

LEGAL ROLES AND MORAL DUTIES

by

MICHAEL DA SILVA

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Douglas Husak

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ABSTRACT OF THE THESIS

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By MICHAEL DA SILVA

Thesis Director:

Douglas Husak

This thesis examines the relationship between the moral rules that apply to all persons by virtue of their humanity ('universal moral rules') and the rules they must follow to continue serving in particular (often socially important) roles ('role responsibilities'). It provides a general framework for what to do if universal moral rules and role responsibilities conflict, focusing particularly on the role of lawyer and similarly state-involving professions. It argues that ideally constituted roles will not create duties to infringe universal moral rules and defends the general priority of universal moral rules when a role's non-ideal constitution leads to conflict. It then offers a limited exception to the general priority of universal moral rules that applies when a role can only be performed if one violates a universal moral rule and the role is necessary for a well-developed society to maintain a certain level of functioning, but suggests one ought to regret the bad effects of acting under that exception.

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LEGAL ROLES AND MORAL DUTIES

INTRODUCTION

The existence and scope of role obligations are important philosophical issues with implications for the structure of both professions and societies in which professionals fulfill crucial functions. This piece analyzes the nature of role obligations and what one ought to do when they conflict with ethical duties all persons must fulfill by virtue of their personhood.¹ Since it is unlikely that one principle will be able to guide action in the wide plurality of roles, this work will primarily analyze professional roles and their attendant responsibilities, specifically focusing on the role and role responsibilities of the lawyer.

Traditional legal ethics was concerned with the question: ‘Can a good lawyer be a good person?’ This work instead asks: ‘What should a lawyer do if his or her professional obligations conflict with universal moral rules?’² Where a role is required for society,

¹ Role obligations will be referred to as ‘role responsibilities’ throughout this piece. They are the obligations one has by virtue of holding a particular role. Ethical obligations all persons must fulfill by virtue of their personhood will be referred to as ‘universal moral rules’. This term is further defined below in Part One, Section A.

² The latter question has multiple dimensions. It can concern how a lawyer ought to feel about violating universal moral rules to fulfill professional obligations. Alternatively, it may address whether one of the two obligation types always takes precedence such that one can judge a lawyer’s action by the type of rule (universal or role-related) s/he chooses to follow. One could also determine which of the conflicting obligations one ought to fulfill all-things-considered on a case-by-case basis. These issues are related.

Susan Wolf would suggest that the question of how to resolve conflicts between universal moral rules and role responsibilities is not a question of legal ethics. On her view, legal ethics is:

a subject that takes as its central focus the study of what ethical principles and virtues are essential not to being a good person, but rather to being a good lawyer. Though the subject, on this conception, would remain a study of ethical principles and virtues, it will be less natural to see it as a subset of ethics than it will be to construe it as a branch of legal education; Susan Wolf, “Ethics, Legal Ethics, and the Ethics of Law” in David Luban, ed, *The Good Lawyer: Lawyers’ Role and Lawyers’ Ethics* (Totowa, NJ: Rowman & Allanheld, 1983) 38 at 39.

fulfilling its necessary functions seems laudable. If these functions require violation of a universal moral rule, one may ask if they create obligations that extend over the universal moral rule and justify its violation or if the exercise of the socially necessary action should instead be viewed as a *prima facie* moral good that is actually wrongful and/or blameworthy. Apparent conflicts dominated forty years of professional ethics focused on legal practice, but questions about the scope of role obligations and what to do when they conflict with universal moral rules extends beyond the legal domain. The case of the lawyer is thus instructive for consideration of a wider moral phenomenon.

The following will defend three claims about what one ought to do in cases of conflict:

Wolf suggests ethicists concerned with how to be a good person while participating in the legal system instead write about the “ethics of law”. Her view better identifies the scope of the ‘legal’ qualifier. This piece will nonetheless occasionally be referred to as a project in legal ethics for the sake of general consistency with the literature.

It is important to note that the present inquiry does not concern what one rationally ought to do in cases of conflict, but focuses on what one ought to do if one wants to be moral. There is a sense in which this is the same as asking what one ought to do all-things-considered on a view of objective reasons that views moral reasons as categorically superior to others. This view will not be assumed here since one can limit the scope of analysis to moral reasons by limiting the source of inquiry, but it is worth mentioning this more ambitious view in passing.

Derek Parfit distinguishes between what one ought to do and what it is rational to do. He suggests that “facts give us reasons when they count in favour of our having some belief or desire, or acting in some way. When our reasons to do something are stronger than our reasons to do anything else, this act is what we have *most reason* to do, and may be what we *should, ought to, or must* do”; *On What Matters: Volume One* (Oxford: Oxford UP, 2011) at 1. His decisive-reason implying sense of ‘ought’ holds that “[w]hen we have decision reasons, or most reason, to act in some way, this act is what we *should* or *ought* to do”; *ibid* at 33. This fact-responsive sense of what to do is distinct from what the belief-sensitive sense what one ought to do rationally: “[T]he rationality of our acts depends...on our beliefs [rather than facts that give us reasons.] When we are trying to decide what we or others ought to do, what matters are the reason-giving facts....When we are asking whether someone has acted rationally, we have a different aim”; *ibid* at 36.

The decisive-reasoning implying sense of ought is supposed to contrast not only with ‘ought rationally’ but also with ‘ought morally’; *ibid* at 38. It is, however, plausible that moral reasons should be decisive reasons. One who denies that Thrasymachus’s question ‘Why be moral?’ is a genuine one may suggest that the distinction could hold in the domain of practical reasons as Parfit articulates it, but suggest that one ought to be moral simply because one ought to be moral. The practical and the moral could be identified in several ways that favor the latter, including a view that moral reasons are always decisive reasons. This piece will not resolve this debate. It will be concerned only with moral reasons involved in the search for what one ought to do if one wants to be moral.

- 1) On the best understanding of the nature of roles and their attendant responsibilities, universal moral rules are primary and roles can only create further constraints on actors, creating a general priority for universal moral rules when conflicts nonetheless arise due to the persistence of non-ideally constituted roles,
- 2) There is a limited exception to the general priority of the universal moral rule, which applies when a role can only be performed if one violates a universal moral rule and the role is necessary for a well-developed society to maintain a certain level of functioning,
- and
- 3) Where one acts contrary to a universal moral rule under the limited exception mentioned in (2), s/he should regret bringing about the bad effects of the action.³

Assessment of these claims requires discussion of the nature of 1) universal moral rules, 2) roles (and role responsibilities) and 3) conflicts between them. Part One of this work will thus define and clarify the nature of these concepts in the present analysis. Part Two will examine the more plausible accounts of the relationship between role and general moralities and their implications for how one ought to deal with conflicts between role responsibilities and universal moral rules. Part Three argues for the three claims above.

Part Three, Section A suggests ideally constituted roles cannot conflict with universal moral rules on the best understanding of the relationship between general and role moralities. This has implications for what to do when roles are not ideally constituted and require one to violate a universal moral rule: one ought to give priority to the universal moral rule and should withdraw from the role if this is required to maintain conformity with the rule. Unfortunately, non-ideally constituted roles are common. They are often necessary for societies to function well. One ought to fill these roles, but ought not fulfill their improperly constituted obligations except in the rare circumstances in which a type of lesser-evil justification is present.

³ These statements concern genuine universal moral rules, not the rules of so-called 'personal morality', viz., what s/he believes to be (im)moral.

Unfortunately, if fulfilling a universal moral rule-infringing role responsibility is required to stay in the role and all individuals give priority to universal moral rules and withdraw from the role, society would no longer function well. Part Three, Section B thus offers a limited exception to the priority of universal moral rules. It allows individuals to give priority to role responsibilities that conflict with universal moral rules when they would otherwise be forced to leave a role and thereby bring the number of individuals in that role below a threshold needed to maintain a certain level of functioning in society. This lesser-evil exception is more strongly justified in cases where staying in the role is also necessary to reform the role such that it no longer requires individuals to infringe universal moral rules.

Part Three, Section C analyzes how one ought to respond to acting under the limited exception in Part Three, Section B. Individuals who perform lesser-evil justified acts that infringe universal moral rules should recognize the wrongful component of their conduct and regret it. Failure to comply with universal moral rules ought to undermine one's sense of oneself as moral, even when one fails to comply in order to maintain a useful function in society and/or the non-compliant act is lesser-evil justified. Lesser-evil justified action may make someone all-things-considered commendable, but even then s/he should regret the bad-making element of his or her (by hypothesis no longer wrongful) act. This is a further bad-making feature of perverse role obligations. They demand that individuals experience the ill feeling of regret.

Combined, the three claims at the center of this work limit the force of appeals to role morality. While infringing a universal moral rule can be justified, role responsibilities rarely provide such a justification. Moreover, they give persons who

infringe universal moral rules to fulfill their obligations reasons for regret even in the limited circumstances where the roles provide a lesser-evil justification.

PART ONE: TERMINOLOGY

A discussion of what to do when universal moral rules conflict with role responsibilities requires accounts of three concepts: ‘rules’, ‘roles’ and ‘conflicts’. Part One defines how these phrases will be used in this piece. Part One, Section B also limits the scope of analysis by highlighting which roles are relevant in the present context and the nature of their attendant responsibilities.

A. Universal Moral Rules

The term ‘universal moral rule’ is not standard in contemporary ethics. It is used here to avoid baggage affiliated with similar phrases. The term ‘universal law’, for instance, suggests controversial implications associated with the moral philosophy of Immanuel Kant. While some of Kant’s moral precepts are strong candidates for universal moral rules, a defense of his Formula of Universal Law and specifications thereof are beyond the scope of this work. New terminology helps specify the present (perhaps modest) subject matter without getting embroiled in philosophical disputes that are orthogonal to the main project.

While some theorists criticize the rule-centered focus of contemporary ethical discourse,⁴ rules are an important aspect of morality. The term ‘universal moral rule’ applies to the set of duty-imposing rules that apply to all rational beings by virtue of their

⁴ E.g., Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 2d ed (Notre Dame, IN: U Notre Dame P, 1984) [MacIntyre, *Virtue*]. For more on MacIntyre’s critique of contemporary ethics, see *infra* at note 31.

status as rational beings. They are, in other words, the rules that apply to all persons as persons. Those who act contrary to universal moral rules must give an account of why their presumptively wrongful action is not actually wrongful. The account must include a justification or excuse if the violator wants to avoid adverse ethical judgments. In other words, all persons are duty-bound to follow universal moral rules by virtue of their humanity in the absence of a justification or excuse. As Part Three, Section A argues below, most accounts grounded in role responsibilities fail to overcome the presumption that universal moral rule violation is wrongful.

It is helpful to consider examples. This project does not attempt to compile a complete list of universal moral rules. Indeed, it does not explicitly argue that any particular rule is a universal moral rule. A list of candidate universal moral rules suffices. If there are universal moral rules, they are likely either on the list below or structurally similar to its members.⁵

Some candidate universal moral rules proscribe particular actions. Examples include:

- i. Do not kill (people).
- ii. Do not injure people.
- iii. Do not steal.
- iv. Do not lie.⁶

⁵ Suggesting that they are candidates for universal moral rules is not meant to imply that they are universally recognized, but the ubiquity of some rules across different times and places counts in favor of their candidacy. For instance, Parfit notes that the Golden Rule “was independently discovered in at least three of the world’s earliest civilizations” (the ancient Near East, India and China) and remains “the widely accepted fundamental moral idea”; Parfit, *supra* note 2 at 321, 469-470n326. This work takes no stand on whether the Golden Rule is a genuine universal moral rule, but its independent articulation across times and cultures and continued widespread acceptance count in favor of its candidacy.

⁶ Examples i) and iii) mirror proscriptions in the Ten Commandments; Exodus 20.3-17. Example iv) is also plausibly read as a Biblical injunction. Whether something like “You shall not commit adultery” applies to all persons by virtue of their personhood is a good question. Given that all sex out of wedlock is adultery on one interpretation of the Judeo-Christian tradition, it seems like it applies to all persons by virtue of their personhood. If, however, the rule was such that it only barred sex out of wedlock by those who were

It is plausible that anyone who kills, injures, steals from or lies to another person owes an account of that action to the other person (or his or her proxy) and perhaps even to the wider society.

Some candidates are more general. Universal moral rules may state particular types of actions one should avoid. Examples include:

- v. Do not frustrate the truth.⁷
- vi. Treat people with respect.⁸
- vii. Promote social justice.
- viii. Maximize utility.⁹

These rules do not clearly proscribe particular actions, but do implicitly suggest that some actions should be performed and others should not. If, for instance, vi) is a universal moral rule, then acts that disrespect others are presumptively wrongful.

Other candidates articulate how to decide what to do. Rather than proscribing particular acts, these rules offer policies one should follow to avoid wrongful action.¹⁰

Examples include:

- ix. Do unto others as you would have them do unto you.¹¹

already married and thereby only applied to married persons, it would seem to be a constraint on the role of married person.

⁷ v) entails iv). Indeed, iv) can be read as a precisification of v).

⁸ For a more precise and related rule, one may appeal to the Second Formulation of Kant's categorical imperative: "Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end"; Immanuel Kant, *Grounding for the Metaphysics of Morals: With on a Supposed Right to Lie Because of Philanthropic Concerns*, James W. Ellington, ed, 3d ed (Indianapolis: Hackett, 1993) at 30. Kant presents several versions of the categorical imperative and claims that they are all equivalent. They are not.

⁹ This is arguably the primary rule underlying Utilitarianism. Rule Utilitarianism, of course, sets out further rules that constrain the scope of the primary one.

¹⁰ Some general candidate policies may conflict with one another when specified. Apparent conflicts between candidates are evidence either that i) one of the candidates is not a genuine universal moral rule or ii) the rules are imprecisely or inadequately specified.

¹¹ This is the so-called 'Golden Rule', discussed briefly above, *supra* note 5.

- x. Act only according to that maxim whereby you can, at the same time, will that it should become a universal law.¹²

These rules also indirectly proscribe particular actions, but they are primarily methods for identifying rules rather than first order rules in their own right. One could, however, recast them as general rules of the second type. ‘Maximize utility’ can arguably be placed in either category.

Determinations on the status of these candidates will not be made here. The more general rules are particularly contentious and some come with added philosophical and theological baggage use of the term ‘universal moral rule’ was designed to avoid in the first place. If they are true, then they are genuine universal moral rules, but defending their truth is not the aim of this piece. Instead, it suffices to identify the types of rules that could bind us all. Denial that a given rule belongs on the list does not undermine the main argument. Problems only arise if there are no universal moral rules. Luckily, most people will at least acknowledge one of the specific rules proscribing action as a strong candidate. It is hard to argue that one person can kill another without it being at least a presumptive wrong.

Of course, one may deny that any universal moral rules exist. This work has little to say about such views, except for a brief exploration of one version suggesting all moral obligations stem from roles. It is primarily intended as guidance for those who acknowledge that some universal moral rules exist. Skeptics who question the existence of universal moral rules may read this piece as doubly hypothetical; they will read it as answering questions about the implications of both the conditional ‘If universal moral rules exist’ and the conditional ‘If universal moral rules conflict with role

¹² This is the first formulation of Kant’s categorical imperative; Kant, *supra* note 8 at 30.

responsibilities'. The work is intended to be only singly hypothetical, focusing on the second conditional; it will proceed on the understanding that some universal moral rules exist (and some of the candidates above are properly described as such).¹³ Part Three will suggest this conditional should not be fulfilled before giving guidance on what to do when it is nonetheless fulfilled.

B. Roles and Role Responsibilities

Before one can analyze role responsibilities, one must understand the nature of a role. The concept of 'role' is notoriously difficult to define.¹⁴ The notion has sociological origins, but there is reason to question whether the sociological definition is the morally relevant one.¹⁵ Clearly, a role is a position one inhabits. Yet not all positions are roles.¹⁶ A role likely helps to constitute a person's identity and arguably entails a certain set of responsibilities to be analyzed here. Rather than providing more detail on the nature of roles, this work identifies a set of particularly important roles and analyzes their

¹³ One could argue that universal moral rules exist, but none of the candidates above are examples thereof. S/he could have a separate list of candidates or suggest that the rules are not currently known to us at all. This project merely requires that some rules have the property of being universal moral rules. Someone with a different set of universal moral rules is welcome to run the same arguments with his or her own set. If we cannot know the rules, this introduces another second level hypothetical related to the condition 'If we knew the universal moral rules', but one can take it for granted that we can know at least some of them.

¹⁴ This point likely does not require authority, but see e.g., Arthur Isak Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (Princeton: Princeton UP, 1999) at 46.

¹⁵ See e.g., David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton UP, 1988) at 105 [Luban, *Lawyers*] where he describes the term 'role' as "social science jargon" with a "social script" component. At 112, he goes on to suggest that we no longer use this original theatrical role, but it still has salience in the contemporary period and is worth questioning.

In earlier work, Luban suggested the sociologist Emile Durkheim is the father of contemporary professional ethics; David Luban, "Introduction" in David Luban, ed, *The Good Lawyer: Lawyers' Role and Lawyers' Ethics* (Totowa, NJ: Rowman & Allanheld, 1983) 1 at 4 [Luban, "Introduction"]. While he noted that role responsibilities in ethics date back to Plato's Republic, Luban suggested that legal ethics was less than 10 years old and professional ethics less than 20 years old in 1983. It is, however, worth noting that this account of the history of professional (and particularly legal) ethics is contested. Thomas L. Shaffer & Robert F. Cochran, Jr. suggest that legal ethics begins with David Hoffman and his 1836 piece "Resolutions on Professional Deportment"; *Lawyers, Clients, and Moral Responsibility* (St Paul, MN: West Publishing Co., 1994) at v.

¹⁶ Michael O. Hardimon reminds us that "Not every status is a role"; "Role Obligations" (1994) 91(7) *The Journal of Philosophy* 333 at 334.

implications for moral decision-making. Unlike Section A's treatment of rules, the members of this set are to be taken as uncontroversial examples; they are not merely candidate roles, but actual roles. Whether the relationship between the responsibilities of these roles and universal moral rules is the same relationship that holds between the responsibilities of other roles and the same rules should be studied elsewhere. General overlap should be expected.

Likewise, a full taxonomy of role types is not required for this project, but brief remarks are necessary. There are natural roles, like parent and child and formal roles like King. One can assume them in various ways. Parent is a role one assumes only through the performance of certain acts. Child is a role one assumes at birth.¹⁷ Formal roles like King can be assumed either 'naturally' through birth or through the performance of acts, from marriage to conquest to pulling a sword out of a stone. A King, in turn, can create roles for his or her subjects. Most sovereigns possess this power. There are many state-created roles both in monarchies and in states organized by other governments. While the role of court jester is rarely assumed today, subsidiary state-created roles are common. Such state-created roles are the focus of this piece.

Some of the earliest work on professional ethics and conflicts between universal moral rules and role responsibilities therein sought to generalize from one type of role to another. David Luban characterizes the work of Richard Wasserstrom thusly: "Surely universalistic morality includes such role-related duties [as those of a parent to his or her

¹⁷ Even if one later chooses to withdraw from its moral demands, disowning one's parent, the role is assumed at birth. One may argue that birth too is a performance of an act. Whether birth is a) an act that b) can be attributed to the child is beyond the scope of this piece.

child] – but if this is the case for parents and their children, why not also lawyers and their clients?”¹⁸

Differences between types of roles are nonetheless morally important and independent grounds for role responsibilities in the professions would be needed even if there were analogies between natural and created roles.¹⁹ Even if the Wasserstrom-ian claim that there are role-related duties between lawyers and clients is true, a further question arises as to whether these duties can conflict with universal moral rules. It is accordingly important to focus on particular *prima facie* duties of particular roles. Focus on professional roles entails close attention to the unique characteristics of those roles that demand scrutiny. For instance, most professional roles require state-sanction. Many are created primarily to ensure the continued success of the state.

This piece only focuses on professional roles and can be read more narrowly as applying to state-involving professions alone. The role of lawyer is created and attributed by the state for state ends. Even in systems where lawyers are self-regulating, the power to regulate is given by state authority. The lawyer’s role is at least partly aimed at ensuring the functioning of the state. Regardless of how one characterizes the role of the lawyer, its necessary ties to the state are clear. Even where the lawyer is explicitly opposed to the state, as is arguably the case of all criminal defense lawyers formally opposing the state in court, s/he is acting within its rules for the furtherance thereof. At

¹⁸ Luban, “Introduction”, *supra* note 15 at 2. Luban suggested Richard Wasserstrom’s “Lawyers as Professionals: Some Moral Problems” was the first “philosophical” treatment of legal ethics at 6. Wasserstrom’s piece is available at (1975) 5 Human Rights 1.

¹⁹ This helps explain why Bernard Williams suggests legal ethics is a branch of professional, not role, morality. He believes that the professions provide uniquely interesting cases of conflict: “It is the possibility of a divergence between professional morality and ‘ordinary’ or ‘everyday’ morality that lends particular interest to the notion of a professional morality”; Bernard Williams, “Professional Morality and Its Dispositions” in David Luban, ed, *The Good Lawyer: Lawyers’ Role and Lawyers’ Ethics* (Totowa, NJ: Rowman & Allanheld, 1983) 259 at 259 [Williams, “Professional”].

minimum, the lawyer's role is fundamentally concerned with interaction with state mechanisms. Its chief aim is to interact with the state when called upon and/or to create agreements the state can permit to be enforced. State-created and/or state-involving roles are common. The implications of this work may not be limited to professional roles, but professions most frequently fit the 'state-involving' mold and are thus the explicit focus of this piece. Not all professional roles are as necessarily state-involving as 'lawyer', but their similar structure suggests that the analysis here should be relevant to them.

The origins and aims of a role are different features thereof. Both are state-involving in the case of the lawyer. State-created roles are creations of humanity and could be otherwise. Just as importantly, one can more easily remove one's self from these roles than their more 'natural' counterparts. The contingent nature of both the roles and the inhabitation thereof makes them easier targets of ethical analysis. A state arguably could be reconstituted to remove the roles and individuals could leave them if morality demanded. It is less clear that the state could do anything to remove the role of parent from the world, even if it stripped parents of many of their seemingly natural responsibilities.²⁰ Where one must appeal to contingencies, solutions to the ethical problems here may not extend to the domain of 'natural' role responsibilities, limiting the impact of this analysis. If a conflict between a universal moral rule and a role responsibility demands no longer inhabiting that role, the demand is not present where exit is impossible. Whether exit is ever impossible is unclear, but limiting the scope of analysis is helpful for avoiding arguments about natural roles and attendant natural demands of morality. Further, state-involving roles alone raise questions of what to do

²⁰ This, of course, is Plato's suggestion in the Republic. Similarly, one cannot easily leave the role of parent even if one disavows one's child and responsibilities to him or her.

when a role is necessary for state functioning but seems to demand violation of universal moral rules. This unique dilemma requires analysis and helps justify a narrow focus.

C. Conflicts

The forgoing raises the question of when a conflict between a universal moral rule and a role responsibility occurs. A genuine conflict occurs iff the universal moral rule imposes a duty to do X and the role responsibility imposes a duty not to do X (or vice versa).²¹ This can occur indirectly if one creates a duty to do X, the other creates a duty to do Y and Y entails a duty not to do X. Interesting questions arise when two duties conflict. Conflicts between permissions, to the extent that they exist, are not relevant to the present analysis.

Conflicts of duties may be more frequent where universal moral rules are understood at a higher level of generality. As discussed below, it is easy to understand certain requirements of client confidentiality as violations of a universal moral rule of the form ‘Do not frustrate the truth’, but it is more contentious whether those professional requirements similarly entail violation of a more specific universal moral rule: ‘Do not

²¹ These conflicts are not resolved by the rules granting discretion about whether to do X or not. Discretionary rules are not duty-imposing like universal moral rules and thus cannot conflict with those universals (or, indeed, with anything). Discretion suggests both X and not X are permissible actions and one can choose either. Following a universal moral rule demanding X cannot conflict with the discretionary rules since compliance and non-compliance are both possible responses to the discretion.

Discretionary rules may nonetheless be appropriate state responses to questions concerning personal morality. When the state does not want to take a definite stand on the truth of a moral proposition, a given morality that claims to be universally applicable claims that X is required by morality and a given role requires one to not X, then a pluralist state that recognizes many moral views are reasonable, if not true, may be warranted in punting on questions about the truth of the moral claim, leaving it up to each person to determine how to deal with the conflict. This could even be appropriate where a universal moral rule’s status is insufficiently clear such that one could reasonably fail to recognize its truth. This would not make violating the universal moral rule morally unproblematic. It would mean that the state would be justified in failing to enforce citizens’ compliance with the universal moral rules in question. Discretionary rules are not, however, always appropriate. There may be a set of universal moral rules whose status as universal moral rules is sufficiently clear that a state should or even must take a stand on it and ensure individuals fulfill the duties imposed by those rules.

lie'. It is nonetheless easy to identify roles that require violations of universal moral rules. The role of soldier seemingly requires violation of the universal moral rule 'Do not kill (people)'.²² The following arguments do not directly apply to the case of the soldier, but the role demonstrates the possibility of conflicts between universal moral rules that proscribe specific actions and role responsibilities. It is not the only example of a role responsibility that violates one of the largely uncontested universal moral rules. As Arthur Isak Applbaum details in *Ethics for Adversaries: The Morality of Roles in Public and Professional Life*, the role of executioner is defined by violation of that universal moral rule and was considered vital to pre- and post-revolutionary France with the same individual, Henri Sanson, serving in the role through several regime changes.²³ It is not hard to imagine other roles requiring violations of this and other universal moral rules.²⁴

One can, of course, create roles that only require that one follow universal moral rules, eliminating the possibility of conflict by making universal moral rules and role responsibilities identical. If, for instance, 'Promote social justice' is a universal moral rule, then a conception of the lawyer's role that only requires lawyers to promote social justice will avoid the possibility of conflict.²⁵ It may be the special obligation of lawyers

²² This issue is, of course, more complex than it appears on its face. Little turns on whether this is a requirement of the role. Those interested in the moral rules that apply to soldiers should enjoy Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009).

²³ See generally chapter 2 of Applbaum, *supra* note 14.

²⁴ Indeed, Applbaum suggests that a visitor from another planet may see lawyers as "serial liars and thieves", suggesting the role may involve (if not require) widespread violation of the action-proscribing universal moral rules 'Do not lie' and 'Do not steal'; *ibid* at 14.

²⁵ In "Lawyers, Justice, and the Challenge of Moral Pluralism", Katherine R. Kruse outlines three "distinct yet related social justice models" of the lawyer's role in her analysis of "what the lawyer should do when asked to assist a client *with whom the lawyer fundamentally morally disagrees*"; (2005) 90 Minn L Rev 389 at 390n6, 391. She attributed the moral activist position to David Luban, the contextual lawyering position to William H. Simon and what she calls the 'lawyer as friend' position to Thomas L. Shaffer and Robert F. Cochran Jr. Each position can itself be viewed as part of a family of related views, but Kruse rightly links them all by a commitment to social justice rather than client ends. Kruse ultimately suggests that neither the standard view nor the social justice models adequately explains "the lawyer's professional role in the face of fundamental moral disagreement"; *ibid* at 393. Her identification of a class of social justice-focused

to ensure that a universal moral rule is followed, giving it priority in their daily lives at the same time that they recognize its inevitable consistency with all other genuine universal moral rules. As discussed below, a view that forestalls the possibility of conflict may be the ideal way of understanding the relationship between universal moral rules and role responsibilities. Yet examples where universal moral rules and role responsibilities are identical do not produce problems about what to do in cases of conflict. Our interest is hypothetical cases where conflicts arise. The foregoing suggests this phenomenon is not merely hypothetical at present. Indeed, certain conceptions of the lawyer's role include duties that may be contrary to universal moral rules.²⁶ Arguments about what to do in cases of conflict should thus be able to guide some real world decision-making.

conceptions of the lawyer's role is nonetheless helpful. Her own fourth model is also worth analyzing. Notably, the 'lawyer as friend' locution is also used to identify a conception of the lawyer's role that is not fundamentally social justice-oriented; Charles Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation" (1976) 85 Yale LJ 1060 at 1086.

For more on these positions, see Luban, *Lawyers*, *supra* note 15; Shaffer & Cochran, *supra* note 15; William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge: Harvard UP, 1998). All three positions suggest that conflicts are possible at present. Luban, for instance, gives guidance on what to do in cases of conflict: "When moral obligation conflicts with professional obligation, the lawyer must become a civil disobedient"; David Luban, "The Adversary System Excuse" in David Luban, ed, *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* 83 at 84 [Luban, "Adversary"] 118. Chapters 4 and 5 of *Lawyers and Justice* expand the argument in that piece; Luban, *Lawyers*, *supra* note 15 at xiv.

The fact that social justice can be promoted in a multiplicity of ways may suggest that 'Promote social justice' is insufficiently precise to articulate proper universal moral rules or role responsibilities. It may thus be helpful to use an example of a social justice model to show how conflict can be avoided. On Shaffer and Cochran's friendship model, lawyers and clients should face moral issues together and help one another to "do the right thing"; Shaffer & Cochran, *supra* note 15 at 43. This suggests the lawyer's role is to ensure that universal moral rules are followed not merely by lawyers, but also by their clients. The role only creates a further, second order obligation to ensure others follow the universal moral rule as well, instead of a separate set of obligations that could conflict with them. In practice, Shaffer and Cochran end up allowing some latitude and do not give lawyers privileged access to moral truths. Ultimately, on Shaffer and Cochran's account, "the lawyer as friend will (1) acknowledge, raise and discuss moral issues with clients and (2) not impose the lawyer's morals on clients"; *ibid* at 54. Just as friends help one another recognize and solve problems without judgment, lawyers should help clients, but will not always assume their own values are paramount. They should not even presume to know clients' interests.

²⁶ E.g., Luban suggests the dominant conception of the lawyer's role includes recognition of the fact that the role may create conflicts that require lawyers to do things that violate universal moral rules. He suggest that the dominant view of legal ethics actually consists of several parts: 1) what we may call a Role First View that he identifies as the theory of role morality, viz. the belief that role morality takes precedence over common morality since "morality consists in performing the duties of my station" and "people in

Part Two will now articulate some of the dominant positions on how to understand the demands of universal moral rules and role responsibilities in light of their place in larger domains of ethics; the general morality applying to all persons creates universal moral rules while role morality creates role responsibilities. Part Two will thereby set the context necessary to defend three claims about what one ought to do in cases of conflict between the obligations created by universal moral rules and role responsibilities.

PART TWO: POSSIBLE RELATIONSHIPS BETWEEN GENERAL AND ROLE MORALITIES

The arguments for this project's three claims about what to do in cases of conflict begin with an articulation of the best way of understanding the relationship between general and role moralities. The second argument provides a limited exception to a principle that stems from that understanding. While the third can be read as an

certain social roles may be morally required to do things that may seem immoral"), ii) the adversary system excuse and iii) the standard conception of the lawyer's role resting on principles of professionalism and non-accountability; Luban, *Lawyers*, *supra* note 15 at xix-xx.

Whether this is actually the dominant view of roles in legal ethics and, if so, whether it actually entails that the lawyer's role is the type of social role requiring immoral action in i) is worth debating. This view was originally called the 'standard conception' in Gerald Postema's work criticizing it; "Moral Responsibility in Professional Ethics" (1980) 55 NYU LR 63 at 73 [Postema, "Moral Responsibility"]. Considerable debate about whether the view is standard followed, but some level of zealous advocacy seems standard. W. Bradley Wendel attributes the standard conception of the lawyer's role to Monroe Freedman, one of the most influential legal theorists; "Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection" (2006) 34 Holfstra LR 986. Yet Wendel does not attribute the principles to Freedman and Russell G. Pearce suggests Freedman can be used to demonstrate how one can have a zealous advocacy model without the principles; "Model Rule 1.0: Lawyers are Morally Accountable" (2002) 75 Fordham LR 1805 at 1806. Pearce goes on to note that most lawyers seem to have internalized the principle of non-accountability. This lends credence to the idea that it is the operative standard conception, even if Freedman's work is influential in academia and likely provides the best formulation of the lawyer as zealous advocate conception.

independent argument about lesser-evil justifications in general, its application to the case of the lawyer depends on how one responds to the first two arguments. It is thus important to understand the dialectic that inspired the first claim about the relationship between general and role moralities. This Part accordingly provides an overview of the plausible positions on the relationship taken by prominent legal ethicists, placing the positions into original categories for analytical clarity. Part Three goes on to defend a variant of what I will call a Persons First View.

Whether there can be conflicts between universal moral rules and role responsibilities depends on how one characterizes the relationship between general and role moralities.²⁷ Those who believe conflicts should be resolved in one way or another tend to acknowledge, as Wasserstrom puts it, “a comprehensiveness, a universalistic dimension of morality, that is at odds with the more particularistic focus and direction of the kind of reasoning that occurs within and through the perspective of roles.”²⁸ One can, however, deny that either realm exists to forestall potential conflicts. What domains of morality exist and how to view the relations between them is fundamental.

Luban identifies three types of duties associated with professional roles: “those that are essential to the proper functioning of the role”, “side constraints” and “customary or accepted practices of the role”.²⁹ He suggests only the first type appeals to the good of the role in itself and limits his analysis to duties fundamental to the performance of roles. This inquiry is not so-limited. On at least one understanding of the nature of roles, roles

²⁷ The term ‘general morality’ is used here to allow the possibility that there are no universal moral rules.

²⁸ Richard Wasserstrom, “Roles and Morality” in David Luban, ed, *The Good Lawyer: Lawyers’ Role and Lawyers’ Ethics* (Totowa, NJ: Rowman & Allanheld, 1983) 25 at 28 [Wasserstrom, “Roles”].

²⁹ Luban, *Lawyers*, *supra* note 15 at 128-129.

only add side constraints on general moral norms to a list of our moral obligations.³⁰

Understanding different views is nonetheless important; it helps explain why the further question at the center of this piece arises.

A. Role Only Views

The strongest claim for the moral force of role responsibilities suggests all moral demands originate in our roles. On this view, there is no conflict between role responsibilities and universal moral rules because there are no universal moral rules beyond ‘Attend to your role responsibilities’. Where all individuals are constituted by their roles only, they have no responsibilities qua role-independent selves. There is no subject to whom universal moral rules could apply except the role-inhabiting self that is already outside the supposed universal realm.

The idea that identities are fundamentally tied to roles is not wholly implausible. According to Alasdair MacIntyre, “in much of the ancient and medieval worlds, as in many other premodern societies, the individual is identified and constituted in and through certain of his or her roles, those roles which bind the individual to the communities in and through which alone specifically human goods are to be attained.”³¹

³⁰ I previously argued that the best understanding of role morality is that it is a subset of the larger moral world that must maintain consistency with it; Author, “Lawyers as Ethical Actors and the Scope of the Cab Rank Rule Exception” [Unpublished winner of the University of Toronto’s *Nathan Strauss Q.C., Essay Prize in Legal Ethics*, 2010]. I remain convinced of that view and argue for it below.

³¹ MacIntyre, *Virtue*, *supra* note 4 at 172. His criticisms of contemporary morality run throughout the book. See e.g., at 2 where he seems to suggest that we only have a “simulacra” of morality at present. The fact that the last society whose ethics he canvasses is the Medieval period also hints at the fact that he sees that period as the last one with a fully developed ethics based on a proper conception of the person.

Elsewhere, MacIntyre suggests that ethics in general is no better than professional ethics in its ability to avoid contradiction and incompatibility. In “What Has Ethics to Learn from Medical Ethics?”, he once again worries that the contemporary moral agent “is detached from all social memberships, loyalties and circumstances”; (1978) 2(4) *Philos Exch* 37 at 40 [MacIntyre, “Medical Ethics”]. He also criticizes modern ethics’ focus on rules (and their justification) and what one should do in particular circumstances. He goes on to suggest that when one focuses on individual agents, rules and individual actions, “no satisfactory

MacIntyre claimed that twentieth-century moral theories erred by viewing individual agents outside of their institutional and role-responsive contexts; this inspired an ample literature stressing the importance of special relations for moral judgment.³² In the legal domain, this fundamentality of roles to identity suggests that the demands of one's role as lawyer are only judged against the demands of other roles, not some universal background conditions for morality.

Denial of universal norms may nonetheless seem implausible. The view can be augmented to allow for general norms, but doing so also admits of potential conflict. Luban suggests any view that denies that there is a common morality is "preposterous",³³ but hints at the theory of personhood commonly used to ground this position.³⁴ We are born into roles, opt in to others and can only eschew role responsibilities by taking on other role responsibilities; role moralists say "one can opt out of a role only into (or by way of) another role. And thus all morality is still role morality."³⁵ Given that MacIntyre suggests we should try to prevent conflicts, rather than trying to solve them,³⁶ this

account of the status of the rules thus conceived appears to be possible"; *ibid* at 41. Competing demands are "rationally insoluble" on this view; *ibid* at 42.

MacIntyre's framework thus suggests that this work is addressing the wrong question. According to MacIntyre, few ethicists start in the right place: "if moral agency is exercised through roles, then the questions that ought to be addressed are much more specific than those with which moral philosophy is conventionally concerned"; *ibid* at 47. If one takes his Role Only View (or one inspired by him), the problem this piece seeks to solve does not arise. Since we tend to encounter moral demands from a first-person perspective and must practically determine what to do in the face of those demands, it is nonetheless important to tell people how they should act if they are interested in acting morally.

³² E.g., Christina Hoff Sommers, "Filial Morality" (1986) 83(8) *The Journal of Philosophy* 439.

³³ Luban, *Lawyers*, *supra* note 15 at 112.

³⁴ He rightly notes that a caste system, for instance, makes all morality role-specific; *ibid* at 107. The broader position, however, is that all moral systems are effectively just sets of role responsibilities because all moral agents are constituted by the roles we inhabit.

³⁵ *Ibid* at 106.

³⁶ MacIntyre, "Medical Ethics", *supra* note 31 at 44.

solution may be uneasy with the approach. It is, however, consistent with MacIntyre's belief that roles are more fundamental to morality than rules.³⁷

General moral norms exist on this view, but only because they "happened to accrue to every role."³⁸ Just as different role responsibilities can conflict, then, so too can a general moral norm of this type and a role responsibility. Indeed, a conflict between a seemingly universal norm and a role responsibility is effectively just a conflict between role responsibilities and neither takes priority. Since Luban's analysis is limited to responsibilities fundamental to the role, the relevant roles are presumably on a par with respect to type and conflicts are to be determined based on the degree of fundamentality, but this point is not explicitly stated. Surely fundamental norms trump mere constraints and customary or accepted practices, so a general norm will trump based on its fundamentality to specific roles rather than its general status. How to deal with conflicts between the demands of the various roles one inhabits on the view where one is constituted by multiple roles is an important further concern. Mere generality, however, has little moral weight. It is incidental. There is no overarching self with moral demands that coexist with, let alone conflict with or eclipse, responsibilities specific to one's roles.

This Role First View thus changes the question. To the extent that it allows for conflicts, the conflicts are not between universal moral rules and role responsibilities, but between role responsibilities. One must determine how to analyze the force of responsibilities in and across roles to decide what one ought to do in such cases of conflict. On (at least) the version of the Role Only View sketched by Luban, moral

³⁷ *Ibid.*

³⁸ Luban, *Lawyers*, *supra* note 15 at 108. He calls them 'universal moral norms'. A different term is used here to avoid confusion.

demands should be formulated as rules for roles as opposed to specific demands to perform or avoid certain actions:

[Role morality] assumes that policies over acts is the right approach – that, for instance, if the policy of zealous advocacy is a morally worthy one, the lawyer shall follow it even on the occasions when she knows it will result in act-level immorality. And, indeed, the general argument in favor of putting policies over acts is both well-known and forceful: Policies over acts leads to greater predictability and regularity in social behavior.³⁹

One may question this predictability and regularity where a hierarchy of roles or at least a regulated means for weighing the demands of roles is not present. On a Role Only View, however, one does not weigh the good of an act against the good of the role, but only addresses which of two acts is more important to that role and perhaps which of two roles demanding differing acts is more important. Only roles matter. We assess morally through the prism of roles.

B. Role First Views

One need not suggest that identities are constituted by roles or that morality is reducible to role morality to advocate the primacy of roles. One can more plausibly recognize role morality and general morality as separate and suggest the former trumps in conflict. Indeed, the ‘policies over acts’ element of role morality is not tied to the conception of the person as a collection of roles. The view that roles are useful for regulating conduct is common on many ethical views with no such metaphysical commitments.

The view that role responsibilities trump seemingly universal moral rules, however, is not easily specified and admits of many precisifications. To say that roles

³⁹ *Ibid* at 118.

trump could mean that the good of following the role responsibility outweighs the good of following the universal moral rule; this appears to advocate something like a principle that the good of fulfilling role responsibilities is better than the good of fulfilling universal ethical demands. Many views instead suggest role morality should generally trump because of special features of roles, usually related to the good of a role or the institution that creates it. As Luban describes one approach,

The obvious structure of...an institutional excuse is the two-step argument that (1) the moral responsibility for the action falls on the role (or institution) and not on the role agent, and (2) the role itself is morally desirable. The first step, however, seems false if asserted independently of the second step....The goodness of the role matters, it seems to me, only if we do not evaluate role-derived actions purely as isolated cases, but think of them as instances of institutional policies that are morally good.⁴⁰

Even if one accepted this approach, there would be a further question of what it entails.

There are various ways of suggesting roles should trump. Even if policies trump acts or institutional goods trump individual ones, one needs a way of articulating how they do so.

The most straightforward way of motivating a Role First View suggests that fulfilling role responsibilities is always justified even if doing so conflicts with otherwise operative universal moral rules, but there are other ways of plausibly achieving the same ends. If a Role First View recognizes that there is ethical force behind universal moral rules to act or refrain from acting in certain ways, but still thinks one ought to fulfill role responsibilities requiring acting contrary to that universal norm, s/he could say that the actor is justified because s/he committed a would-be moral wrong, but the bad was outweighed by the good of fulfilling the particular responsibility. This is likely the best way of articulating a Role First View.

⁴⁰ *Ibid* at 117.

Alternatively, one could say that role responsibilities create exceptions to universal moral rules, negating the force of seemingly universal moral rules in cases of apparent conflict, but retaining their force elsewhere. In the latter case, it would be more appropriate to describe the non-particular norms as general since they admit of exceptions and accordingly do not apply universally. Regardless, the justification view is more plausibly understood as a Role First View than the alternative since it does not make the general rules primary norms from which one could be exempted.⁴¹

The appeal of both role-emphasizing views is easy to see. They both give substantial moral weight to the features specific to individual lives, treating ethical actors in a manner that recognizes specific features of their lives. Unfortunately, they do so at the expense of ignoring many other important factors thereof. It may be the case that when morality speaks to persons as individuals, they are more likely to comply with it, but role-emphasizing views ignore everything outside the role for the sake of moral analysis, reducing individuals' moral identities to their roles. This may make determining what to do in a given case much easier. If the only relevant moral commands are role-related, one only needs to follow the rules of a role to remain free from blame. As Wasserstrom puts it, "roles provide a degree of moral simplification that makes it much easier to determine what one ought to do or what is right for one to do."⁴² Where this comes at the expense of ignorance of objectively important conflicting moral values and, as we now see, important aspects of moral agents' identities, this ease is hard won at best.

⁴¹ Both views share a common command to let roles trump and are thus placed together in this taxonomy.

⁴² Wasserstrom, "Roles", *supra* note 28 at 29.

C. Persons Only Views

An explicitly contrary understanding of the person to that operative on Role Only Views entails a different perspective on the relationship between universal moral rules and role responsibilities. On the strongest contrary view, one's moral identity is constituted by one's personhood. This view denies the existence of role responsibilities. It thus denies the potential for conflict. There is only one set of moral rules and the rules apply to everyone in the same way.

This view is admirably simple (and thus appealing), but its plausibility is highly contested. A whole school of thought challenged mainstream ethics' denial of roles' import throughout the latter part of the last century. In 1994, for instance, Michael Hardimon wrote that

the view that role obligations are marginal is mistaken....[T]hey are central to morality and should be taken seriously. Role obligations are especially interesting because they illustrate the existence and importance of a dimension of the moral life largely unnoticed by the ethical mainstream[.]⁴³

Building on the work of MacIntyre, Bernard Williams and others, Hardimon not only demonstrated the importance of role responsibilities as moral norms, but also as elements

⁴³ Hardimon, *supra* note 16 at 333.

Hardimon is concerned with when role obligations are binding. He takes issue with a 'standard' voluntarism-based account of institutionally-assigned role obligations and adds a role identification requirement for the role obligations to have any normative force as reasons. Role identification on this view is "(i) to occupy the role; (ii) to recognize that one occupies the role; (iii) to conceive of oneself as someone for whom the norms of the role function as reasons....If you identify with a role, its norms will function for you as reasons"; *ibid* at 358. A. John Simmons, in turn, suggests this view is not standard; "External Justifications and Institutional Roles" (1996) 93(1) *The Journal of Philosophy* 28 at 30.

In the cases at issue in this piece, we generally assume the threshold for reason-giving is met to create a conflict. Questions of when role obligations are reason-giving and to what extent are important for determining what one ought to do when they conflict. If, however, one takes a categorical approach whereby universal moral rules always trump role obligations or vice versa, the amount of reason-giving becomes less important. Sorting out amounts beyond a threshold is thus a concern only for case-by-case views and will not be a primary concern of this piece.

of agents' understanding of their moral identities.⁴⁴ Several persuasive arguments suggest morality should recognize that individuals fill roles that come with morally relevant responsibilities.

Indeed, even if one generally accepts a Persons Only View as a theoretical ideal, it is likely irrelevant in the present debate about state-created and state-involving roles. This work proceeds on the assumption that roles exist and people inhabit them. Denial of their existence is accordingly not an available move in the dialectic.

One may still deny the moral relevance of role responsibilities. On this view, a person remains a person even in the role of lawyer and we interact with the person, not the lawyer, when we assess his or her actions on moral grounds. Role responsibilities carry no moral weight. Unfortunately for this view, the fact that s/he is a lawyer seems morally relevant. Even if we do not think lawyers should be exempt for universal moral rules, we may still want to assess their actions differently than other persons who are similarly non-exempt. It is not enough to say that "roles are not exempt from the dictates of these moral demands; instead, they are concrete instantiations of what these demands require and justify".⁴⁵ Roles seem to create additional moral burdens, not mere specifications of a universal norm.

D. Persons First Views

A similar family of views recognizes the reality and moral relevance of roles, but downplays their significance. They suggest that we are persons first and the universal moral rules applying to all persons qua persons are primary. Universal moral rules are not

⁴⁴ E.g., Hardimon, *supra* note 16 at 345-346. At 333n1, Hardimon cites Lawrence Blum, *Friendship, Altruism, and Morality* (New York: Routledge, 1980), MacIntyre, *Virtue*, *supra* note 4, Sommers, *supra* note 32 and Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge: Harvard UP, 1985).

⁴⁵ Luban, "Introduction", *supra* note 15 at 3, paraphrasing Richard Wasserstrom on the approach of Alan Donagan and Murray Schwartz.

the *only* rules since persons inhabit roles and acquire attendant responsibilities. They are simply primary. This is Luban's view; he writes:

Corresponding to our view that morality is common to all persons, that is, to persons *simpliciter*, is a view of ourselves as persons first and role occupants only secondarily. The role theorist reduced us to a sum of our roles and nothing more. This, I have argued, is a mistake.⁴⁶

This and related views recognize universal moral rules and role responsibilities as separate parts of morality that can conflict. There may be reason to assume roles and accept their responsibilities,⁴⁷ but universal moral rules trump role responsibilities.

Persons First Views are often used to help justify refusing role responsibilities on the basis of one's personal morality.⁴⁸ This is not what is at issue here (or in Luban's work). Instead of focusing of what one ought to do when one's personal morality conflicts with one's responsibilities, this piece concerns conflicts between genuine universal moral rules and specific role responsibilities. Whether professional norms accommodate personal values is the subject of important work in legal ethics.⁴⁹ Whether professional norms violate universal moral rules is more pressing. If so, Persons First Views suggest we must assess moral agents primarily as persons subject to universal

⁴⁶ Luban, *Lawyers*, *supra* note 15 at 111.

⁴⁷ Patricia H. Werhane, for instance, denies that role relations are capable of precluding "individual and institutional culpability for harmful decisions and actions that are within their scope to prevent"; "Self-Interests, Roles and Some Limits to Role Morality" (1998) 12(2) Public Affairs Quarterly 221 at 223. In cases of conflict, then, one must follow universal moral rules. Yet Werhane leaves room for role obligations on efficiency grounds; *ibid* at 239. Werhane believes that morality demands that one step outside a role to see if conflicts are present and remedy them where possible, but roles are useful for guiding action in most cases.

⁴⁸ For instance, in his classic work of legal ethics, Fried writes that "if the law enjoins an obligation against conscience, a lawyer, like any conscientious person, must refuse and pay the price"; *supra* note 25 at 1086.

⁴⁹ E.g., Bruce A Green, "The Role of Personal Values in Professional Decisionmaking" (1997) 11 Geo J Legal Ethics 19.

For a view that conflict is necessary, see Andreas Eshete, "Does a Lawyer's Character Matter?" in David Luban, ed, *The Good Lawyer: Lawyers' Role and Lawyers' Ethics* (Totowa, NJ: Rowman & Allanheld, 1983) 270 at 274.

moral rules and bound first to respect them. These rules should trump role responsibilities in the case of conflict.

E. Context-Dependent Determinations

The relationship between general and role moralities may not be absolute. It may be that universal moral rules and role responsibilities exist on different moral planes and cannot be compared on an absolute scale. They could even be wholly incommensurate, allowing for little assessment and demanding non-moral considerations to be determinative in deciding which one to choose. Less radically, it is possible that neither set is primary or categorically better. Just as William Simon criticizes standard legal ethics' "categorical" decision-making structure,⁵⁰ one may criticize attempts to categorically determine how to respond to conflicts between universal moral rules and role responsibilities. This account of the relationship between general and role moralities as separate spheres that are incommensurate and/or not categorically comparable gives little guidance on what one generally ought to do in cases of conflict.

Contextual factors will provide different answers about what to do in different circumstances. How particular domains of general and role morality interact may be highly contextual. For present purposes, it suffices if one can say something categorical about how relevant domains of general and role moralities interact, remaining confident that one can give a categorical response to queries about what one ought to do when the demands of a particular role conflict with universal moral rules.

⁵⁰ Simon, *supra* note 25 at 8. Simon goes on to give a contextualist conception of the lawyer's role.

PART THREE: ARGUMENTATION

The following provides more categorical guidance on what to do when the demands of the lawyer's role conflict with universal moral rules. The first section begins by articulating how one ought to understand the relationship between the domain of role morality relevant to lawyers and the domain of general morality that produces universal moral rules. The account best articulates the relationship between the whole of general and role morality and accordingly should be helpful for any account of what to do in the face of conflicts between universal moral rules and role responsibilities, but the more modest aim is all that is required to guide lawyers faced with conflicts between universal moral rules and the demands of their particular role. It suggests properly constituted roles cannot create responsibilities that conflict with universal moral rules and any purported responsibilities that do conflict should be viewed as morally void. In cases of conflict, universal moral rules trump. Recognizing that conflicts exist due to the non-ideal construction of many contemporary professions, however, one must determine whether circumstances exist where the priority of universal moral rules should not apply. The second section of Part Two defends a limited exception to the priority of universal moral rules. The third section argues that regret is the appropriate moral response to acting under the exception and one can be judged for failing to have the right response.

A. Claim 1: On the best understanding of the nature of roles and their attendant responsibilities, universal moral rules are primary and roles can only create further constraints on actors, creating a general priority for universal moral rules when conflicts nonetheless arise due to the persistence of non-ideally constituted roles.

The best understanding of the relationship between general and role moralities denies the possibility of conflict. On my variant of a Persons First View, the Universal Norms as Primary, Role Responsibilities as Additional Constraints View, legitimate conflicts do not arise. Roles cannot genuinely create obligations contrary to universal moral rules. Any role responsibility that conflicts with a universal moral rule is thus void.

I previously motivated a version of the Persons First View to answer questions of personal conscience.⁵¹ This view is more plausible as an understanding of the nature of the relationship between genuine universal moral rules and role responsibilities than the nature of the relationship between personal morality and role responsibilities. In short, the view shares the Persons First View that we are primarily to be judged morally as persons, but both recognizes the importance of roles and denies that universal and role morality are separate spheres. It holds that universal moral rules are primary and serve as limiting conditions on what responsibilities one may accrue by inhabiting a role. In other words, genuine role responsibilities exist in the domain of universal morality and are limited by universal moral rules. Ideally constituted roles cannot demand violation of universal moral rules because consistency with those norms is a sufficiency condition for a justifiable role and genuine attendant responsibilities.

As originally presented, this view was methodological. It suggested that “legal ethics is a subset of general ethics and lawyers cannot be excused from the general ethical

⁵¹ Author, *supra* note 30.

duty to take responsibility for choices, actions and consequences thereof.”⁵² It went on to suggest that “[l]awyers must be held to the same moral standards as other individuals.”⁵³ Implicit, but not as clearly stated, in this earlier work was an understanding that lawyers nonetheless accrue further obligations by virtue of their role. Lawyers benefit from their role, helping to justify the additional moral demands made on them, but it is the nature of the role that necessitates those demands rather than a sense of balance. The role of lawyer is created by the state to fulfill certain functions. By assuming roles, lawyers accept additional responsibilities to help achieve those functions. This view has a different take on the limits of the responsibilities. If role morality is a subset of universal morality (and legal ethics is thus a subset of general ethics), it is limited by the larger set. A role may place additional burdens and constraints on an individual inhabiting it, but it cannot demand that s/he violate a universal moral rule.

In short, the Universal Norms as Primary, Role Responsibilities as Additional Constraints View holds that i) moral agents are not merely collections of roles and attendant obligations and ii) there are moral rules that apply to all individuals regardless of what further roles they may occupy. It goes on to hold that genuine role obligations place additional constraints on professionals rather than giving them justifications for their *prima facie* ethical wrongs. Genuine role obligations thus do not conflict with universal morality. Following role obligations accordingly should not require violating universal moral rules. This fact undermines the force of appeals to role to justify one’s

⁵² *Ibid.*

⁵³ *Ibid.*

actions. If, for instance, ‘Do not lie’ were a genuine universal moral rule and a role demanded that one lie, then the role would cease to be ideally constituted.⁵⁴

On this view, there can be no conflict when roles are ideally constituted and one should not be asked to leave a role to remain moral. Moral purity adheres to the justifiable roles. To take on a role is to take on extra burdens for the sake of a good that are not offset by any countervailing violations of universal moral rules. One can appeal to a role to explain some of one’s actions, but a role cannot explain why one violated a universal moral rule since violation cannot be demanded by a properly constituted role.⁵⁵ While one may be justified or excused for violation of a universal moral rule on this view, the standard move that suggests that a role provides a justification or excuse is unavailable.⁵⁶ An apparently justified role cannot transfer its justification on to an action

⁵⁴ While there are epistemic concerns with identifying genuine universal moral rules, this problem is no worse here than it is on any other understanding of their relationship with role responsibilities (except those that deny universal morality in its entirety).

⁵⁵ This is generally consistent with the moral of Applbaum’s view. He writes:

though roles ordinarily cannot permit what is forbidden, they can require what is permitted. Professional roles are powerful obligators. Nothing that I have said here should be taken to argue for the weakening of the moral commitments that tie professionals to their legitimate and just professional role obligations. But neither consent nor some version of the fair-play principle can bind an actor to an illegitimate or unjust role. Montaigne is wrong: lawyers and financiers, politicians and public servants, *are* responsible for the vice and stupidity of their trades, and *should* refuse to practice them in vicious and stupid ways; Applbaum, *supra* note 14 at 259.

The present view similarly holds that individuals are persons first. Roles can impose burdens, but cannot impose duties to violate role morality. It makes a further claim about the nature of roles not found in Applbaum, but it is generally consistent with him.

⁵⁶ This move is common in legal ethics. David Luban seems to suggest that it is common in all role-centered moralities. He identifies the so-called “Fourfold Root of Sufficient Reasoning” as the “deep structure of role morality”:

one justifies a morally disquieting action by appealing to a role-based obligation; one justifies this role-related obligation by showing that it is necessary to the role; one justifies the role by pointing to the institutional context (such as the adversary system) that gives rise to it; and finally, one demonstrates that the institution is a morally worthy one; Luban, *Lawyers*, *supra* note 15 at xxii.

He suggests this structure basically boils down to the adversary system excuse when applied to lawyers. Luban denies that it is justifiable given the weak justification for the adversary system:

that would violate the universal moral rule because inclusion of the role responsibility to violate the rule would undermine the claimed justification.

One may question whether a society could be constituted such that the state only creates roles that do not violate universal moral rules. Whether a just society requires that individuals fulfill roles that demand violation of universal moral rules for their completion is an important empirical concern. It may depend on how fine- or coarse-grained one articulates universal moral rules. It is easier to see how the role of lawyer can be consistent with ‘Do not lie’ than ‘Do not frustrate the truth’, for instance. I suspect that an ideally constituted state can exist without roles that demand violations of universal moral rules, but this may be beside the point given the current state of the world.⁵⁷ The reader will thus be spared an extensive exercise in identifying the nature of

[A] social institution, such as adversary advocacy, that can receive only a pragmatic justification is not capable of providing institutional excuses for acts that would be immoral if they were performed by someone who was not an incumbent of the institution. To provide an institutional excuse, an institution must be justified in a stronger way by showing that it constitutes a positive moral good. A pragmatic argument, by contrast, need only show that it is not much more mediocre than its rivals; *ibid* at 104.

The wider components of the Fourfold Root of Sufficient Reason are important when analyzing conflicts between role obligations and universal moral rules in other domains. Alan Donagan can be read as adding a fifth ‘root’ in which the society itself must be justified. He suggests that there is strong reason for societies to include an adversarial system based on the importance of respect for dignity:

A society fails to respect the human dignity of those within its jurisdiction if it denies them a fair opportunity to raise questions about what is due to them under the law before properly constituted courts, and to defend themselves against claims upon themselves or charges against themselves; it would so fail if it denied them the opportunity to hire legal advisers whose professional obligation would be to advise them how best to do these things and to represent them in doing them....[This requires adversarial tactics. A]ny social-juridical system in which the adversary system is not an element must fail to respect the dignity of its members; “Justifying Legal Practice in the Adversary System” in David Luban, ed, *The Good Lawyer: Lawyers’ Roles and Lawyers’ Ethics* (Totowa, NJ: Rowman & Allanheld, 1984) 123 at 133.

Where universal moral rules and role responsibilities are properly constituted, one will not be able to appeal to the Fourfold Root of Sufficient Reason to justify violations of universal moral rules since a role that includes a violation is faulty and thus cannot itself be strongly justified. If this move has any salience, it is in the limited non-ideal circumstances outlined in Part Three, Section B.

⁵⁷ Initial readers of this thesis suggest that a role need not be badly designed if it includes a universal moral rule. They suggest that deviation from the moral rule may be necessary given the nature of roles as they

an ideal society. Other understandings of the relationship between spheres of morality are sufficiently prevalent that the possibility of conflict lingers. It is thus important to identify what one ought to do where conflict arises even if the conflict is evitable.

Conflicts will not arise on our best understanding of the relationship between universal and role moralities;⁵⁸ unfortunately, such conflicts are common. In such

reflect and help one navigate the complexity of human life and human institutions. Even roles that require violation of universal moral rules may be 'ideally constituted for our non-ideal world'. This denies my claim that the best understanding of roles (or at least the best understanding of how roles can be instantiated in the real world) will not lead to conflict. I do not find this account of the nature and logic of roles appealing and am more optimistic about the ability to create a world where roles do not conflict with universal moral rules. Roles creating additional constraints rather than justifications or exceptions to moral rules seems like an inviting picture to me.

Those who disagree can still accept the general argument about the priority of universal moral rules. If conflicts are inevitable, then my answer to the question of what one ought to do when conflicts arise is even more pressing. My argument that one reason we should give general priority to universal moral rules is that this would keep us closer to the ideal would falter, but other arguments would remain intact. My critics who place the origins of conflict elsewhere are invited to read 'non-ideally constituted role(s)' as 'role(s) that can only be fulfilled by universal moral rules' moving forward in order to more easily assess the arguments on their own terms. To the extent that people think that roles that necessarily violate universal moral rules are necessary for human interaction in a complex world, I think the moral salience of their necessity is more limited than they might expect and craft my exception to the general priority of universal moral rules rather narrowly in Part Three, Section B.

⁵⁸ One may inverse my view such that roles are primary and universal moral rules are limited by role responsibilities. This is an odd position if taken literally. Suggestions that one is a role agent first and a person second or that general norms are a subclass of particular norms are bizarre. On closer inspection, the counterpart view appears to be a version of the Role Only morality outlined above. While most Role Only Views suggest general moral rules are a type of role responsibility, this one says universal moral rules are genuine types of their own limited by extant roles. Each suggests the universal can only exist as a subclass of role morality. There is, however, considerable doubt about whether any norm is universal on this inverse of my view: where roles serve as a limit, the limit will be different for each person.

It is worth outlining a more plausible counterpart view for the sake of charity. Virginia Held holds a Role First View that comes close to a Role Only View. It may be understood as the better counterpart for the present proposal. She views role morality as a subset of morality, but suggests it should be the operative one for professionals:

Role morality is not amorality but a relying on part rather than the whole of morality. Ideally, all the parts would fit coherently together into a comprehensive whole, and there would be no conflicts between the priorities of members of a profession and of those not in the profession because all would see how a complete moral picture would reconcile seeming conflicts. But in the real world, at least for the foreseeable future, conflicts will continue. For reasons already considered, it seems to me appropriate for different professions to have different views of the morally appropriate to their practice of their profession. But they should not be amoral; Virginia Held, "The Division of Moral Labor and the Role of the Lawyer" in David Luban, ed, *The Good Lawyer: Lawyers' Role and Lawyers' Ethics* (Totowa, NJ: Rowman & Allanheld, 1983) 60 at 77.

circumstances, one ought to act as if one is in an ideal scenario where the conflicting role responsibility is morally invalid. Role-specific rules may remain in force, but one ought to act according to the universal moral rule, even if failing to fulfill the role obligation would result in one being removed from the role. It is helpful to consider real cases to test this principle. While we are not interested in the debate over the actual demands of the so-called ‘standard’ picture of the lawyer’s role (and whether the picture really is really standard in the first place), it is worth examining some of the key claimed conflicts created by that conception to show how this understanding of the ideal relationship can be operative in non-ideal scenarios where conflicts arise.

Commonly cited examples of morally questionable conduct allowed (and perhaps even required by) the adversarial system include keeping relevant materials confidential, denigrating witnesses one knows to be truthful who are testifying contrary to one’s cause, providing irrelevant information on discovery, failing to inform one’s adversary of deadlines in hopes of winning on procedural technicalities, etc. If the lawyer’s role is merely to win a case, these actions appear permissible, though many individuals now recognize that the adversarial system itself requires limits on the scope of the lawyer’s

On her Division of Moral Labor View, ethical questions are best answered by attending to the limited class of moral concerns clearly related to them. She suggests people cannot engage with universal morality and are inefficient when they attempt to do so; *ibid* at 64-65. We create roles and their attendant responsibilities to clearly delineate which ethical concerns are relevant for specific persons in specific situations. Given the division of moral labor, “nearly all morality is role morality. We can specify the set of circumstances within which we are making a moral recommendation, not by ignoring the background, but by clearly identifying it”; *ibid* at 66. This Role First View with Role Only View tendencies could serve as a counterpart to my Persons First View variation.

The Role Only View is less tortured than the literal inverse of my view. Held’s Role First View is even more plausible. Yet neither is satisfying. Held is right to point out that following role responsibilities is easier. It may even be more efficient. Which subset of norms should be operative, however, is not best answered by pre-establishing roles, but by determining which universal ethical norms are at stake and how to weigh them. We should not select out potentially relevant norms on the basis of role. We should attend to the subset clearly at issue, minimizing the task without categorically denying the salience of ethical norms that can conflict with the roles but are not initially seen as even related to it.

duties to his or her clients. As jurisdictions recognize duties to a court over duties to clients, bars on many of these actions have been enacted.⁵⁹ Conflicts between duties to the client and duties to the court nonetheless remain common with guidance on how to deal with them often difficult to determine. To use an example based on the extant obligation to maintain confidentiality, even the Law Society of Upper Canada's practice management group was recently unable to tell a lawyer how to resolve a conflict between his duty not to intentionally mislead the court and his duty of confidentiality when his client was charged under the wrong name due to a mistake on the client's driver's license.⁶⁰ In either case, one is primarily trying to determine the scope of different duties inherent in the lawyer's role. If the duty to the client requires misleading the court and there is a universal moral rule, rather than another role-specific duty, not to do so, this is the type of conflict in which we are interested.

⁵⁹ E.g., Ontario's replacement of 'relating to' language with 'relevant to' language in its rule on discovery (via O. Reg. 438/08, s. 26) was explicitly designed to avoid abuse of discovery. For the recommendation on which the Attorney General acted, see Honourable Coulter A. Osborne, Q.C., *Civil Justice Reform Project: Summary of Findings & Recommendations* (Toronto: Ministry of the Attorney General, 2007), online: Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf> (suggesting the change for that reason at 65-66) and citing the *Report of the Task Force on the Discovery Process in Ontario* (Toronto: Task Force on the Discovery Process in Ontario, 2003) at n44.

The relevant provision now reads:

30.02 (1) Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document. (2) Every document relevant to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, unless privilege is claimed in respect of the document.; R.R.O. 1990, Reg. 194, r. 30.02 (1)-30.02.

⁶⁰ Anthony Marchetti, "An Untenable Situation: What Happens When Your Duty to the Client Conflicts with Your Duty to the Court?" (2013) 2 JUST 12-15.

Rules of confidentiality remain and are of questionable moral status.⁶¹ They seem necessary to perform any of the adversarial conceptions of the lawyer's role. The idea that a client should be able to speak with one's lawyer freely without fear of being incriminated for doing so is often seen as necessary for a lawyer to provide a client with proper legal guidance and is supposed to thereby help improve the efficiency of the legal system. It is thus rare for adversarial advocates to allow lawyers to undermine their duty of confidentiality, except in the face of strong countervailing policy considerations, such as the prevention of future wrongdoing, corporate misconduct or lawyer self-defense.⁶² On the other hand, confidentiality appears to frustrate the pursuit of truth even in banal cases where these considerations do not operate. Given these facts, confidentiality is a good test subject for how to use the Universal Norms as Primary, Role Responsibilities as Additional Constraints View to guide action in non-ideal circumstances.

One can, of course, deny that failing to provide the truth is not a moral wrong. Confidentiality, then, does not run contrary to universal moral rules. This tack is common in legal ethics. Whenever one purports to show what one ought to do in the case of conflict, another denies that there is a conflict. Since this work is concerned with what one ought to do in the case of conflict, one can change the facts to generate conflict if necessary. For instance, one can ask a related question like 'Should a lawyer lie if doing

⁶¹ It was identified as one of the most important issues in legal ethics from the beginning. It was listed among the most important issues in the introduction to the Luban text along with the adversary system, representing immoral causes, moral psychology and clinical legal education; Luban, "Introduction", *supra* note 15 at 14-20. These issues remain contentious to this day with only clinical legal education arguably standing on its own now divorced from legal ethics. The confidentiality issue likely cannot be divorced from the adversary system issue in the current Anglo-American context, but it is an issue even if one does not adopt an adversarial model of the lawyer's role.

⁶² Bruce M. Landesman lists these as four areas of dispute. He assumes the duty is genuine and seeks to develop a "reasonable view of its scope"; "Confidentiality and the Lawyer-Client Relationship" in David Luban, ed, *The Good Lawyer: Lawyers' Role and Lawyers' Ethics* (Totowa, NJ: Rowman & Allanheld, 1983) 191 at 192-193.

so is a duty of his or her role?’ or another question about adversarial norms like ‘Should lawyers provide too much information on disclosure to frustrate opponents and thereby meet an extreme notion of the duty of zealous advocacy?’ Unfortunately, these examples raise the possibility that one will deny that lying or overloading are moral wrongs or that zealous advocacy requires either action. Confidentiality will be analyzed here because it is required by the lawyer’s role and is no worse than alternatives in addressing whether it denies a universal moral rule. Clear violations of universal moral rules are, however, preferable even if it is questionable whether they are presently required; the purer (potentially hypothetical) example of a role requiring lying will thus be examined too.

There are several potential solutions to any purported conflict between duties of confidentiality and truth norms. Given the fact that most operate with dominant conceptions of the lawyer’s role, it is unsurprising that they appeal to either Role First or Persons First Views commonly associated with those conceptions to address problems those conceptions helped create in the first place. On each adversarial view, the role of the lawyer is limited to a certain domain. S/he is only responsible for the outcome of the legal issue and holds no larger moral responsibilities qua lawyer. One judges the lawyer ethically only for how the lawyer acts according to the rules of the system. Within the role, then, there is no conflict between demands of the client and demands of the general good. Conflicts only arise when one asks the classic question of whether a good lawyer can also be a good person; being a good person is not necessary to be a good lawyer on these conceptions, though we may want to create a system where one can be both. When paired with a Role First View, this suggests one should judge people morally by how well they fulfill the role, even if doing so runs contrary to universal moral rules. If there is a

moral rule requiring that one assist the court in finding the truth to the best of one's knowledge, it is overridden by the importance of confidentiality in the adversary system. Alternatively, these conceptions could be paired with a Persons First View. If there is a universal moral rule requiring disclosure of truths, individuals are required to breach confidentiality, undermining their special relations with their clients and the legal system on which they are built.

The Universal Norms as Primary, Role Responsibilities as Additional Constraints View suggests a different response to potential conflicts between a universal moral rule not to frustrate the pursuit of truth and the role obligation to maintain confidentiality. It is understandable that individuals do not appeal to the idealistic Universal Norms as Primary, Role Responsibilities as Limiting Conditions View in non-ideal scenarios where roles are not ideally constituted and conflicts with universal moral rules follow. There is, however, reason to question extant solutions to this conflict, particularly those based on Role First Views. These reasons provide a partial defense of a new solution requiring one to act *as if* ideals were operative.

The first reason to question Role First solutions to the conflict relates to the tensions in the structure of such views when best formulated as justifications. Where the Role First picture succeeded, it often did so systematically.⁶³ The basic notion was that it is good if people can work with their lawyers in confidence and, further, general conformity with a role rule in favor of confidentiality is more likely to achieve the good

⁶³ Even views that seek to justify role responsibilities on the basis of special relations between persons rather than the role itself ultimately justify those relations on the basis of larger moral systems. Sommers, for instance, defends role responsibilities on the basis of special relations between persons in different roles. According to her Differential Pull Thesis, "the ethical pull of a moral patient will always partly depend on how the moral patient is related to the moral agent on whom the pull is exerted"; Sommers, *supra* note 32 445. Yet these relations are only justified when given systems are justified; *ibid* at 454.

ends of the collaborative enterprise than each lawyer making particular judgments about whether sharing different pieces of information is necessary to reach the truth. Both elements of this conjunctive argument can be scrutinized.

First, it is questionable whether it is good that people can work together with their lawyers to frustrate the pursuit of truth. This initial premise seems to rely on an understanding of the legal system where the phenomenon of individuals escaping certain negative consequences of legal judgments against them is considered worse than the truth being achieved. This is consistent with some adversarial and non-adversarial conceptions of the lawyer's role, but it is at least questionable whether it is morally optimal.⁶⁴ Second, if truth-finding is the goal of the legal system, it is questionable whether uniformly following the role rule best achieves that end.⁶⁵ Where clients presently decide if privileged information can be shared, following the role rule may frustrate zealous advocacy when a client refuses to reveal information that could benefit him or her. Outside the adversarial model, confidentiality may help lawyers have more candid conversations, helping lawyers and their clients become better persons,⁶⁶ but one wonders if moral growth takes place if sharing the information to reveal the truth does not follow.

⁶⁴ Indeed, this view is not even held by most adversarial theorists. Truth-finding is often identified as one of the most important ends of the adversarial system. Murray L. Schwartz suggests that truth-ascertainment is a necessary goal of adversarial ethics and should be the primary objective of rules of behavior for civil litigators; "The Zeal of the Civil Advocate" in David Luban, ed, *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (Totowa, NJ: Rowman & Allanheld, 1984) 150 at 52-160.

Luban, in turn, suggests that the truth-finding abilities of the adversarial system provide one of the three consequentialist arguments offered in its favor. The complete list is as follows: "the adversary system, is the best way of ferreting out truth", "it is the best way of defending people's legal rights", "by establishing checks and balances it is the best way of safeguarding against excesses"; Luban, "Adversary", *supra* note 25 at 93. Luban's original taxonomy of arguments for the adversarial system appeared in "Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics" (1981) 40 Maryland LR 451.

⁶⁵ Even if that is not the end of the legal system, one may wonder if the uniform following of confidentiality rules fulfills the other ends.

⁶⁶ This is the goal of Shaffer & Cochran's view, *supra* note 15, but the example does not belong to them.

The second reason to question Role First Views is that they oppose our best understanding of the relationship between universal and role morality. A Persons First View is plausible in non-ideal situations where conflicts arise and becomes more plausible the closer it comes to meeting our ideal. Once one recognizes that Universal Norms as Primary, Role Responsibilities as Limiting Conditions View is an ideal, s/he should avoid moving away from it as much as possible. The fact that it is an ideal favors individuals acting as if it were operative. When one is confronted with a conflict, one should recognize that the role is improperly constituted and s/he should not be obliged to fulfill the role responsibility that should not exist. On this Persons First View, one recognizes that a conflict arose, but notes that only the primary universal moral rule should be operative. S/he thus acts in conformity with the universal moral rule.

The negative attack on Role First moralities in the confidentiality case may not extend to other conflicts. Some universal moral rule-infringing acts may have better articulated ends that are more plausible and more clearly satisfied by individuals following a particular role-relative duty rather than universal moral rules. This favors a Contextual View where one judges the merits of conflicting rules and their underlying values against one another.

Fortunately, the positive argument in favor of Persons First Views applies more generally, allowing one to move beyond confidentiality and make a broader point about what to do in cases of conflict. It would, however, be a problem if this solution did not even work in the confidentiality case. The widespread acceptance of confidentiality norms is thus worrying. It is worth addressing the unintuitive consequences of this view for the confidentiality case head on.

The proposed solution suggests we should not recognize agent-relative duties to violate universal moral rules. In the confidentiality case, then, we would deny the force of the demand insofar as it required violation of a universal moral rule not to frustrate the truth. This may be intuitively jarring. To the extent that the adversarial system is justified and the confidentiality provision is necessary to it, many would suggest that there is good reason to maintain confidentiality. If there is a genuine universal moral rule requiring pursuit of the truth, however, one's legal system should be constructed to that end. The adversarial system could be criticized for enabling (and indeed requiring) its agent to frustrate that purpose. This would be a datum in favor of inquisitorial legal systems. Given problems with inquisitorial systems, many would not be persuaded by this response. Such persons share strong intuitions that the adversarial system is the best system possible (even Luban suggests as much) and it seems to require confidentiality. The intuition that one ought to violate the rule against frustrating the truth is strong.

It is plausible this intuition is not driven by a strong justification for the adversarial system or any system that includes a confidentiality norm, but by a belief that one is not obligated to help bring about the truth regardless of what roles one inhabits in a given system or society in general. This seems like a mere denial of the universal moral rule. To the extent that we are required to bring about the truth, some would suggest this is only a role responsibility. Imagine that an individual overhears a piece of condemnatory evidence while walking down the street. Many would suggest this individual does not have a duty to share this information in the absence of a specific role-created duty as witness. Now imagine the same individual is a lawyer and the potential condemned enters his office to share the same piece of information. To the extent that the

lawyer has a positive duty to pursue the truth and share this information, which is likely an uncommon intuition in the first place given the prevalence of the confidentiality norm, it is likely because we see truth as the aim of the legal system and the lawyer as having a special place in fulfilling this end. The duty thus appears to be a role duty. Any individual in a courtroom setting remains under an obligation to share the information on this view, but this obligation does not exist without the interference of the legal system. The obligation is general throughout the legal system, in a Role Only sense of generality whereby the duty extends to every role but is fundamentally tied to roles; it is not universal in the sense used elsewhere. As with adversarial models of the lawyer's role, the role and its attendant actions are justified by a larger legal system norm of truth-seeking. While one can go further and deny the existence of any general norm not to frustrate the truth, this provides a means of denying conflict by taking a Role Only View where conflicts merely exist between role responsibilities. The example cited above of a conflict between a duty to the court and a duty to the client takes just this form.

Given the fact that intuitions favoring roles in this case may be driven by a belief that no universal moral rule is operative, it is worth determining whether the intuitions survive when a less controversial candidate is violated. Consider a situation where lawyers are required to lie to fulfill their role obligations. Unconstrained zealous advocacy models could result in such a view, though they are often constrained in practice to avoid such problems. If such constraints were not present and such a system was created, it is likely that people would not share the intuition that one ought to lie to save one's client. The fact that most would object that it is implausible that any legal

system would require this of lawyers supports the view that we do not share the intuition that it is wrong for us to ignore it if it did exist.⁶⁷

Not everyone recognizes lying as a universal moral wrong, but lies are at least presumptively wrongful. The strong Kantian position in which lying cannot be justified even to save someone's life is not commonly accepted in the modern literature.⁶⁸

Radicals on the other side may suggest that one does not owe an account for his or her lies, but this is implausible. Many philosophers instead recognize that lying can be justified. This does not distinguish 'Do not lie' from other universal moral rules. The question is whether a role responsibility to lie overcomes the presumption that a lie is wrongful. It is unlikely that lying can be uniformly justified by virtue of a state-created role or its overarching system. At best, pushing on the claim that lying is wrongful could salvage a Contextual View whereby a role responsibility to lie is justified in certain circumstances. This may be a general justification for a lie where the role is incidental, rather than necessary for the justification to operate.

Intuitions change with stakes. Many view the lie necessary to save an individual from the death penalty differently than the lie told to save an individual from a parking

⁶⁷ While I wrote this passage prior to reading *On What Matters*, its main point now strikes me as structurally similar to Parfit's claim that the fact that it is hard to imagine a given case serving as the crux of his objection to subjectivist theories of reasons strengthens the objection by demonstrating our widespread acceptance of objectivists' key assumptions; Parfit, *supra* note 2 at 84.

Parfit's treatment of imaginary cases is broadly helpful. Parfit notes that "Any acceptable normative theory must be able to be applied to...imaginary cases"; *ibid* at 104. Similar points are made at 74, 91 and elsewhere, although the articulation at 91 only suggests theories of reasons need to apply to imaginary cases. This work similarly assumes any theory about the moral reason-giving force of role responsibilities (particularly as contrasted with universal moral rules and universal morality in general) should be applicable to imaginary cases.

⁶⁸ See Kant's notorious "On a Suppose Right to Lie because of Philanthropic Concerns", in which Kant says one cannot lie to save a friend from a murderer; *supra* note 8 at 63-67. For a good overview of the controversy surrounding that pamphlet and the place of the position in Kant's larger juridical project, the Doctrine of Right, see Jacob Weinrib, "The Juridical Significance of Kant's 'Suppose Right to Lie'" (2008) 13(1) Kantian Review 141.

ticket (where guilt or innocence are uniform across the two lies). The death penalty abolitionist and rule of law advocate may see saving the innocent from death as justified even if the same lie were seen as an unjustified cheat in the parking case, while the cartoon retributivist sees the guilty person being free from death as worse than the same guilty getting away without paying his or her parking ticket.⁶⁹ These differences based on stakes raise questions about how universal the norm may be. It is not clear that they favor a role responsibility trump. The lawyer's role does not make his or her lie better than that of the witness where both are necessary to save the innocent person from death. A lawyer's status as a client's representative or friend may give him or her more agent-relative reason to lie, but it is not clear that this absolves the lawyer from moral blame and allows him or her to act on his or her reasons. The stakes-relative reasons are independently sufficient to justify lying if they are ever able to so justify the lie.

In cases of conflict, then, one ought to follow universal moral rules. There may be reasons to question whether universal moral rules are operative or determinative when deciding what one ought to do. Role responsibilities, however, are insufficient to override universal moral rules and ought to be ignored when they require direct violation of those rules. Where fulfilling role responsibilities serves well-defined ends that are of greater importance than the ends that would be fulfilled by following the universal moral rules, this presents better support for taking a Role First or at least Contextual approach to a case. One still ought to take a Persons First View inspired by the ideal in most cases. This entails following a universal moral rule even when the contrary role responsibility is necessary for the role.

⁶⁹ The abolitionist may see the lie to save the guilty from the death penalty as more justified than the lie to save the innocent person accused of a parking violation. The main point that our intuitions change based on stakes remains.

This has practical implications if what it means for a responsibility to be necessary is that failure to fulfill it results in removal from the role. In the legal domain, breaching the rules specific to the profession can result in one being disbarred. In cases of genuine moral conflict, one ought to give up one's position in an ill-constituted role rather than violate a universal moral rule. This pushes further on confidentiality as an example. But if there is a universal moral rule against lying and one can choose between lying on a client's behalf or disbarment, one should not sacrifice one's moral status for the purposes of filling a role. The state should not demand that you violate universal moral rules to fill important roles, but you should not fill them if they make the mistake of making such demands. It is better to be a non-professional without sin than the caricature of the lawyer as liar.

This practical desideratum raises another issue of stakes that is worth considering. It is not as easily captured by the Universal Norms as Primary, Role Responsibilities as Additional Constraints View. It seems that the more important a role is for society, the less plausible this practical result may be. One may accordingly carve out a place for a Role First View where a role is necessary for society to function. The need for a limited exception forms the basis for a second claim, which is defended in the following section. The spirit of the Universal Norms as Primary, Role Responsibilities as Additional Constraints View will remain in determining how one ought to feel when following the responsibilities on this Role First View. One still ought to regret violating the otherwise primary norms when forced into a situation where one must follow a Role First View. This claim about appropriate moral response will be considered in the final substantive section of this work.

B. Claim 2: There is a limited exception to the general priority of the universal moral rule, which applies when a role can only be performed if one violates a universal moral rule and the role is necessary for a well-developed society to maintain a certain level of functioning.

Even if one grants that roles cannot create genuine obligations to violate universal moral rules, s/he must recognize that many extant roles purport to do so and can only be fulfilled by such violations. Difficulties are particularly noticeable when a role is important for society and it is only possible to fill it by valuing an invalid particular norm over a valid universal one. As a general principle, exit from even important roles is a requirement of morality even in such circumstances. Yet the plausibility of this claim is strained when the stakes of exiting the role are sufficiently high. A limited exception to the principle favoring universal moral rules to the point of exit may thus be required. The question is how to specify the scope of the limited exception.⁷⁰

The general issue of what to do in cases of conflict becomes more complicated when we recognize that the proposal in Part Three, Section A seems to imply that all persons will be required to exit a profession that demands violations of universal moral rules for its performance. If the role is necessary for society to function, then it seems like society demands a role that no one can ethically fill. One may suggest that this is a problem with society and society cannot demand that people sacrifice themselves for the good of the collective. As Gerald Postema writes, “if no person can enter a certain profession without jeopardizing his or her moral integrity, then that alone stands as a powerful indictment of the profession. A job no worthy person can accept is a job no

⁷⁰ This is not to say that there is an exception to the universal moral rule, but only to the principle favoring them in cases of conflict with a role responsibility.

worthy society can create.”⁷¹ Part Three, Section A accordingly gave a positive response to the question, ‘Can morality demand that someone give up a role that is necessary to society?’ The answer to this question plausibly differs, however, when we begin to think about the last lawyer to leave the profession and whether morality can demand that all individuals leave the profession, leaving us in a world without lawyers. Lawyers may not be necessary for society to function. Acting as if they are necessary, however, raises some important issues in how to analyze whether morality can demand that one give up a necessary role. As Susan Wolf suggests, “[i]f we allow people to become lawyers, we must allow them to be good lawyers – that is, we cannot condemn them for acting in ways that the ideals of the profession must encourage.”⁷² Whether we want to allow people to fill a role that requires a breach of universal moral rules is an important question. The claim that the world needs lawyers and must allow them to perform certain seemingly problematic actions necessary to their role may be undermined if one cannot justify individuals staying in said role.

It is common to picture the world without lawyers as Utopian, but disputes will arise in any realistic society and professional legal representatives are an optimal (if not necessary) component of a system designed to resolve them peacefully. Even if one does not see lawyers as necessary,⁷³ the role of lawyer seems important in any society resembling our own (despite the many difficulties precisely specifying how to conceive

⁷¹ Gerald J. Postema, “Self-Image, Integrity, and Professional Responsibility” in David Luban, ed, *The Good Lawyer: Lawyers’ Role and Lawyers’ Ethics* (Totowa, NJ: Rowman & Allanheld, 1983) 286 at 290 [Postema, “Self-Image”].

⁷² Wolf, *supra* note 2 at 57.

⁷³ Lawyers may not be necessary for the functioning of society. A society with an inquisitorial legal system could place truth-seeking powers in the hands of a judicial official with whom litigants interact directly. Individuals could reach agreements directly without a legal intermediary and have their merits assessed by inquisitors in cases of disagreement. We could run the same types of arguments about such fact-finders.

it). It seems important that there be at least one lawyer in society.⁷⁴ Indeed, the number of lawyers required for our society to run smoothly is much higher than one. Despite the large number of lawyers in the profession, there are many people in different parts of the developed common law world who are unable to access legal representation when they desire and require it.⁷⁵ In addition to the point that Postema recognizes about the import of lawyers in society in general, the lawyer may be best placed to remedy ethical issues requiring exit in the first place. We want to advise people on how to act in a non-ideal society prior to the revamping of all roles in society. Requiring exit from the role that forestalls the possibility of reform seems like odd advice in this context. One must ask: Can morality require someone to give up a role that is necessary for the functioning of society even when the role would not otherwise be filled? An affirmative response appears to rely on an affirmative response to a related genuine question in the other direction: Can morality require that society give up one of its necessary components?

There are at least two senses in which it may be necessary for one to fill a role. Both suggest morality cannot demand that all individuals leave the legal professions in particular. In both cases, the role is necessary for society. In one, the role can only be performed through the performance of *prima facie* morally wrongful action and the individual moral agent is the only one who would fill the role. This echoes the famous ‘Last Lawyer in Town’ scenario. In the other case, the role is corrupted and could be corrected to avoid conflicts with universal moral rules, but currently filling it requires

⁷⁴ Postema himself opposes deprofessionalization movements because of the importance of the professions for society; “Moral Responsibility”, *supra* note 26 at 72.

⁷⁵ There are many different potential and real so-called ‘access to justice’ problems. While some of these problems can be explained by geographical limitations, some of them are fundamentally economic. Indeed, some provinces seem unable to serve the average citizen. For discussion of the access to justice concerns of the Canadian working poor and middle class, see Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: U Toronto P, 2012).

violation of those rules and one must fill the role to enact the change. This is arguably the case with the contemporary lawyer in jurisdictions where the legal profession is self-regulated. It is worth briefly analyzing both scenarios.

The issue in the first scenario is familiar to legal ethicists. The Last Lawyer in Town Problem is commonly discussed in the debate on whether a lawyer can accept a client s/he finds morally repugnant.⁷⁶ In its most basic form, it holds that an individual having a lawyer is a demand of justice. Where it is ethically permissible for an individual lawyer to appeal to morality to deny serving that individual, one must nonetheless help fill this demand of justice by suggesting another lawyer. This option remains available to every lawyer except the last lawyer in town. There is considerable debate over whether the last lawyer in town can still appeal to morality to permissibly deny representation or whether s/he must instead represent the client. The seemingly morally irrelevant order of questioning may result in one person being unable to follow his or her ethical code where this is available to all others.

The specific issue of the Last Lawyer in Town is not important here.⁷⁷ The basic structure of the problem is applicable. If we stipulate that a role is necessary but each individual should refuse to continue performing it, our intuitions differ when we have fewer people in it. We want to grant individuals the ability to exit the profession to

⁷⁶ E.g., Kruse, *supra* note 25 at 453; Teresa Stanton Collett, "The Common Good and the Duty to Represent: Must the Last Lawyer in Town Take Any Case?" (1999) S Tex LR 137 (part of a symposium on The Lawyer's Duty to Promote the Common Good beginning at 1); W. William Hodes, "Accepting and Rejecting Client: The Moral Autonomy of the Second-to-Last Lawyer in Town" (2000) 48(4) U Kan LR 977.

Notably, some authors admit that their conception of the lawyer's role causes this problem. Donagan admits that his conception of the lawyer's role could lead to certain innocent but erroneously identified as guilty individuals wrongly failing to secure representation, but suggests his conception is not alone in this respect. He states that Schwartz's system seems to have the same outcome, resulting in similar last lawyer in town problems; Donagan, *supra* note 56 at 168.

⁷⁷ Whether lawyers take clients' ends at their own is orthogonal to the main project. A voluminous literature has been written on this and related topics.

salvage their moral identities. We think they should do so. Yet a society with no one in a necessary role is impoverished. By stipulation, it will be unable to function. This is bad.⁷⁸

We may want the Last Lawyers in Society (and their individual analogue, the Last Lawyer Before the System Falters,) to continue performing *prima facie* morally wrongful actions to ensure society continues to function. One may grant that a society ought not demand sacrifice of its citizens and still say it is alright for one to sacrifice himself or herself when society has erroneously made such sacrifice necessary.

The second issue may not extend to all roles necessary in society. It may be the case that a role necessary to society can only presently be fulfilled by violating a universal moral rule, i.e., failing to violate the rule would result in removal from the role, but that requirement is contingent and can be changed *only by those filling the role*. In such a case, violating a universal moral rule is required to address a systematic error.

This arguably would arise in any self-regulating profession with an unfortunate provision in its rules requiring violation of universal moral rules. Many nations are now moving away from the self-regulation of the legal profession.⁷⁹ Self-regulation nonetheless remains in several jurisdictions. In Ontario, for instance, the Law Society of Upper Canada not only determines who is admitted to practice law, but also establishes and enforces the rules of the profession. The ‘*Benchers*’ in this jurisdiction are often senior members of the society with a long history of practice. If a professional rule were in place in Ontario requiring a clear violation of universal moral rules at risk of being disbarred, one would need to a member of the Law Society of Upper Canada to change it.

⁷⁸ The badness of this situation requires little elaboration. The suggestion is that it is bad in an impersonal sense, though it is likely bad for most living persons as well.

⁷⁹ E.g., England (*Legal Services Act 2007*, 2007 c. 29); New Zealand (*Lawyers and Conveyancers Act 2006*, with further regulations in *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008*).

To be a member, one would have to be a lawyer, which would mean violating universal moral rules. Indeed, s/he would have to be a senior member to become a Benchers, increasing the opportunities to so violate. If the role is necessary for society, which it arguably is in a province like Ontario with an adversarial legal system, it is implausible to suggest one cannot violate the universal moral rules to both salvage the role and avoid further violations of the rules.

Both cases intuitively support a Role First View. This demands that one determines first whether these intuitions are acceptable and then whether there is something about the Last Lawyers in Society and/or Last Lawyers Capable of Enacting Change scenarios that makes them different from others. This latter concern is alleviated somewhat by work suggesting that the order of actions may be morally relevant.⁸⁰ The last person to act is in a morally distinct situation from previous persons. While the system is no more justified when s/he acts than it was when others refused to do so, its import is more relevant at this later stage. Many individuals will deny that what one ought to do depends on whether others act morally. Charles W. Wolfram, for instance, responds to the Last Lawyer in Town Problem by suggesting that “there should be no moral imperative to act in a particular way solely for the reason that other moral agents

⁸⁰ Jeff McMahan, for instance, suggests whether two acts are permissible may “depend on the order in which they are done...[In the abortion and prenatal injury realm,] the order does make a difference”; “Paradoxes of Abortion and Prenatal Injury” (2006) 116 *Ethics* 625 at 649.

But see Hodes, *supra* note 76 at 985 for a common response to the Last Lawyer in Town problem that denies the moral relevance of the order of actions for determining obligations lawyers have to serve clients (“I would...permit individual lawyers to exercise maximum moral autonomy...whether they were the last lawyer in town, the second-to-the-last, or the first. This must follow...because the last lawyer...only became the lawyer by chance, *or because all the other lawyers in town made their choices first and passed the buck without the pressure*. They have the legal and moral right to pass the buck...but they must take responsibility for their choices on the same basis as anyone else.”).

might act immorally in the same circumstances.”⁸¹ In this case, however, others acting *morally* changes what one ought to do in the circumstances. One is motivated to violate universal moral rules to ensure those individuals can act morally while remaining in a secure society. This is different than acting immorally because others would do the same.

There is reason to question whether a role and its overarching system are worth saving if it cannot be changed. Wolf notes that the possibility of conflict often inspires demands for change, not exit:

[I]nsofar as our society allows and makes use of the existence of a legal system, we condone and rely on the existence of practicing lawyers. If the legal system is structured in ways that discourage morally upright people from entering the profession of law or that tend to corrupt the people who do choose to enter it, then we have reason to try to alter our system in ways that alleviate those defects.⁸²

This is a noble goal. Where change is impossible, however, exit remains important.

The worry about intuitions only being operative where change is possible, limiting the exception to the Last Lawyers Capable of Enacting Change at best, can be avoided for certain roles that are necessary for *any* society to function. This result may push us too far; one may be better served by recognizing that a well-functioning society is a good prelude to an ideal society and having people in roles necessary for well-functioning societies is both a present good in its own right and a necessary step towards building an ideal society. This would extend the exception to the Last Lawyers in Society. If roles that are necessary for *any* society to function require violation of universal moral rules, it seems like we want to ensure a *de minimus* number necessary to

⁸¹ Charles Wolfram, “A Lawyer’s Duty to Represent Clients, Repugnant and Otherwise” in David Luban, ed, *The Good Lawyer: Lawyers’ Role and Lawyers’ Ethics* (Totowa, NJ: Rowman & Allanheld, 1983) 214 at 232-233.

⁸² Wolf, *supra* note 2 at 53.

continue society are present. If we assumed that lawyers fit this role, the Last Lawyer Before the System Falts would be more accurately described as appropriately following a Role First morality. S/he and the Lawyer Necessary to Enact Change would both be plausible candidates for the Role First View. Unfortunately for many professionals, lawyers are not necessary for any society, let alone lawyers who necessarily violate universal moral rules. Recall the aforementioned inquisitorial systems. One could even argue that no roles are necessary for any society and the exception will never be fulfilled if it is so-constructed.⁸³ Intuitions about roles necessary for any society to function are no doubt inspired by a belief that some society is better than no society. Similar beliefs about a well-functioning society being better than no society may lead us to recognize a wider class of roles as potentially falling under the exception. The key is not to make the exception too broad.

It is easy to understand why one wants to allow for widespread exit from non-ideal roles, but one may be too easily moved by extreme cases. Recognition that a certain level of necessity creates a limited exception immediately raises questions about where it can plausibly be drawn. An exception for all roles necessary for a well-functioning society may be too permissive. Recall Applbaum's executioner and his persistence through many stages of French political history.⁸⁴ Sanson was viewed as necessary to French society in general and several particular configurations thereof. While the rapid political change in that state (and mass killings during certain regimes) arguably undermines its claim to being a well-functioning state, one worries about an argument that pre-revolutionary or revolutionary France was well-functioning but required

⁸³ The sovereign is a counterexample to this proposal, but the worry about the standard being too demanding is fair.

⁸⁴ Applbaum, *supra* note 14.

someone to fill the role of executioner to remain well-functioning. The necessity of the executioner could be a sign that the state was not well-functioning, but this may be too quick. On the other hand, it is important not to create a standard that merely maintains the status quo. We can tell stories about most roles in contemporary society that make them seem like plausible candidates for exception, but there is little to suggest this is the best society possible or that it would crumble if some helpful roles were excised. We do fine without the once-common milkman.⁸⁵ If there is no non-arbitrary stopping point between roles necessary for all societies and roles necessary for the status quo, I will limit the exception to the former and live with the criticism that it is too narrow to be helpful, but I am hopeful that a variant of the well-functioning society criterion will prove acceptable.

It likely suffices to create an exception for roles that are necessary for a well-developed society to maintain a certain level of functioning. This may not save the lawyer. Earlier, we noted that the lawyer is necessary for a province like Ontario with an adversarial legal system. Given the large population and complex cultural, economic and political differences throughout that province, it is unsurprising that there are many disputes in Ontario requiring many different solutions. Procedural rules make resolving all these issues easier and it is helpful to have legal representatives to help litigants deal with these rules. Ontario without the lawyer would be a fundamentally different place. Ontario could gradually phase out lawyers and adopt an inquisitorial system, but lawyers may be necessary to Ontario running *optimally*. Yet we do not want societies to be able to

⁸⁵ Granted, the milkman's role was not as fundamentally state-involving as that of the lawyer and state action actually helped make milkmen less important by regulating milk production and assisting efforts to make it safe to drink milk produced at a distance, but the history of the milkman is nonetheless a good example of a role being necessary at one time but ceasing to be so as society progressed. For a study of the history of milkmen in New England, see the online exhibit hosted by Historic New England (the former Society for the Preservation of New England Antiquities), "From Dairy to Doorstep" (2013), online: Historic New England <http://www.historicnewengland.org/collections-archives-exhibitions/online-exhibitions/From_Dairy_to_Doorstep>.

ask people to sacrifice their morality just so societies can run optimally. There is likely a minimal level of functioning below the optimal we should be willing to accept so people do not have to sacrifice their morality. The exception should only apply wherever a role is necessary to keep a society at that sub-optimal standard of functioning.

How to specify the sub-optimal level of functioning and how many persons must fulfill the role for that level to be maintained are both difficult determinations. The level must be well-above mere functioning and allow well-developed societies to thrive, but does not require optimality.⁸⁶ What it specifically requires is more difficult to articulate. It is clear that a society that is constructed on the adversarial model and requires lawyers to successfully function on its own terms can be viewed as well-functioning if one looks at it from a high enough (e.g., federal) level despite lacking the requisite number of lawyers necessary for the justice system to succeed at lower (e.g., municipal) levels. The lower levels may even be broadly well-functioning despite the deficiencies in the legal elements thereof. At some point an access to justice problem in a given community may lead it below acceptable levels of functioning, but it is hard to find the precise point where this would happen. This limited exception will only work if we can identify the morally relevant ‘society’ and the number of persons needed both throughout the society and specific distributions within it. Once again, one must avoid justifying all legal practice that runs contrary to universal moral rules without making the exception so limited as to be inapplicable and thus trivial.

However the numbers work out, whether lawyers would still fit under this exception is worth questioning. How bad a society where disputes are solely handled by

⁸⁶ Indeed, where the optimal state is the ideal state, the optimal state should be one that does not require people to violate universal moral rules.

fact-finders would be is an empirical question. Note, however, that even here *a* legal role remains necessary. The question of what one should do when that role is necessary but requires committing an otherwise immoral action remains. If ‘fact-finder’ is a necessary role for all well-developed societies at an acceptable level of well-being and it requires violation of a universal moral rule, then the individuals who cannot exit the role without the requisite numbers of persons inhabiting the role getting too low would be subject to the exception and able to permissibly violate the universal moral rule. We may not think that the exception will be the same for each role or even if it will apply for all universal moral rules. It would seem odd if even the Last Fact-Finder Before the System Falters were able to kill a man to keep the system going.⁸⁷ Certain deontological constraints may need to apply, though it is unlikely that any conception of roles in the legal system will require those filling the roles to act contrary to the rules requiring constraints in the first place; it is hard to imagine a conception of the lawyer’s role that obliges him to kill.

Ultimately, this structure of the limited exception is more important than identifying whether lawyers actually fit under it. If we take jurisdictions like Ontario and other adversarial systems as exemplifying the requisite sub-optimal standard and see the lawyer as necessary to it, it more helpfully allows us to move on with the same terms of debate we have worked with thus far, but it is not clear whether the lawyer’s role actually fits under it.

If we grant that Role First Views are plausible in the limited circumstances in which the exception applies, there is a question of which Role First View is operative. It is unlikely that the roles being necessary entails that we necessarily create exceptions to

⁸⁷ Note, however, that the soldier’s role is often viewed as one requiring that one kill and is a plausible candidate for the title of a role that is necessary for any society to function. See note 22.

universal moral rules. They remain operative throughout. Rather, the necessity of the role and/or the change makes acting contrary to the universal moral rule lesser-evil justified. More good would come from the Last Lawyer Before the System Falters or Lawyer Necessary to Enact Change acting in his or her role than from his or her exit. This demands closer scrutiny of what lesser-evil justifications entail. A full analysis of lesser-evil justifications is beyond the scope of this work. Instead, the final substantive section of this work develops a further answer to the question “What should one do in cases of conflicts?” by motivating an argument about how we ought to react to our lesser-evil justified acts and those of others.

C. Claim 3: Where one acts contrary to a universal moral rule under the limited exception mentioned in Part Three, Section B, s/he should regret bringing about the bad effects of the action.

If we grant that there are circumstances where a Role First View is acceptable, it is because of a lesser-evil justification based on necessity. This may erase liability to blame. It should not eliminate one’s feeling of regret. Failure to regret may create a new basis for negatively judging the otherwise justified actor. The argument for this approach is simple:

1. One ought to regret the bad consequences of his or her actions
2. Lesser-evil justifications include bad consequences.
3. The exception in Part Three, Section B is a lesser-evil justification.
4. Therefore, one ought to regret the bad consequences of acting under the exception in Part Three, Section B.

This does not entail that one ought to regret the whole action. To the extent that regret cannot be tied to element of an action, but only to a whole action, the argument instead suggests one should respond to the bad consequences of one’s action with the related ill

feeling regret*. One can fail to regret an action while still feeling regret* for the negative consequences that stem from it. The key is that some ill feeling is included in the appropriate moral response to resolving a moral dilemma in a manner that violates a universal moral rule but produces less evil than compliance with said rule. It is difficult to see why one should not feel regret* for the bad consequences of one's lesser-evil justified action if they are stipulated to be bad effects that are not wholly negated.

In the moral realm, justifications are supposed to relieve individuals from liability to blame, even for actions that are otherwise *prima facie* wrongful. Where a justification is present, *prima facie* wrongs are not classified as wrongs. How justifications differ from excuses and other defenses is contested, but the basic idea is that there is no liability for a wrong where there is a justification. One purported class of justifications consists of lesser-evil justifications. Mitchell Berman identifies three conceptions of lesser-evil justifications in the criminal law:

- (1) that a justification simply reflects a permission - extended for whatever reason - to do what the criminal law otherwise forbids;
- (2) that a justification applies to conduct that realizes a lesser evil, or avoids a greater evil, than would have occurred had the defendant complied with the law; and
- (3) that a defense is a justification if and only if the conduct to which it applies may be aided by a third party.⁸⁸

These criminal law-specific conceptions have analogues in morality when one replaces criminal blameworthiness language with their own analogues in general moral blameworthiness. Whether they are all necessary or jointly sufficient is, as with all things

⁸⁸ "Lesser Evils and Justification: A Less Close Look" (2005) 24 Law and Philosophy 681.

in this domain, contested.⁸⁹ All three conditions here are only fulfilled in our cases by necessity conditions. If we take a permissions view, then the ‘for whatever reason’ is the necessity of the role and/or the change. The *prima facie* wrongful act is permitted where it is necessary to the performance of a role that is essential to the functioning of society. So-constructed, this begins to sound like an exception view. The moral norm simply does not apply to a certain class of individuals. Regardless, the ill brought about by violation of the universal moral rule is outweighed by the good of the necessary role such that one ought to take a Role First View.

On a view closer to Larry Alexander’s, the justificatory nature of the defense is clearer.⁹⁰ The act is not a wrong because it brings about less harm than the relevant alternative. Withdrawing from the role to accord with universal moral rules creates more ill than simple violation where the necessity conditions are fulfilled. It is worse for society to fall apart than for one violation of almost any rule to take place. In less extreme cases, one may hold that it is worse to fail to remedy a systematic glitch whose correction would salvage an otherwise very good system than to commit a single bad-making act.

Of course, one could suggest that there are no lesser-evil justifications for infringing universal moral rules. S/he could claim that the very universality of rules means that their violation is always the greater evil; lesser-evil justifications confuse us

⁸⁹ Berman goes on to defend the permissions view grounded in (1) alone against Larry Alexander’s view focused primarily on (2) and (3); *ibid.* Berman’s piece is a response to Larry Alexander, “Lesser Evils: A Closer Look at the Paradigmatic Justification” (2005) 24 *Law and Philosophy* 611.

Each view denies wrongdoing despite the performance of a would-be wrongful act. The criteria can be met intentionally or unintentionally. When focused on what one ought to do, intentional actions are of primary interest.

⁹⁰ Alexander, *ibid.* Alexander’s criminal law-focused piece suggests that lesser-evil or “choice of evil” defenses are the paradigmatic justifications in the criminal law. He notes that the Model Penal Code also treats them as the paradigmatic justification, but identifies several issues with how the Code articulates the notion. His thorough analysis of the related issues is followed by a call for reform. The position articulated here is not a reconstruction of Alexander’s position. It is merely one view that takes the justificatory nature of lesser-evils seriously.

by stipulating a lesser evil, but the violation of a rule is the worse outcome regardless of what the consequences of staying in conformity may be. This view gives a stronger priority to universal moral rules than I am comfortable with, stretching the bounds of plausibility, but the general idea that one can heavily weigh the wrong of violating universal moral rules is worth mentioning.

One need not take this strong deontological approach to recognize that some harm is done when a universal moral rule is violated. One can appeal to the name of the justification to highlight this fact. The fact that it is a 'lesser evil' does not erase the fact that some evil has been committed. The moral salience of this evil is too often ignored. It may be the case that a lesser-evil justified act is not a wrong because the moral considerations balance out as best as they could be given the circumstances. A third party should not blame someone for bringing about what is stipulated to be the best outcome. Yet one cannot ignore the fact that bad effects are present in this case. They are sufficiently bad that we have general prohibitions against bringing them about. In isolation, one would see creating the harm as blameworthy. One who brings it about should be knowledgeable about and attentive to the harm s/he causes. An account of their action is required. One may also judge how the person responds to knowledge of the bad elements stemming from his or her actions.

In the cases where the exception in Part Three, Section B applies, the acts tied to the lawyer's role are necessary, but the necessity does not erase the fact that the act violates a universal moral rule. To the extent that the rule is violated, this action has bad-making features. A person of character takes responsibility for all outcomes of his or her

actions.⁹¹ One ought to regret those features and can be open to criticism for failing to do so. The nature of justification suggests s/he does not commit a wrong, but s/he does create bad (albeit outweighed) consequences. This will make being a lawyer morally difficult. There is something to be said for making fulfilling a role an uneasy task.⁹²

When acting in the domain of lesser-evil justifications, there will always be a variety of good and ill regardless of what one chooses. This means that there will be something to regret in any case. A properly morally oriented person *should* experience regret for the bad features, regardless of what one chooses. The lesser-evil justified person should experience less regret because s/he did the right thing all-things-considered, but s/he should still regret that s/he had to bring about bad effects to do so. Thus, the lawyer who maintains confidentiality may be happy that s/he saved her client from death row at the same time s/he regrets that the client will not be punished and the family will not get their deserved feeling of retributive justice. S/he should experience even more regret if s/he leaves the person without representation and the client is unjustly treated to more punishment than the client deserves, resulting in her death. In the first

⁹¹ This is broadly consistent with Gerald Postema's integrity strategy and its ideal of the responsible person; Postema, "Self-Image", *supra* note 71 at 290-291. Postema's project of creating a legal system in which individual lawyers are able to act in a manner that allows them to maintain moral integrity is influential; e.g., Daniel Markovits, "Legal Ethics from the Lawyer's Point of View" (2003) 15 Yale JL & Human 209. I do not follow Postema in suggesting that we "need to spend much less time attempting to define the content and limits of professional responsibilities, and to invest much more time and creative energy in an effort to understand the social and institutional conditions of morally responsible professional behavior"; Postema, "Self-Image", *supra* note 71 at 310. Like Postema and his followers, I do recommend that lawyers must take responsibility for the bad outcomes of their role, but it is important to minimize conflicts that require creating such bad effects.

⁹² According to Williams, there is something to be said for views in which "the professional consciousness sustains a certain degree of uneasiness"; Williams, "Professional", *supra* note 19 at 266. This general point about structuring roles is not taken here; ideally constituted roles will not create such uneasiness. There is, however, something to be said for the idea that one ought to feel uneasy about filling an improperly constituted role that demands injustice but is necessary for society. Unease appears more appropriate than other commonly identified responses to having to commit actions that undermine one's moral character like short-term focus on goods like wealth or enjoyment of bad character traits in themselves identified by Eshete, *supra* note 49 at 279.

case, we judge both her action and her moral response as rightful. In the latter, these come apart: s/he is blameworthy for his or her action and not blameworthy for her moral response to his or her wrongful action. In our cases of lesser-evil justifications, the converse could be true. Indeed, even if blameworthiness for an inappropriate moral response is unjustified, one may at least negatively judge the moral response to the non-blameworthy action.

An inappropriate moral response to having to commit justified actions may itself be a wrong. We can and should judge people for their reactions to certain circumstances. Our emotional responses are an element of our character and thus an element of our moral identities. To the extent that we have inappropriate responses to situations, this undermines our character and opens us up to claims that i) we performed a wrongful act and ii) we do not have a good character. Failure to recognize the wrongful elements of a lesser-evil justified act is itself a sign of a lack of moral discernment and character. If one actually recognizes these wrongful elements and does not regret them, this is a further sign of a lack of good moral character. When one recognizes that one brought about bad consequences, one should respond with regret for the bad. The lesser-evil justified person is thus not subject to blameworthiness for his or her act, but we can judge him or her for failing to appreciate and respond to that action's multiple dimensions.

This is a demanding standard, but it is not implausible. One should want individuals to feel the effects of the evil they bring into the world. Our necessity conditions do not produce moral dead ends in the sense that one is subject to blame regardless of what they do, but they are dead ends insofar as one should feel regret regardless of what one does. Where conflict is defined as a conflict of duties, one can

view all conflicts as moral dilemmas where either resolution will lead to ill one can regret when looking at the situation from certain standpoints. By stipulation, acting under the exception will minimize the ill effects here, but there is still a sense in which one has failed to fulfill his or her duties in a way that brought about bad consequences. This is easily recognizable as a basis for regret. It is natural to want to minimize one's regrets. Inspiration to continue to bring about the lesser-evil thus remains, suggesting this revision will not frustrate attempts to coordinate activities in favor of the overall good.

If one finds this result unsavory, this is a further bad-making feature of the roles that necessarily include violations of universal moral rules. Insofar as we wish to avoid these dead ends, we should revise our roles rather than absolving every one of responsibility for the bad effects of their actions. This may not be possible where our necessity conditions are met, but we should see this as a further bad-making feature of the roles even where those conditions are met. They may be necessary for society, but the fact that their necessity entails those filling the roles will need to feel regret means they are less than ideal even over and above the fact that they create the ill of the universal moral rule violation in the first place. While many want to suggest that the fact that they are lesser-evil justified and thus not wrongs suggests that they should absolve those who commit them from a sense of responsibility, not being wrong is not the same as being free from obligations to regret. A failure to be good and the creation of wrong can still create those obligations. It would be better if roles did not violate universal moral rules, create bad effects and require that those filling the roles feel regret for an element of their otherwise justified actions. Where a role is necessary for society and necessitates a universal moral rule violation, however, the further bad of regret may be unavoidable.

CONCLUSION

The forgoing motivated three claims. The first may seem trivial, but several popular views deny it: when confronted with a conflict between a genuine universal moral rule and a role responsibility, one ought to follow the former, even if this requires exit from the role. The second is more controversial: one may be allowed to follow the role responsibility if s/he is one of the persons necessary to ensuring the continuation of a role and the role is necessary for a society to maintain some sub-optimal level of well-being. This suggests what one ought to do may differ depending on how many others persons fill a similar role, requiring that the order of actions has moral significance. This exception to the priority of universal moral rules is more plausible when filling the role is not only necessary for society to function well, but also for remedying moral deficiencies in the role. The third claim focuses on appropriate response to one's actions: if one commits a justified act with bad-making features, s/he should regret the bad even if it is outweighed by the good; failure to do so is cause for negative moral judgments even if one cannot be blamed for creating the bad that is justified by other factors. Being free from moral disapproval is thus not merely a matter of doing the right thing. It also requires responding appropriately to the different elements of the all-things-considered right thing. Even the lawyer who is lesser-evil justified in violating a universal moral rule ought to regret the ill caused by the violation.