version of the rule-utilitarian's dilemma: he can either abandon that central idea and deny that ordinary morality has a direct say in determining the strength and content of role-obligations, or he can hold on to it, but leave himself vulnerable to the sorts of criticisms of act-utilitarianism set out in the previous section and which re-emerge against this "collapsed form" of rule-utilitarianism. As we have seen, Luban chooses the second horn of this dilemma. In doing so he defends a model that, once again, cannot secure robust role-obligation. For that, we need another, even less direct route.

6 A Clean Break: Role-Obligations as Distinct from Obligations of Ordinary Morality

We can develop such a route, I maintain, on the basis of John Rawls's idea that the justifications for institutions or practices may differ from the justifications for conduct within those institutions or practices. Rawls provides the classic statement

[37] Luban, 'Freedom and Constraint in Legal Ethics', op. cit., p. 442.

[38] Ibid.

[39] Ibid.

of this distinction between levels of justification in a paper addressing the problems we have been discussing: act-utilitarianism cannot preserve practices, rule-utilitarianism is unstable, hence "[i]t seems to follow that a utilitarian account of [for example] promise cannot be successfully carried out."[40] Rawls proposes a solution. Critics of utilitarian accounts of promising portray promisors deciding whether to keep promises as entitled to appeal directly to the same sorts of moral considerations which justify the practice of promising. They assume, that is, that if the practice of promising is justified on utilitarian grounds, then whether or not particular promises should be kept is also to be settled by appeal to utility. Rawls's solution turns upon the claim that this assumption is not warranted. The critics "fail to make the distinction between the justification of a practice and the justification of a particular action falling under it."[41] Before promises are made, promisors are free to weigh up the merits and do whatever seems best on the balance of reasons. Once a promise is made, however, promisors have a duty to act as they have promised to act and promisees have a correlative right that they do so. Indeed, the function of promise, on this account, is precisely to establish rights and duties and so rule out certain kinds of deliberation: "the point of the practice is to abdicate one's title to act in accordance with utilitarian and prudential considerations in order that the future might be tied down and plans coordinated in advance."[42] If this model of promise is correct, then the appropriate justifications for conduct within the practice of promising differ dramatically from the justifications of the practice itself. We may be utilitarians when designing the institution, but build into the design a set of deontological constraints that exclude appeal to utilitarian considerations from within the institution.

The Rawlsian model allows us to see how institutions might be justified by appeal to ordinary or general morality, while the conduct of those within those institutions is to be governed not by the original moral considerations but by the rules of the institution. It allows us to see, for instance, that role-occupants may be subject to distinct sets of role-differentiated obligations and permissions which prevent them appealing from within their roles to the considerations of ordinary morality that justify those roles. We can employ a version of Luban's four-fold root to set out the process more explicitly: We are to first, justify the institution to which the role belongs "by demonstrating its moral goodness"; second, show that the role is required if the good of the institution is to be achieved; third, justify the role-obligation by showing that it is essential to the role; and, finally, justify a particular action by showing that it is required by the role obligation. According to Luban, recall, the role act will be justified if "taken together these justifications for the role-act outweigh" the moral reasons for acting according to ordinary morality. Armed with Rawls's distinction, we can see how this last balancing step may be resisted. For Luban the normative force of the role-obligation depends upon the transmission onto the role-act of the normative force of ordinary morality, but Rawls has shown that there need be no direct transmission. The roles and role-obligations established

[40] John Rawls, 'Two Concepts of Rules' op. cit., p. 16.

[41] Ibid.

[42] Ibid.

by justified institutions can function as independent sources of moral obligation for those acting within them.

Luban set out to give role-morality its proper weight without allowing it to swamp ordinary morality. He did not succeed, but the Rawlsian approach does seem to secure the desired balance between ordinary and role-morality. On the one hand, the distinction between the justification of practices and the justification of actions within practices allows us to see how roles might function as independent sources of obligation for role-occupants, and so avoids the collapse of role- into ordinary-morality. On the other hand, the approach preserves the significance of ordinary morality. We are to construct roles, building our "constellations of institutionally specified rights and duties … around … institutionally specified social functions", with all the resources of "ordinary" morality at our disposal. And the perspective of ordinary morality always remains available to us. Although what counts as a promise will be determined by the rules of the institution (by what Rawls calls the practice rules) we can always judge the institution from the perspective of ordinary morality, perhaps lobbying for a change in the practice (for a change in what Rawls calls the constitutive rules) when the practice seems to have come apart from the concerns of ordinary morality which drove its construction.[43]

Arthur Applbaum has argued, however, that the Rawlsian model does *not* allow us to have both robust roles and to give ordinary morality the limited role described in the last paragraph and we can add some detail to the model by responding. According to Applbaum, if we conceive of role obligations in terms of the Rawlsian model then "[m]oral criticism of … particular action from outside the practice is logically precluded".[44] His argument proceeds from the implication of the Rawlsian model that since practices are exhaustively defined by its constitutive rules, *only* conduct recognized by those rules counts as an action within that practice. The baseball batter who, having swung and missed three times, turns to the umpire and seriously suggests he be allowed an extra strike, is proposing that he be allowed to stop playing baseball and begin to participate in some other, new, practice. And so it is, Applbaum argues, with the other role-occupants. The lawyer who acts in ways unrecognized by the constitutive rules of legal practice, for instance, is on a par with the revisionist baseball batter. If the practice rules of law require lawyers to be diligent advocates for clients seeking lawful though immoral ends, a lawyer cannot refuse to do so "and still call herself an advocate, for unless the defining rules of lawyering are changed, a lawyer who is not a diligent advocate for the legal interests of her client in not engaged in the proper practice of advocacy."[45] Far from facilitating "ethical lawyering", then, Applbaum argues, Rawls's model severely curtails it. "Moral criticism of … particular action from outside the practice is logically precluded", and many of the acts evaluation might recommend may not be available to practitioners given the constitutive rules of the practice. If we embrace

[43] See the related discussion below, where I argue lawyers have a positive duty to engage in this sort of external assessment of their roles.

[44] Arthur Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (Princeton, 1999), p. 85.

[45] Ibid. The facts are broadly those of *Zabella* v *Pakel* 242 F.2d 452 (7th Cir. 1957), a classic in the legal ethics literature.

the model, then one cannot *be* a role occupant, given the way a practice is constituted, and act in ways that are inconsistent with the practice as it stands.

Earlier, I argued against the "literal prescription" standard for functional role specifications, suggesting that there was for most roles a *range* of activity that competent users of role descriptions accepted as meeting the expectations that constitute the role, and we can make a similar point here. The constitutive rules of some practices allow greater latitude in what will count as activity within the practice than others, and sport and law are toward the opposite ends of this spectrum. In the sports arena we place high value on clear rules and speedy decisions. We recognize that this carries a cost: every sports fan can think of an important game influenced by a controversial umpiring decision. But institutional design in sport is driven in part by the high value we place on clear rules and speedy decisions. Institutional design in law, by contrast, is driven in part by recognition that the stakes are often high, that there will not be another game tomorrow, that the parties are more interested in particular victories and decisions than in winning percentages across a long season, and, consequently, the constitutive rules of law, unlike those of baseball, permit lawyers to question clients and judges about their decisions, to appeal decisions, to run arguments challenging orthodox interpretations, to seek equitable intervention in extraordinary cases, and the like. The result is that it is just not as clear that a lawyer who turns to a judge or a client and asks about these issues "stops playing the game", as it is that a batter who asks for a fourth strike mid-game misunderstands the practice of baseball. And that will be true in most practices, the constitutive rules of which, whether by design or accident, allow for considerable latitude while yet constituting meaningful roles.

It might seem that there is an additional and obvious response to many of the concerns raised by the current discussion. Rawls realizes, of course, that we can and do *change* the constitutive rules of practices. He argues, however, we cannot initiate these changes from within the practice – from there, all we can do is appeal to the rules of the practice – but we can take on a different office. "If one holds an office defined by a practice", writes Rawls:

> … questions regarding one's actions in this office are settled by the reference to the rules which define the practice. If one seeks to question these rules, then one's office undergoes a fundamental change: one then assumes the office of one empowered to change and criticize the rules, or the office of a reformer ….[46]

Notice, however, that one *can* change offices: for any role there is the possibility of an accompanying reformer's role. However, Applbaum does not think this is enough to rescue the Rawlsian model. Just as a player cannot act, *qua* player, other than as recognized by the constitutive rules of the practice (since if he does he stops being a player), so an external commentator cannot complain that a player, *qua* player, should have so acted. A sports commentator who criticizes a player for failing to do something not permitted by the rules (the baseball batter for failing to convert fourth strike opportunities perhaps) can only be criticizing the practice for

[46] Rawls, 'Two Concepts of Rules', op. cit., p. 27.

failing to provide that opportunity – not the player. It makes no sense, on this account, to criticize a role occupant for failing to act in a way the constitutive rules of the practice did not recognize. Applbaum takes this criticism one step further. Under the Rawlsian model external critics are all the more impotent, he argues, when confronted with morally questionable cases occurring within practices that are "on the whole" justified. If external critics can only criticize practices, rather than particular actions, what are they to say about an "on the whole" justified practice (such as law) which allows or requires morally questionable conduct, such as – in the legal example – pleading a statute of limitations to allow a client to avoid a just debt, or casting doubt on the evidence of a truth-telling witness? They cannot criticize the practitioner, *qua* practitioner, for failing to do something not recognized by the practice, and if the practice is justified on the whole, they can't criticize that either.

But I think Applbaum gives too little weight to what the occupant of the office of external critic *can* do. Suppose the external critic believes that it is morally regrettable that the rules of the practice requires advocates to plead a statute of limitations on behalf of a client seeking to avoid payment of a just debt in the absence of reasons to think the barred proceedings would be inequitable. She may be limited in what she can legitimately conclude about the practitioner. She cannot criticize him, *qua* practitioner, for failing to perform an action – refraining from advancing the defense – not recognized by the current practice. But she can argue that the practice ought to be changed, perhaps to allow recourse to the statute only where it would be inequitable to allow proceeding after a certain period. She can regret that the practice allowed the objectionable conduct when it did. She might think all of this without thinking that the practice as it stands is "on the whole" unjustified. She need not suppose that the untidy systems of rules and principles which constitute a complex practice, generated over a long period, by different agents and collectives, motivated by varying social, moral and political concerns and pressures, is likely to be seamlessly coherent, all of a piece, and without flaw. She might even think that revising the institution to remedy the particular injustice would carry too high a price in other cases. Whether she favors reform or not, she might think that an on the whole justified practice allowed an act which, from the external perspective, was unjustified, even while acknowledging that she can do no more than express regret about the particular case which prompted her review. In sum, she can do more than simply ask whether the action is an action under an on the whole justified practice.

7 Conclusion

If roles are to make a moral difference, they must be conceived of robustly, as themselves the source of obligations for role occupants. There is an obvious concern, however, to ensure that roles are not completely immune from the oversight and authority of ordinary morality. The Rawlsian distinction between constitutive and practice rules shows how a practice or 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 roles or the conduct of their occupants.