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Freedom and Constraint in Legal Ethics: Some Mid-course Corrections to Lawyers and Justice

David Luban

FREEDOM AND CONSTRAINT IN LEGAL ETHICS: SOME MID-COURSE CORRECTIONS TO *LAWYERS AND JUSTICE*

DAVID LUBAN*

David Wasserman's criticisms go to the most theoretical and philosophical portions of my argument in *Lawyers and Justice*:[1] the theory of role morality and the analysis of the moral authority of law.[2] At the same time, Wasserman's objections implicate practical issues at the heart of legal ethics, and thus their import is by no means merely technical or scholastic. I found much of his essay convincing, and therefore read it with mixed emotions: pleasure at the acuteness of his analysis, and chagrin at the thought that if he is right then it is back to the drawing board for my own argument.

On further reflection, however, I am not persuaded that Wasserman is right, nor even that his reconstruction of my view is one that I wish to accept. If it is not, the fault is no doubt mine. When I wrote *Lawyers and Justice*, I made a conscious decision to keep the discussion of issues of academic moral theory to a minimum. As a result, however, I was far from explicit concerning several important philosophical questions; neglecting them was no great sacrifice, since it relieved me of the burden of having to make up my mind about difficult issues that no one ever gets right anyway. (Moral philosophy is like the clarinet, the instrument Benny Goodman once defined as "an ill woodwind that nobody blows good.") Wasserman's essay provides a welcome occasion to face the music.

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* Professor of Law, University of Maryland; Research Scholar, Institute for Philosophy and Public Policy, University of Maryland at College Park. B.A., University of Chicago, 1970; M.A., 1973; M. Phil., 1973; Ph.D., Yale University, 1974. I am grateful to Alan Strudler and David Wasserman for extensive conversations about this paper, and to Judith Lichtenberg and Deborah Rhode for several helpful suggestions. I found myself in the unusual position of discussing my reply to David Wasserman with him as I wrote it. For that reason, I shall alter the usual disclaimer: while the mistakes in my response are entirely my own, any misrepresentations of Wasserman's position in the current paper are his fault as much as mine.

1. D. LUBAN, LAWYERS AND JUSTICE (1988).

2. I leave to one side his section on the right to legal services. In that section, Wasserman discusses my views in tandem with those of Alan Wertheimer. His criticisms are directed at Wertheimer, and concern points at which I too diverge from Wertheimer.

I. AN EQUIVOCATION IN *LAWYERS AND JUSTICE*

It will be useful to begin the discussion with an example, the Garrow case I described in *Lawyers and Justice*:

> Lawyers Frank Belge and Frank Armani were told by their client Robert Garrow, who was accused of murdering a student camping near Lake Pleasant, New York, of two other murders he had committed. They found and photographed the bodies but kept the information to themselves for half a year—this despite the fact that the father of one of the victims, knowing that Armani was representing an accused murderer, personally approached him to ask if he knew anything about his missing daughter.[3]

Armani met with the father but then, nervous and shaken, reneged on an appointment with the other victim's father at the last moment. Months later, after the truth came out, he found himself similarly unable to answer a letter from the sister of one of the victims asking him to explain himself. In a television interview with Fred Graham, Armani reflected on his dilemma:

> *Armani*: This was something that was really momentous for us because of the conflict within us. Your mind screaming one way "Relieve these parents!" You know—what is your responsibility? Should you report this? Shouldn't you report it? One sense of morality wants you to relieve the grief.
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> *Graham*: And the other?
>
> *Armani*: The other is your sworn duty.
>
> . . . .
>
> *Graham*: Didn't you think that there was a factor of just common decency here?
>
> *Armani*: I can't explain it—but to me it was a question of which was the higher moral good.
>
> *Graham*: Between what?
>
> *Armani*: The question of the Constitution, the question of even a bastard like him having a proper defense, having adequate representation, being able to trust his lawyer as to what he says.
>
> *Graham*: Against what?
>
> *Armani*: As against the fact that I have a dead girl, the fact that her body's there. As against the breaking hearts of her parents. But they are—[pause]. It's a terrible thing to play God at that moment, but in my judgment—and I still

3. D. LUBAN, *supra* note 1, at 53.

> feel that way—that their suffering is not worth jeopardizing my sworn duty or my oath of office or the Constitution.[4]

That excruciating moral dilemma (and its less excruciating, because less extreme, counterparts) motivates the moral theory of chapters six through eight of *Lawyers and Justice*: on the one hand, the parents' breaking hearts, on the other, a lawyer's sworn duty. On the one hand, the commands of what in *Lawyers and Justice* I termed "common morality": to assuage the parents' heart-breaking uncertainty; to expedite the honorable burial of the dead women rather than allowing them to rot in deserted mine-shafts and cemetery underbrush; to speak truths rather than carefully-worded evasions; to aid in the punishment or incapacitation of a cruel rapist and murderer rather than fighting for his welfare. On the other hand, the commands of a lawyer's "role morality": to keep faith with his client, to hold Garrow's disclosures in confidence, to represent his interests with true zeal.

This is the "problem of role morality" that I analyze in chapters six and seven. I argue that the appeal to role morality—to the lawyer's sworn duty—amounts to an *institutional excuse* from the requirements of common morality. That is, it tacitly appeals to the importance of the lawyer's role in a morally worthy institution. Here is my analysis in *Lawyers and Justice* of the institutional excuse in the Garrow case:

> The lawyers' role acts (preserving the defendant's confidences, photographing the bodies but telling nobody) were required by the general duty of confidentiality—the role obligation. This is justified by arguments that confidentiality is required in order to guarantee an adequate criminal defense—the institutional task . . . . The next step is to show that zealous criminal defense is required by the adversary system, and this in turn . . . serves the positive moral good of overprotecting individual rights against the encroachments of the state.[5]

In other words, I read Armani's appeal to his "sworn duty" as a kind of abbreviation for the four-step argument that I believe constitutes the structure of an institutional excuse. I refer to this four-step argument as the "Fourfold Root of Sufficient Reasoning," or "fourfold root" for short, and explicate it as follows:

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4. *Ethics on Trial* (WETA-TV video 1987).

5. D. LUBAN, *supra* note 1, at 149. In tying Armani's duty to the adversary system, I follow Monroe Freedman's analysis of the Garrow case. M. FREEDMAN, LAYWERS' ETHICS IN AN ADVERSARY SYSTEM 1-8 (1975).

> [T]he institutional excuse, fully spelled out, will take the form I have indicated: the agent (1) justifies the institution by demonstrating its moral goodness; (2) justifies the role by appealing to the structure of the institution; (3) justifies the role obligations by showing that they are essential to the role; and (4) justifies the role act by showing that the obligations require it.[6]

This analysis is intended to explain the origin and force of a lawyer's role obligations—Armani's "sworn duty." Professional duties must originate somewhere; they are not dark ancestral mysteries that command our reverence because their origins are lost in the depths of time. They arise from the requirements of social institutions (such as our adversary system) the rationality of which must be appraised with a generous yet skeptical eye. Once we see this we understand that the weight of professional obligations is finite, bounded above by the weighted product of the worth of the institution, the centrality of the professional role to that institution, and the importance to that role of a putative professional duty.

Few of us believe that our common moral obligations are so absolute that we can never violate them regardless of the consequences. Rather, moral obligations are typically prima facie obligations, that is, obligations that may be overridden in special circumstances.[7] Thus, whenever a lawyer faces a dilemma between doing her "sworn duty" and following the dictates of common morality, she must ask whether the moral wrong involved in doing her sworn duty overrides the prima facie obligation it imposes. The fourfold root is meant to specify, in schematic form, the factors determining the moral weight of the professional obligation.

The major conclusion I drew in chapter eight of *Lawyers and Justice* is twofold. First, in the paradigm situation of criminal defense—a relatively powerless defendant confronted by the full weight of the state—the adversary system is a moral good sufficient to underwrite

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6. D. LUBAN, *supra* note 1, at 131. The name "Fourfold Root of Sufficient Reasoning" was intended as an easy-to-remember name and also a weak witticism, alluding to Arthur Schopenhauer's book ON THE FOURFOLD ROOT OF THE PRINCIPLE OF SUFFICIENT REASON (1813). I now heartily repent the choice of labels: the Schopenhauer allusion is pointless as well as obscure, and most readers find the term "the fourfold root of sufficient reasoning" awkward. I will retain the term as a permanent reminder to its penitent author of the perils of trying to be clever.

7. This is not to say that *no* moral obligations are absolute: the moral prohibition on genocide, just to take the most extreme and obvious example, is surely an absolute prohibition (what could override it?). The point is rather that more mundane moral obligations—promise-keeping, truth-telling, courtesy, and so forth—can be overridden in unusual circumstances.

very powerful institutional excuses[8] and is also an important device for maintaining the proper relationship between state and citizen. Not without qualms, I concur with Monroe Freedman that Armani and Belge did the right thing.[9]

Second, however, in the civil suit paradigm—by which I mean relatively evenly-matched adversaries neither of which is the state or even a powerful, state-like institution—the adversary system is justified much more weakly, and cannot support weighty institutional excuses, for the most common justifications of the adversary system all fail. These include its alleged superiority as an engine of truth and a protector of rights, its supposedly self-correcting character, the moral praiseworthiness of the attorney-client relation it creates, and its centrality to our tradition. In the civil suit paradigm, the only persuasive argument on behalf of the adversary system is a bare appeal to the status quo: the adversary system is not demonstrably worse than the available alternatives. If we had a nonadversary system as the status quo, the same argument would justify retaining that system. This, I argue, is too slender a reed to support hefty institutional excuses. On the basis of these arguments, I propose a more-or-less drastic rethinking of the lawyer's role, away from a stance of extreme partisanship without common moral accountability toward what I term "moral activism."[10]

But let us return to Armani's dilemma. Implicit in Armani's eloquent framing of the problem we find yet another contrast: on the one hand, an ethics of consequences (the parents' breaking hearts), on the other, an ethics of duty. Moral philosophers distinguish between *consequentialist* moral theories (such as utilitarianism), which evaluate actions in terms of their consequences, and *deontological* moral theories, which evaluate actions in terms of duties and obligations partly or wholly independently of consequences.[11] To borrow W.D. Ross's terminology, consequentialists give priority to the

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8. D. LUBAN, *supra* note 1, at 148. Even in the criminal defense paradigm, however, the adversary system cannot excuse everything. *See id.* at 156. For examples of controversial criminal defense tactics that I claim the adversary system cannot excuse, see *id.* at 150-52 (cross-examining the truthful rape complainant to make her "look like a whore"); *id.* at 197-201 (perjurious client).

9. *See* M. FREEDMAN, *supra* note 5, at 2.

10. *See* D. LUBAN, *supra* note 1, at 160-61.

11. Utilitarianism is the best-known consequentialist theory. As I use the term, utilitarianism is simply one special case of consequentialism: utilitarianism may be defined as that form of consequentialism that (a) ranks outcomes of action solely according to how much welfare they produce (where welfare may be explicated in terms of pleasure and pain, or in terms of the satisfaction of human preferences), and (b) determines total welfare levels by summing the welfares of all affected individuals. This characterization

goodness of outcomes ("the good") while deontologists emphasize the rightness of actions independently of outcomes ("the right").[12] Deontologists stress the importance of refraining from certain actions that are in and of themselves morally repugnant, even if they lead to desirable outcomes.

Armani's own language frames his dilemma—common morality or role morality?—as a clash between consequences and duty. It is by no means *necessary* to frame the dilemma this way, since common morality itself contains important deontological components—after all, the common moral obligation to honor the dead that Armani violated can be more readily understood in deontological than consequentialist terms. Moreover, I shall argue that role morality must be understood in terms that, if not entirely consequentialist, still pay a lot of attention to consequences. Finally—an important warning—these are by no means the only or even the most important alternatives. Indeed, later in this Essay I will argue that my own approach in *Lawyers and Justice* moves off at an oblique angle from the line connecting consequentialism and deontology.[13] I bring up the overworked and jejune theoretical debate between consequentialists and deontologists because Wasserman has persuaded me that I waffled between two approaches in *Lawyers and Justice*'s theory of role morality, one of which is straightforwardly consequentialist and the other of which appears to be deontological (though Wasserman does not call it that and—as we shall see—it need not be understood that way).

The consequentialist reading appears most vividly in the Oxfam example I employed to motivate the fourfold root argument.[14] The example amounts to a kind of "for want of a nail the kingdom was lost" story: because the Oxfam logistics officer obeys the dictates of common morality, P (the local boss) withholds the trucks; because P withholds the trucks, the food does not get delivered; because the food does not get delivered, many innocent lives are lost. Although I insisted in *Lawyers and Justice* that this is not a simple consequentialist problem,[15] Wasserman surely is right that the example trades in

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of utilitarianism—as sum-ranking welfarist consequentialism—comes from UTILITARIANISM AND BEYOND 3-4 (A. Sen & B. Williams eds. 1982).

12. W.D. ROSS, THE RIGHT AND THE GOOD 1 (1930).

13. *See infra* notes 52, 76-78 and accompanying text.

14. Wasserman quotes this example in his article, so I shall not repeat it here. *See* Wasserman, *Should a Good Lawyer Do the Right Thing?: David Luban on the Morality of Adversary Representation* (Review Essay), 49 MD. L. REV. 392, 396-97 (1990).

15. D. LUBAN, *supra* note 1, at 130-31.

large part on our consequentialist values and intuitions.[16] The example suggests that we determine whether a role obligation should be overridden in a particular case by asking whether the damage done to the institution's mission by defaulting from the role obligation in that case outweighs the good accomplished by breaking the role.[17]

It comes as a small surprise that outside of contrived examples such as the Oxfam case the answer is often "no": had Belge and Armani violated Garrow's confidence the damage to the practice of lawyer confidentiality surely would have been slight, and indeed far too slight to outweigh the good that violating confidentiality in this one case would accomplish.[18] Similarly, an occasional lapse from zealous representation of a particularly repulsive and dangerous criminal defendant would not do much damage to criminal defense as a whole, and might do a lot of good. (Let us suppose that we are considering only cases in which the crime has been violent and ugly, the criminal is unrepentant, and the proposed sentence is neither disproportionate nor racially motivated.)[19] Wasserman therefore

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16. *But see infra* note 29 for further discussion of the Oxfam example.

17. This reading of the fourfold root is reinforced when I suggest that in employing the fourfold root "we keep a 'running total' of justificatory strength . . . which comes into play when we finally wonder what to do." D. LUBAN, *supra* note 1, at 135; *see also id.* at 140 (spelling out the procedure of assessment).

18. This is Wasserman's conclusion, and I agree with it. It is possible, however, that Wasserman and I are wrong about this; after all, if Garrow's lawyers violated confidentiality the case would have received widespread publicity, and in that event it is possible that public reliance on lawyers' commitment to confidentiality would have been severely damaged.

I doubt this for two reasons, however. First, the facts of the Garrow case were so unusual that the lawyers would most likely have had no difficulty convincing the general public that in less extreme circumstances the duty of confidentiality would have bound them. Second, it is unlikely in any case that the public believes confidentiality to be inviolable. Fewer than half the clients surveyed in a recent study conducted by Fred Zacharias believed that the confidentiality rules are absolute. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 383 (1989). Zacharias queried the subjects concerning a dozen hypotheticals presenting strong temptation to betray client confidences. In 9 of the hypotheticals, 40-60% of those surveyed believed that lawyers are permitted to disclose under current confidentiality rules, and at least 28.8% believed that disclosure is permitted in all of the hypotheticals. *Id.* at 394. Given that so many people already believe that lawyers are permitted to violate confidentiality in problem cases, I doubt that Garrow's lawyers would have drastically undermined confidentiality by disclosing where the bodies were buried.

19. Without this stipulation, we may believe that subjecting the defendant to punishment is itself immoral. Many people believe (a) that our prisons are so horrible that it is never, or almost never, justifiable to incarcerate anyone in them; or (b) that non-probation sentences are typically far too harsh to "fit the crime"; or (c) that our criminal justice system has become ineluctably racist, and hence immoral; or (d) that nonviolent crimes against property committed by desperately poor or underclass offenders, and

concludes that the logic of the fourfold root ought to force me to just such conclusions.[20]

The point is that the marginal harms to the system that result from violating one's professional duty typically are slight in a single case. On the other side of the ledger, the marginal benefits of following common morality rather than professional duty may be great. Thus, when common morality clashes with role morality the exceptional cases in which the duty must be overridden simply devour the duty itself; role morality usually loses. And this is what Wasserman fears my fourfold root argument implies. Wasserman writes that the fourfold root "is really a form of 'sophisticated' act consequentialism, taking account of roles, policies, and acts only to the extent that they bear on the consequences of specific acts."[21] I said earlier that enormous practical consequences are embroiled in the theoretical issues Wasserman raises: here we have a perfect example. For if this consequentialist reading of the fourfold root argument is correct, the argument would virtually abolish the attorney-client relationship as we know it.[22]

The fourfold root, however, can be sung in a deontological rather than a consequentialist key. I have said that in the final step of the fourfold root analysis, an agent "justifies the role act by showing that the obligations require it."[23] This language lends itself to a paradigmatically deontological reading. *Question*: Why should Armani keep Garrow's confidences? *Answer*: Because the obligation

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victimless crimes, do not deserve punishment at all; or (e) that punishment as such is simply a barbaric institution incapable of moral justification. I disagree entirely with (e), and partly with (a), since it may prove even more horrible simply to release every offender, no matter how dangerous; incarceration will be justifiable in many cases as a lesser evil. For the record, I believe that only in some cases, and to a limited degree, will (d) be true, though I agree with (b) and (c). In any event, we are stipulating that (a)-(d) do not apply in the cases we are considering.

20. Wasserman, *supra* note 14, at 400 (Garrow case); *id.* at 401-02 (zeal in criminal defense).

21. *Id.* at 395.

22. This statement stands in need of qualification, which is explained most readily in the somewhat artificial language of costs and benefits. Even if Wasserman is right, a criminal defense lawyer should default on the traditional attorney-client relationship only when enough other lawyers are *not* defaulting that the marginal damage to the relationship is less than the marginal benefit of defaulting. If all lawyers defaulted, then the relationship would be destroyed, and we are assuming that in the usual criminal defense situation this would be unacceptable. It follows that at some point the marginal damage to the relationship caused by one's defaulting must exceed the marginal benefits: it cannot be that in each individual case the marginal benefit of defaulting exceeds the marginal harm, but that the total harm over all cases exceeds the total benefit. *See* D. REGAN, UTILITARIANISM AND CO-OPERATION 61-62 (1980).

23. D. LUBAN, *supra* note 1, at 131.

of confidentiality requires him to. Period. Armani can offer this deontological-sounding answer (remember that he spoke of "my sworn duty, my oath of office") without engaging in a consequentialist weighing of the marginal benefits against the marginal damage to the adversary system from breaking confidentiality in a single case.

But if Armani is simply to appeal to the duties of his lawyerly station, what is the point of the fourfold root argument? Is it not to facilitate such a consequentialist weighing? After all, I offered the fourfold root as an *alternative* to settling the problem of role morality simply by appealing to "my station and its duties."[24]

The point of the fourfold root on this deontological reading is, as it happens, quite straightforward. The fourfold root inquiry helps Armani determine how strong the duty of confidentiality really is, in order to decide whether the appalling circumstances of the Garrow case suffice to override it.

Remember that even deontological duties are often prima facie rather than absolute; they can be overridden in exceptional cases. But how exceptional must a case be to override a duty? That depends not only on the details of the case but also on the strength of the duty. Duty is duty, but all duties are not created equal. Not even all duties of the same type are created equal. Consider, for example, the duty to keep one's word. If I say "I absolutely promise I'll call you tomorrow" my duty is stronger than if I say merely "I'll call you tomorrow," and the latter duty is stronger than if I say "I'll see if I can get back to you tomorrow." All three expressions amount to giving my word that I will call you tomorrow.[25] But the first can be overridden only by a grave emergency, the second by a variety of unanticipated difficulties that keep me from the telephone, and the third merely because I am rather busy.

The purpose of the fourfold root inquiry, then, is simply to determine the strength of the professional duty. Let us suppose we determine that the duty is strong, because the institution has strong moral justification, the role is central to the institution, and the duty in question is crucial to the role (even if violating it in a single case will not damage the role). We have then determined that the duty can be overridden only in grave emergencies, and not simply in any case in which the benefits of violating the duty outweigh the costs.

In legal terms, the difference between the two interpretations of

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24. *See id.* at 120-25, 137-39.

25. One might object that in the third expression I do not *literally* commit myself to calling you. But the expression is not meant to be taken literally: it is an idiomatic way of indicating a weak commitment to call you.

the fourfold root is roughly equivalent to the difference between a balancing test and a rebuttable—or, as philosophers usually put it, "defeasible"—presumption. The consequentialist reading asks for a straightforward balancing of the consequences of doing one's duty against the consequences of violating one's duty. The deontological reading grants a presumption in behalf of doing one's duty—the strength of the presumption to be determined by the fourfold root inquiry—which nonetheless may be defeated in exceptional cases. The practical difference is that the threshold for defeating the presumption is higher than the threshold for tipping the balance. Only in rather grave cases should Armani default on his duty. (One might, by the way, accept all this and still disagree with me about the Garrow case, believing that the sensational and disturbing circumstances of that case created a grave enough emergency to override even a very strong duty of confidentiality. As I wrote in *Lawyers and Justice*, "any moral theory that allows you to answer hard questions confidently is simple-minded."[26])

This way of understanding the fourfold root avoids the unpleasant result of the first, consequentialist interpretation, namely the extreme attenuation of professional duty that it implies. As Wasserman argues, in *Lawyers and Justice* I implicitly rely on this "deontological" understanding of the fourfold root argument in my resolution of the Garrow case, in my general argument for strong obligations of zeal in criminal defense, and in my argument in chapter nine on behalf of the attorney-client privilege in criminal cases.[27] Wasserman charges me with faulty reasoning in all three of these instances, but that is because he assumes that I have opted for the first, consequentialist understanding of the fourfold root.

To sum up, *Lawyers and Justice* equivocates between two understandings of institutional excuses, which I have characterized as "consequentialist" and "deontological." (Shortly I shall suggest that this is not quite the right way to characterize them, but the names may stand for the moment.) I am grateful to Wasserman for pointing out this equivocation which, quite frankly, I had not noticed when I wrote the book. I am not entirely surprised at the equivocation, since I confess to a certain amount of vacillation between consequentialist and nonconsequentialist sympathies.[28]

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26. D. LUBAN, *supra* note 1, at 152.

27. Wasserman, *supra* note 14, at 400-02.

28. As Judith Lichtenberg puts it,

> Some days, I think I am a consequentialist; some days, I am sure I am not. Is it simply that I cannot make up my mind? Or is it that the meaning of consequen-

Having noticed the equivocation, I now wish to plump for the second, "deontological," reading of the fourfold root—at least until Wasserman or others can convince me that this, too, lands me in hot water. On the deontological reading my resolution of the Garrow case, my argument for zealous advocacy in the criminal defense paradigm, and my defense of the attorney-client privilege in criminal cases follow smoothly, or at least as smoothly as they would have if I had clearly enunciated the deontological reading of the fourfold root in the first place.[29]

The deontological reading requires me to modify and deepen the general approach to thinking about social roles I sketched in chapter six of *Lawyers and Justice*, in which I concluded with the consequentialist solution to the problem of role morality that I have now repudiated:

> [T]he appeal to a role in moral justification is simply a shorthand method of appealing to the moral reasons incorporated in that role. And these may be—*must* be—balanced against the moral reasons for breaking the role expressed in common morality. In forming our all-things-considered judgment, the reasons for acting in role will sometimes outweigh the reasons for breaking the role; but sometimes they will not.
>
> Let me say straightaway that I believe that some version of this simpleminded balancing approach is the solution to our problem.[30]

The first sentence is right, but Wasserman has persuaded me that the rest of the passage is an error. For on the reading of the four-

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> tialism refuses to stay still? One thing seems sure: An approach to ethics that seems by turns as if it must be right, as if it cannot be right, and as if it misconceives the crucial questions shows all the signs of striking a deep philosophical chord.

Lichtenberg, *The Right, the All Right, and the Good*, 92 YALE L.J. 544, 544 (1983).

29. It is interesting to observe how the Oxfam example lends itself ambiguously to both a consequentialist and a deontological reading. We already have seen that our sympathy for the logistics officer's institutional excuse may rest on consequentialist intuitions (one life versus many). The deontological reading of the fourfold root argument, however, yields the same outcome: Oxfam is an institution that serves a central moral good, the logistics officer plays a vital role in that organization, and negotiating with local officials to obtain trucks is one of the key duties of the logistics officer. Thus, her professional duty is very strong, and can be overridden in only the most dire emergencies. I concocted the Oxfam example to motivate the fourfold root argument because I thought it was a relatively easy case. We may now see that it seems relatively easy precisely because it bridges the divide between consequentialism and deontology: in the Oxfam case our consequentialist and deontological intuitions concur in the result.

30. D. LUBAN, *supra* note 1, at 125 (emphasis in original).

fold root that I now endorse, the moral reasons incorporated in the role must *not* simply be balanced against the reasons for breaking the role; rather, role obligations should be regarded as defeasible presumptions. Treating role obligations as defeasible presumptions implies an important asymmetry between role morality and common morality, since role morality becomes in effect the "default" position, and thus takes precedence over common morality. In Section II, I shall return to the implications of treating role morality in this fashion.[31]

Apart from this important correction, I believe and hope that the practical conclusions of *Lawyers and Justice* do not depend on equivocation between the consequentialist and deontological readings of the fourfold root, but rather follow from the deontological reading that I now endorse.

Before proceeding, however, I want to explore the difference between the two readings a bit more carefully, since I believe that here Wasserman goes astray.

Wasserman believes that the equivocation arises in the connection between duties and acts, that is, at link four of the fourfold root.[32] He notices that in the Oxfam example, the role-act (in this case it is an omission rather than an act) of keeping silent about the murder is *causally* (or, as Wasserman says, "instrumentally") necessary to fulfill the role obligation of obtaining trucks.[33] If the logistics officer warns the murder-victim, she sets in motion a chain of events resulting in her failing to obtain the trucks. This corresponds with judging the role-act by its consequences. In the Garrow case, however, the role-act of keeping Garrow's confidences is *logically*, not causally, required by the duty of confidentiality—it is (in Wasserman's words) " 'required' only in the trivial sense that keeping silent is required to fulfill the duty to keep silent."[34] And this looks very much like judging the role-act deontologically, that is, by its correspondence to duty.

The equivocation here is only apparent, however, for there is really no significant difference between the two cases. In the Oxfam case, the logistics officer's duty to negotiate with local officials to

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31. *See infra* notes 53-78 and accompanying text.

32. Link one consists of the institution and its justification. Link two is a role and its derivation from the institution's requirements. Link three is a role obligation and its derivation from the role's requirements. And link four is a role act and the demonstration that it is an instance of the role obligation. D. LUBAN, *supra* note 1, at 132.

33. Wasserman, *supra* note 14, at 397.

34. *Id.* at 399.

obtain trucks *logically requires* that she negotiate with P to obtain trucks. That, in turn, *causally requires* her to keep silent about the murder P is planning. In the Garrow case, Armani's duty to keep client confidences *logically required* that he keep Garrow's confidences. That, in turn, *causally required* that he do several other things—lying or evading direct questions about whether he knew the location of the bodies, cancelling his appointment with the victim's father because he feared that his self-control would crack, surreptitiously changing cars to ensure that he was not being followed when he drove out to photograph the bodies, and so forth.

The point is that a role-"act" is often a complex performance consisting of other acts. This is true in both the Oxfam and Garrow cases. In both cases, in other words, the role-act logically required by the role obligation causally requires other acts—and it is these other acts that demand institutional excuses. Sometimes, of course, the role-act is itself simple and does not causally require other acts. In that case, the only question is whether the role-act actually is required by the role obligation—the typical lawyer's question of the scope of an obligation. Sometimes, on the other hand, the role obligation obviously requires the role-act. In that case, the only question is how, instrumentally, to carry it out. Thus, in some cases determining the logical requirements of a role obligation is trivial; in other cases determining the causal requirements of the obligation is trivial; in still other cases, both may be trivial. But this difference shows no equivocation in the fourfold root argument and has nothing to do with the two readings of the fourfold root that I have discussed.

The real difference between the consequentialist and deontological readings of the fourfold root emerges in link three, the derivation of specific professional duties from the requirements of the professional role. Typically, we ask whether the role could be carried out if no such duty were imposed: we ask, for example, if lawyers could represent clients successfully if there were no duty of confidentiality. To answer this question, we ask what would happen if lawyers were permitted to reveal client confidences at will. The most common answer is that in a world in which lawyers were permitted to reveal client confidences at will, clients would conceal information from their lawyers that might prove vital for successful, or even minimally competent, representation. We then conclude that confidentiality is an important role obligation of lawyers.[35]

35. For a more detailed and nuanced discussion of confidentiality, see D. LUBAN,

I spell the argument out in this rather pedantic fashion to show that in its logical structure it is a *generalization argument*: it shows that confidentiality is a duty by asking "what if every lawyer was permitted to reveal client confidences?" and answering that the lawyer's role would prove impossible. The "what if everyone did that . . . ?" locution is the hallmark of a generalization argument.[36]

The consequentialist interpretation of the fourfold root inquiry involves no such generalization argument. Instead of asking "what would happen to the adversary system if everyone revealed client confidences?", the consequentialist interpretation asks only "what would happen to the adversary system if *I* reveal client confidences (and everyone else acted as they do now)?" It is because the consequentialist interpretation refuses to generalize that it plumps so unequivocally in favor of revealing Garrow's dreadful secret.

Generalization arguments are among the most common forms of moral persuasion we use. They also bear a strong link to deontological moral theory because of the role they play in the philosophy of Kant, the paradigm deontologist. Kant argued that a moral law necessarily binds all moral agents, so that the test of a maxim is its "universalizability": "Act only according to that maxim by which you can at the same time will that it should become a universal law."[37] Though this formula is notoriously hard to interpret, it clearly involves generalization arguments. Indeed, on the Pogge-Scanlon interpretation that I find most plausible, Kant's formula means:

> An agent can assume that he is permitted to adopt a particular maxim just in case he can will that everyone should *be permitted* to adopt it. To check this, he must then imagine a world like ours—with the one modification that everyone feels (morally) free to adopt his maxim.[38]

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supra note 1, at 177-234, where I argue for several limitations on confidentiality, most notably in cases in which the client is an organization rather than a natural person. *See also* Zacharias, *supra* note 18, at 376-96 (noting serious doubts about the extent to which this argument for the importance of confidentiality rests on sound empirical assumptions).

36. *See* M. SINGER, GENERALIZATION IN ETHICS: AN ESSAY IN THE LOGIC OF ETHICS, WITH THE RUDIMENTS OF A SYSTEM OF MORAL PHILOSOPHY 61 (1961) ("The generalization argument has the general form: 'If everyone were to do *X*, the consequences would be disastrous (or undesirable); therefore no one ought to do *X*.' ").

37. I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 39 (Beck trans. 1959).

38. T. Pogge, The Categorical Imperative 2 (1986) (unpublished manuscript) (emphasis in original) (copy on file with author). Pogge takes this "universal permission" reading of the categorical imperative from T. Scanlon, Kant's *Groundwork*: From Free-

The argument I sketched above concerning confidentiality fits this schema quite comfortably.

Generalization arguments, however, are standard factory-installed equipment in consequentialism as well. In the literature of utilitarianism, they emerged in response to the difficulty Wasserman discovered in the consequentialist interpretation of the fourfold root, namely the tendency of consequentialist theories to devour our duties, because we must violate duties any time the benefits of doing so outweigh the costs.

In its most disturbing form, the problem is that utilitarianism (the most popular and often-discussed consequentialist theory) sometimes requires intrinsically horrible actions—actions that violate our profoundest deontological duties—simply because these actions maximize utility. If I can save five lives by murdering one person (to use his organs for transplants, for example), utilitarianism seems to require that I do so.

Philosophers concerned with this worry address it by distinguishing between the utility of individual acts and the utility of rules or general policies. It may be that committing a murder to save five lives would be best on utilitarian grounds, but a general rule requiring agents to commit murders whenever they believe that doing so will save several lives will create so much fear and anxiety, and lead to so many pointless murders, that it creates less utility than a blanket prohibition against murder. Similarly, it may on occasion prove beneficial to punish an innocent person (because, for example, we cannot find the true perpetrator of a crime and we need to punish someone for the sake of deterrence). Nevertheless, a social institution of punishing innocents clearly would create enormous disutility.

Philosophers, therefore, distinguish *act-consequentialism*, which evaluates the rightness of each act by appraising its consequences, from *rule-consequentialism*, which evaluates the rightness of each act by appraising the consequences of general rules requiring or permitting such acts.[39] Rule-consequentialism seems to accord better with

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dom to Moral Community (July 1983) (three unpublished lectures) (copy on file with author).

39. The distinction was made famous by Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955), though it appeared two decades before Rawls's article in Harrod, *Utilitarianism Revised*, 45 MIND 137 (1936). J.O. Urmson traced rule-utilitarianism all the way back to John Stuart Mill in Urmson, *The Interpretation of the Moral Philosophy of J.S. Mill*, 3 PHIL. Q. 33 (1953). It should be noted that philosophers often distinguish rule-utilitarianism, which asks about the utility of general rules, from utilitarian generalization, which for every act A asks what would happen if everyone did A. I am collapsing the two here by

our common-sense moral views: it rules out killing the one to save the five, for example, since we understand the disutility of a general rule permitting such killings.

To evaluate general rules, however, we may naturally employ generalization arguments. Indeed, Pogge's analysis of the Kantian categorical imperative that I quoted above can readily be regarded as a formula for rule-consequentialist evaluation: to find out if a rule must be adopted, ask what the world would be like if everyone were permitted to disobey it.[40] What I have been calling the "consequentialist" interpretation of the fourfold root structure is understood more properly as an act-consequentialist interpretation (as Wasserman points out); and what I have been calling the "deontological" interpretation of the fourfold root may be regarded just as easily as a rule-consequentialist version. Viewed in this way, my argument so far in the present paper has amounted to a defense of the rule-consequentialist reading of the fourfold root over the act-consequentialist reading.

It may be objected to this facile assimilation of deontological generalization and rule-consequentialism that Kantian and consequentialist generalization differ greatly in the underlying view of human life that motivates the arguments. For Kant, the universalizability formula follows from the fact that moral laws are binding universally, and that in turn follows from an underlying concern with human equality. Though the world that confronts us is riddled with inequality in goodness and ability, our moral agency resides in selfhood that is profoundly egalitarian; and the moral law binds us all precisely because we are all moral equals. For me to permit myself to do something without being able to will that everyone else also be permitted to do it is tantamount to treating myself as a special case, a cut above the rest of humanity. In chapter three of *Lawyers and Justice*, I argue that the outrage we often feel at lawbreakers arises from our sense that they are treating themselves as special cases;[41] thus, the argument of chapter three is Kantian in an important sense.[42]

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suggesting that generalization arguments are essential for assessing the utility of general rules.

40. I do not mean to argue that Kant was a consequentialist: Kant's criteria for accepting a universal duty are more stringent than typical consequentialist criteria. Most importantly, Kant insisted that one can will maxims to be available only if conduct pursuant to them does not conflict or fail to harmonize with any person's status as an end in itself. (I take this paraphrase of Kant's formula from T. Pogge, *supra* note 38, at 26.)

41. D. LUBAN, *supra* note 1, at 34.

42. *See also* Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY 111 (1988),

Consequentialists, on the other hand, respond to rather different concerns. Much of the attractiveness of consequentialism is that it locates the basis of moral decisions in real-world, non-transcendent considerations: the consequences of actions.[43] The attractiveness of consequentialism derives from its reminder that our individual acts have worldly consequences, for which we are partly responsible. Thus, where Kantian theories respond to our sense that, worldly trappings apart, we are all at bottom each others' equals, the fundamental attractions of consequentialist systems lie in their this-worldliness and their antifatalistic sense that consequences are not destinies but the outcomes of human choices.

In my view, however, this difference in motivation need not mark a decisive watershed between the two theories. After all, I have said that a Kantian applying the generalization test must look to the real-world consequences of a universal permission to act in a certain way, and likewise a consequentialist surely may number fairness and unfairness among the consequences that matter.

Let me elaborate the latter point. Utilitarianism always has been the most influential version of consequentialism, and its hallmark is precisely that it disregards consequences other than welfare. There is, however, no compelling reason for regarding welfare as the only morally relevant characteristic of states of affairs.[44] If two distributions of goods achieve identical levels of welfare, but one distribution is much fairer than the other, even a consequentialist should prefer the fair distribution.[45] This suggests that our inventory of factors relevant to the rightness of acts should include moral properties of states of affairs, such as their fairness, as well as non-moral properties, such as their contribution to welfare. The relevant "moralized" properties of states of affairs may include the fact that a state of affairs is unfair, or that it violates someone's rights, or that it results from someone doing her duty, or that it involves the

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which spells out a similarly Kantian underpinning for the practice of retributive punishment.

43. *See* B. WILLIAMS, MORALITY: AN INTRODUCTION TO ETHICS 89-90 (1972).

44. For a more thorough discussion of this point, see Luban, *The Quality of Justice*, 66 DEN. U.L. REV. 381, 393-95 (1989).

45. [T]he goodness or badness of a complex state of affairs is not a function merely of the goodness or badness of its parts. A certain set of goods distributed in one way between a number of people may constitute an intrinsically better state of affairs than the same set distributed differently. And the appeal to "fairness" seems to rest on the principle that the best possible state of affairs is reached when the group of producers and that of enjoyers is as nearly identical as possible.

Broad, *On the Function of False Hypotheses in Ethics*, 26 INT'L J. ETHICS 377, 388 (1916).

corruption of a virtuous person. Consequentialist theories that include moral as well as nonmoral properties of states of affairs in their inventories of "the good" are usually referred to as "ideal utilitarianism,"[46] though "ideal consequentialism" would be a more precise name, since such theories are not strictly speaking utilitarian theories at all. A form of deontological generalization that takes consequences (both moral and extra-moral) into account, and an ideal rule-consequentialism that values dutifulness and fairness seem awfully close to each other.[47]

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46. Ideal utilitarianism originated in Broad, *supra* note 45.

47. In recent years, anticonsequentialist critics have objected additionally that consequentialism—utilitarian, ideal, or otherwise—demands too much of us. Rule-consequentialism always demands that we engage in practices that maximize the good, regardless of the sacrifice. Thus, consequentialism seems to imply that I *must* spend all my evenings and weekends volunteering at the shelter for the homeless, up to the point at which my exhaustion and despondency make me a marginally worse agent of the good, or outweigh the good I do. I must volunteer at the shelter, that is, unless some even more worthwhile cause lays claim to my evenings and weekends. Clearly, such a view of what morality requires is crazy. This objection to consequentialism is by now standard, but it originated in Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & B. WILLIAMS, UTILITARIANISM: FOR AND AGAINST 75 (1973). *See also* Wolf, *Moral Saints*, 79 J. PHIL. 419, 419 (1982) ("moral perfection, in the sense of moral saintliness, does not constitute a model of personal well-being toward which it would be particularly rational or good or desirable for a human being to strive"). As Gilbert Harman nicely puts the point,

> Consider your own present situation. You are reading a philosophical book about ethics. There are many courses of action open to you that would have much greater social utility. If, for example, you were immediately to stop reading and do whatever you could to send food to places like Africa or India, where it is scarce, you could probably save hundreds, even thousands of lives, and could make life somewhat more tolerable for thousands of others. That is something you could do that has a greater utility than anything you are now doing; it probably has a greater utility than anything you are ever going to do in your whole life. According to utilitarianism, therefore, you are not now doing what you ought morally to be doing and this will continue to be true throughout your life. You will always be doing the wrong thing; you will never be doing what you ought to be doing.

G. HARMAN, THE NATURE OF MORALITY 157 (1977).

However, the culprit here is not the basic consequentialist idea that we should judge the rightness and wrongness of actions by looking at their consequences. The real culprit is the additional claim that after rank-ordering possible outcomes of one's actions according to the goodness of their consequences one must then choose the single action that *maximizes* the good. Instead, one could simply set a less demanding threshold than maximizing the good while still operating in a generally consequentialist framework. This idea appears in a paper by Judith Lichtenberg, and has received extensive development in works by Michael Slote, who has coined the term "satisficing consequentialism" to refer to forms of consequentialism that allow one to do less than maximize the good, provided that one does good over a certain threshold. *See* Lichtenberg, *supra* note 28, at 554-55; M. SLOTE, BEYOND OPTIMIZING 1-31 (1989); M. SLOTE, COMMON-SENSE MORALITY AND CONSEQUENTIALISM 35-59 (1985). Another approach allows an agent certain "prerogatives" to refrain from maximizing the good; these prerogatives appear as limi-

In *Lawyers and Justice*, I generalized the distinction between act- and rule-consequentialism by contrasting "Acts Over Policies" moral theories with "Policies Over Acts" moral theories.[48] The former, exemplified by act-consequentialism, takes the individual act as the logical subject of moral evaluation; the latter, exemplified by rule-consequentialism, takes as the logical subject of moral evaluation the general policy or rule that the particular act implements. My current defense of rule-consequentialism may puzzle readers of *Lawyers and Justice*, since in chapter six I offered a sustained critique of Policies Over Acts.[49] The contradiction, however, is merely apparent. I criticized Policies Over Acts only for denying that acts are proper subjects of moral evaluation. This criticism does not apply to the version of rule-consequentialism contained in the fourfold root. Prima facie general duties may be overridden in exigent circumstances, and thus we must always be ready to scrutinize particular acts to determine if the circumstances are exigent. In chapter seven, I again faulted rule-consequentialism, this time for ignoring the fact that duties differ in their strength.[50] But the whole purpose of the fourfold root is to help us understand the different strengths of legitimate duties, and thus the fourfold root yields a version of rule-consequentialism that escapes this criticism as well.

But is it actually rule-consequentialism, or a form of deontology? I have said that the fourfold root employs a generalization argument common to Kantianism and rule-consequentialism. Moreover, I have said that Kantianism and ideal rule-consequentialism respond to the same underlying values; I have added that Kant's question whether an agent could will that all other agents be permitted to undertake an action cannot be answered without empirical assessment of the consequences of such a universal permission.[51] In the end, I believe, it is the generalization argument and the assessment of consequences that it demands that matter to legal ethics, not the theoretical baggage the argument totes. Moral theory aims

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tations on what remains a maximizing framework. *See* S. SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM: A PHILOSOPHICAL INVESTIGATION OF THE CONSIDERATIONS UNDERLYING RIVAL MORAL CONCEPTIONS 14 (1982). These approaches appear to avoid the problem that consequentialism asks too much. Indeed, such strategies bring consequentialism into rough alignment with deontological theories, which typically distinguish obligatory from supererogatory good actions.

48. *See* D. LUBAN, *supra* note 1, at 117-18.

49. *See id.* at 120-25.

50. *Id.* at 129 n.4.

51. This is a highly controversial point of Kant interpretation, and my reading follows T. Pogge, *supra* note 38, at 2-10.

to systematize and explain our modes of moral deliberation and discourse, but it is those modes of thought, and not the competing theories, that matter to us in practice; as a morally troubled admirer once complained to Kant, "Now put yourself in my place and either damn me or give me solace. I read the metaphysic of morals and the categorical imperative, and it doesn't help a bit."[52] To the momentous question between deontology and rule-consequentialism we may therefore be tempted to echo the famous moralist Butler (Rhett, that is) and answer: Frankly, my dear, I don't give a damn.

II. THE POLITICAL ECONOMY OF THE SOUL

The conflict between role morality and common morality marks a conflict within the self—even, if I may put it melodramatically, a conflict between two selves within us. One is the "social" self made up by the roles we play, while the other is the self that we all harbor within, that—in some sense—we all are: the self that holds itself free and aloof from total immersion in any role. Treating role morality as the "default" position in its conflicts with common morality in effect gives priority to the social self; and this marks an important departure from a view expressed in *Lawyers and Justice*, according to which the two selves, or modes of regarding our selves, are equally fundamental. I shall now attempt to justify this change in view.

In *Lawyers and Justice*, I insisted on the centrality of the questions "who are we beyond the roles we play? How do we account for the fact that roles grip us, but only lightly or partially?"[53] I worried that viewing oneself as a kind of glassy essence independent of social roles "lapses into an incoherent transcendental romanticism."[54] As Roberto Unger has stated, a human being cannot live a worthwhile life fighting "a perpetual war against the fact of contextuality, a war that he cannot hope to win but that he must continue to wage."[55] But it is equally clear that flatfootedly identifying one's self with one's roles devastates the human spirit; as Unger explains this side of the dilemma, "The individual may vanish—to a greater or lesser extent, he will vanish—into a ready-made social station and find himself recast as a helpless placeholder in the grinding contrast of

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52. Letter from Maria von Herbert to Kant (Aug. 1791), in KANT: PHILOSOPHICAL CORRESPONDENCE 1759-99, at 175 (A. Zweig ed. 1967) [hereinafter KANT: PHILOSOPHICAL CORRESPONDENCE].

53. D. LUBAN, *supra* note 1, at 126.

54. *Id.*

55. R.M. UNGER, PASSION: AN ESSAY ON PERSONALITY 36 (1984).

genders, classes, communities, and nations."[56]

This dilemma forms the deep motivation of the debate between act- and rule-consequentialism, and for the remainder of this discussion I shall focus on this debate. The act-consequentialist proceeds from a deep intuitive sense that our freedom to choose, and thus to shake ourselves free from the demands of our roles, is unbounded. We live our lives one moment, or at any rate one episode, at a time, and thus we must scrutinize the consequences of our actions one moment or episode at a time. From this perspective it seems like a cowardly denial of freedom and responsibility to bring about inferior consequences simply because a prior rule or duty tells us to. As Bernard Williams writes (in a passage I quoted in *Lawyers and Justice*): "Whatever the general utility of having a certain rule, if one has actually reached the point of seeing that the utility of breaking it on a certain occasion is greater than that of following it, then surely it would be pure irrationality not to break it?"[57] Consequentialism, I have said, arose from the desire to replace morality founded on superstition and taboo with concern for the this-worldly consequences of our actions.[58] Rule-consequentialism seems from this standpoint to mark an incomprehensible and retrograde fetishism of rules and duties.

The rule-consequentialist, on the other hand, emphasizes the importance of stable expectations. Without rules to which we adhere and roles that we play with some degree of confidence-inspiring predictability, life would be unbearable. Moreover, as Unger

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56. *Id.* at 96.

57. B. WILLIAMS, *supra* note 43, at 102.

58. For the classical utilitarians, much of religiously-based morality amounted to superstition. Aldous Huxley offers a marvelous example when he discusses the history of hygiene and sanitation. In the middle ages, filth was conceived to be part of the human condition:

> God has decreed that "the mother shall conceive in stink and nastiness."
>
> That there might be a remedy for stink and nastiness—namely soap and water—was a notion almost unthinkable in the thirteenth century . . . . [E]ven if soap had been abundant, its use for mitigating the "stink and nastiness," then inseparable from love, would have seemed, to every right-thinking theologian, an entirely illegitimate, because merely physical, solution to a problem in ontology and morals—an escape, by means of the most vulgarly materialistic trick, from a situation which God Himself had intended, from all eternity, to be as squalid as it was sinful. A conception without stink and nastiness would have the appearance—what a blasphemy!—of being Immaculate.

A. HUXLEY, *Hyperion to a Satyr*, in TOMORROW AND TOMORROW AND TOMORROW 153 (1956). According to Huxley, one of the leaders in the English campaign for sanitation in the 19th century was Edwin Chadwick, a disciple of the utilitarian Jeremy Bentham. *Id.* at 162.

argues, stable contexts are crucial in mitigating the jeopardy of social existence and empowering us to take chances in our relations with each other: they are not just constraints, but "enabling conditions" of growth and self-transformation that acknowledge the essentially social character of our lives.[59] Rule-consequentialism, in other words, takes the social self as basic.

Unger views the dilemma between role and individuality, constraint and freedom, rule (or role) and act, as an irresolvable conflict within human life; and so do I. Why, then, do I now give priority to the claims of role?

I gave the germs of the answer in *Lawyers and Justice* when I wrote that we cannot resolve all conflicts between common morality and role morality in favor of the former. "It would be quite mad for someone to claim to be acting within a role, while backing out of its duties whenever the going gets tough."[60] As Wasserman has shown, however, just that would often be the outcome if we simply elected to balance the demands of role morality against the demands of common morality in each case—the act-consequentialist alternative to giving (defeasible) priority to the demands of role morality. For, as we have seen, when common morality clashes with role morality the marginal benefit of violating one's role obligation may be quite large, whereas the marginal damage to the role itself is almost always slight. In Wasserman's example, remember, the marginal benefits of diminished zeal in representing a guilty and unrepentant criminal defendant surely will outweigh the marginal costs to the whole system imposed by diminished zeal in this one case.[61] If an advocate's practice consists largely of the defense of guilty and unrepentant criminal defendants, as is the case in public defender offices as well as in white collar criminal defense, this same

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59. *See* R.M. UNGER, *supra* note 55, at 95-115. The importance and rationality of precommitment forms a central theme of J. ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY (1979). *See also* Holmes, *Gag Rules or the Politics of Omission* and *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 19, 195 (J. Elster & R. Slagstad eds. 1988) (pointing out the need to adhere to certain precommitments in a constitutional democracy). I have myself argued against the rationality of thoroughgoing precommitment, that is, precommitment that includes a commitment to refrain from investigating whether precommitments ought to be abandoned; this argument is perfectly compatible with treating precommitments less radically, as defeasible presumptions, as I do here. *See* Luban, *The Paradox of Deterrence Revived*, 50 PHIL. STUD. 129, 138-40 (1986).

60. D. LUBAN, *supra* note 1, at 125.

61. Wasserman, *supra* note 14, at 399. Let me remind the reader that we are stipulating that the crime has been violent and the proposed sentence neither disproportionate nor racially motivated.

argument will apply in a great many of her cases.[62] And thus an act-consequentialist criminal defense lawyer ought to diminish her zeal in all such cases—in far too many, indeed, for her to claim with a straight face that they are "exceptional"—even if she accepts the general argument for zeal in criminal defense.

Unless we give priority to the demands of role, a kind of paradox thus results. We may frame it as a contradiction among the agent's beliefs and actions:

(1) The agent acknowledges the moral worth of the institution that creates the role, as well as the importance of the role to that institution and—most importantly for the present argument—the centrality of a certain duty to the effective functioning of the role. That means that she agrees that widespread violation of the duty, even in cases in which it conflicts with common morality, would damage the role.

(2) Nevertheless, the agent finds herself electing to violate that duty every time it conflicts with common morality.

(3) And yet she insists that she retains her undiluted commitment to the role.[63]

What has gone wrong? The answer is illuminating.

The act-consequentialist, I have said, is driven by the sense that we live our moral lives one act at a time, and thus that shifting focus from acts to rules—or to the roles underlying the rules—amounts to a kind of fetishism and irrationalism. For the act-consequentialist, "my role as a lawyer" is simply an unhelpful abstraction from what is really real, namely a whole series of individual lawyering episodes. The act-consequentialist insists that the role is necessarily created anew in each episode by the decision the lawyer makes in that episode. And that decision must be based on an assessment of the moral goods and bads of acting in role *as those goods and bads manifest themselves in the current episode.*

The act-utilitarian view of professional roles is reminiscent of Descartes's famous argument that God creates us anew at every moment:

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62. *See* K. MANN, DEFENDING WHITE-COLLAR CRIME 233 (1985) (former white collar defense lawyer believes clients usually "objectively guilty"); Bellows, *Notes of a Public Defender*, in P. HEYMANN & L. LIEBMAN, THE SOCIAL RESPONSIBILITIES OF LAWYERS 69, 74 (1988) (former public defender acknowledges that most of his clients were guilty).

63. So-called "externalists," who argue that merely having a moral belief in and of itself provides no motivation for acting on it (the motivation is *external* to the belief) will perhaps find these three propositions less paradoxical than I do; but I am an internalist, for reasons I have explained elsewhere. *See* Luban, *Epistemology and Moral Education*, 33 J. LEGAL EDUC. 636, 645-47 (1983).

> For all the course of my life may be divided into an infinite number of parts, none of which is in any way dependent on the other; and thus from the fact that I was in existence a short time ago it does not follow that I must be in existence now, unless some cause at this instant, so to speak, produces me anew, that is to say, conserves me.[64]

For the act-consequentialist, the "self" of social role, for purposes of moral deliberation, should be regarded as nothing more than a Cartesian sequence of selves that the agent creates anew at each moment by conscious choice. We may call these "episode-selves."

Of course, none of us really experiences the flow of our own lives as a string of episode-selves, and indeed to do so is the hallmark of a kind of brain damage.[65] We all possess a person-defining interest in maintaining the integrity of our selves, and this implies a constancy incompatible with genuinely episodic selfhood. Indeed, it is precisely the demand for integrity that generates the paradox involved in insisting simultaneously that one occupies a role, that one understands its obligations, but that one habitually breaks the role.[66] Thus, the act-consequentialist suggestion amounts to the prescription that regardless of the psychological facts of the matter we should act *as though* we were episode-selves. Parallel to Kant's categorical imperative—"Act only according to that maxim by which you can at the same time will that it should become a universal law"[67]—we may construct an act-consequentialist imperative: "Act only according to that maxim that you could will if your life had begun yesterday and will end when the current episode is over." The question I wish to explore is what effects this act-consequential-

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64. R. DESCARTES, *Meditations on First Philosophy*, in 1 THE PHILOSOPHICAL WORKS OF DESCARTES 168 (E. Haldane & G. Ross trans. 1955).

65. *See* H. GARDNER, THE SHATTERED MIND 210-14 (1974). Describing a famous patient of A.R. Luria, Gardner writes:

> so overpowered was he by the particular imagery of concrete experiences that he was severely impaired in generalizing across situations, in classifying together members of the same category, such as variations of the same voice, or different glimpses of the same visage. This susceptibility to the accidental, and concomitant insensitivity to the general, proved not infrequently a serious handicap.

Id. at 212. J. Borges dramatized his plight in the story *Funes the Memorious*, in LABYRINTHS (1964). *But cf.* A. ADKINS, FROM THE MANY TO THE ONE 13-48 (1970) (arguing that preclassical Greeks lacked our conception of personal identity).

66. Though this may be less paradoxical for someone who is rather thoroughly alienated from her role. *See generally* J. SEGAL, AGENCY AND ALIENATION: A THEORY OF HUMAN COHERENCE (in press).

67. I. KANT, *supra* note 37, at 39.

ist "categorical imperative" has on our interest in maintaining the integrity of our selves.

Let us, then, consider the moral biography of a single agent, singling out the sequence of episodes in which a given role obligation conflicts with some obligation of common morality. We may assume, based on Wasserman's comparison of the costs and benefits, that in each episode considered by itself the obligation of common morality outweighs the role obligation. In each episode, the agent confronts a decision: to defect from the role obligation or to adhere to it.

Take, for example, a hypothetical public defender we shall call Cecilia, whose docket contains many guilty, violent, and unrepentant clients. Cecilia accepts the moral importance of zealous advocacy in criminal defense, and understands herself as a faithful and stalwart adherent to the advocate's role. Indeed, understanding herself that way is essential to her integrity as a lawyer—what we may call her "professional integrity." Her professional integrity will be one important component of her moral integrity as a whole. Can she maintain that professional integrity if she obeys the act-consequentialist imperative and behaves as though she were not a single Cecilia but a chronological series—a "community"—of episode-selves?

The answer is no. We are supposing, remember, that doing the morally right thing is essential to Cecilia's sense of integrity, professional as well as personal. When Cecilia narrows her focus to today's case she identifies Cecilia with today's episode-self, and today's episode-self has an overarching interest in *its* doing the right thing—creating the best consequences in the current case. That, we have assumed, implies defecting from the role obligation, since doing so will work only slight harm to the adversary system and accomplish a greater good by incapacitating her dangerous client.

Even if we suppose that each episode-self also has an interest in Cecilia's professional integrity over the span of her whole career, and does not simply dismiss the whole career as an ephemeral rule-consequentialist fiction, it will still defect in the current case. That is because an analogue to Wasserman's argument that the benefits of defecting from the role outweigh the costs in today's case applies among Cecilia's episode-selves in the same way that it applies among the members of the entire criminal defense bar. Regardless of what she does in her other cases—regardless, that is, of what her other episode-selves do—the *marginal* faithlessness to her role entailed by a single defection from zeal in today's case will be slight.

And just as Cecilia's professional integrity over her whole career will not be much harmed by today's faithlessness, it will not be much aided by today's fidelity. Since the gain in episode-self integrity outweighs the loss in Cecilia's professional integrity over her whole career, Cecilia ought to defect in today's case regardless of what she does in other cases (what her other episode-selves do).

In the language of game theory, the choice to defect *dominates* the choice to adhere to the role obligation: it is better from the point of view of Cecilia's integrity regardless of the choices of Cecilia's other episode-selves.

Or is it? The same reasoning applies in tomorrow's case, and in next week's case; put them all together, and she has been driven entirely out of the role, her professional integrity in tatters. That is the paradox: what is morally right, and essential to her integrity on an episodic, or case-by-case basis, is disastrous when the cases are taken collectively.[68]

I have organized the problem in this way to exhibit that Cecilia's problem is a version of the much-studied *problem of collective action*: the problem that self-interested actors typically underprovide themselves with collective goods. Here, the "collective good" is Cecilia's professional integrity, and the self-interested actors are Cecilia's various episode-selves. Collective action problems ordinarily arise among groups of people; but once we have come to regard our own career as a sequence of episodes, as an act-consequentialist must, then the problem arises equally among the "group" of our episode-selves.[69]

The problem of collective action is simply one instance of a more general problem, also much studied by game theorists: this is the so-called Prisoner's Dilemma, a situation in which the individually-rational decisions of many agents lead to a collectively irrational or self-defeating outcome.[70] Cecilia's difficulty may be understood

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68. This example illustrates how the integrity of Cecilia's role can be nickel-and-dimed away by her commitment to common morality. More common, I expect, is the opposite phenomenon: corruption by inches of our common moral commitments by the nagging compromises of our professional roles. In either case, I believe, the dynamics are more or less the same.

69. *See generally* M. OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 5-36 (rev. ed. 1971) (explaining how the collective action problem arises). I discuss collective action problems in D. LUBAN, *supra* note 1, at 364-67. The idea of regarding single individuals as multiple selves, so that problems of collective decision-making may arise for a single agent, is explored in THE MULTIPLE SELF (J. Elster ed. 1985).

70. The literature on the Prisoner's Dilemma is vast, but perhaps the most accessible work for the general reader is R. AXELROD, THE EVOLUTION OF COOPERATION (1984).

as an n-person Prisoner's Dilemma game, where her n episode-selves are the players of the game.

All this may suggest that act-consequentialist reasoning is not as rational as it seemed at first blush. But I do not accept this conclusion. As game theorists have come to realize, the paradoxical character of the Prisoner's Dilemma signals a deep contradiction between two conceptions of rationality, both of which are highly persuasive. One, as we have seen, is *dominance*: if option A is worse than option B regardless of what others—including other episode-selves—do, it is rational to choose B. (If zealous advocacy is worse than defecting in the present case regardless of what she does in other cases, Cecilia should defect.) The other is *best expected consequences*: if we can expect that, when the smoke clears, pursuing A will have led to an overall worse outcome than pursuing B, it is rational to choose B. (If defecting will lead overall to a self-defeating collapse of Cecilia's professional integrity, she is better off adhering to her role obligation.) The Prisoner's Dilemma constructs a situation in which dominance reasoning and best expected consequences reasoning diverge; hence the paradox.[71]

All of this may strike the reader as merely an arid exercise in cleverness. Annette Baier, dismissing game theoretic moral philosophy as a "male locker room," once wrote that "preoccupation with prisoner's and prisoners' dilemma is a big boys' game, and a pretty silly one too."[72] I sympathize with this view—and yet I am also convinced that a self can be divided against itself (I know that *my* self too often is). I am convinced that wholeness and integrity are difficult achievements that we can never take for granted; that in the quest for integrity there are many paths to well-intentioned self-defeat; and—most to the point—that the reasoning that creates the problem of collective action lies on one of the most familiar of those paths to me, and, I trust, to you. Quite simply, collective action

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For a proof that collective action problems take the form of Prisoner's Dilemmas, see R. HARDIN, COLLECTIVE ACTION 25-28 (1982).

71. A key discovery in the analysis of the Prisoner's Dilemma was David Lewis's proof that the Prisoner's Dilemma is a form of Newcomb's problem, a philosophical conundrum first analyzed by Robert Nozick that has typically been taken to illustrate the divergence between dominance and best expected consequences. *See* Lewis, *Prisoners' Dilemma Is a Newcomb Problem*, 8 PHIL. & PUB. AFF. 235 (1979); Nozick, *Newcomb's Problem and Two Principles of Choice*, in ESSAYS IN HONOR OF CARL G. HEMPEL 114-46 (N. Rescher ed. 1969). These papers, together with other major contributions to this analysis, are collected in PARADOXES OF RATIONALITY AND COOPERATION: PRISONER'S DILEMMA AND NEWCOMB'S PROBLEM (R. Campbell & L. Sowden eds. 1985). *See also* Lewis, *'Why Ain'cha Rich?'*, 15 NOUS 377 (1981).

72. Baier, *What Do Women Want in a Moral Theory?*, 19 NOUS 53, 54 (1985).

analyses are among the most compelling metaphors we have for the political economy of the soul.

The upshot of our Cecilia example is this. The tension between common morality, understood as a form of ideal act-consequentialism, and role morality, understood as a form of ideal rule-consequentialism, signals a deep divide between two profoundly compelling conceptions of reason. In *Lawyers and Justice*, I had expressed hope that these conflicting demands could simply be balanced against each other;[73] but the present analysis proves that straightforward balancing systematically unravels the agent's long-term integrity, her stability within her role.

If, on the other hand, we regard the demands of role morality, justified by the fourfold root inquiry, as defeasible presumptions, then stability becomes possible once more. I now see that this manner of understanding roles actually follows from the conclusion of chapter six of *Lawyers and Justice*, where I wrote:

> Our independence from roles derives from the claim of the moral *patient*, the person affected by our actions, and not the agent . . . . Such a moral patient cannot be identified with a role, because human woes do not respect role boundaries. Trouble, which cuts across roles, takes us to the lowest common denominator of all roles—and that is what we call *the person* . . . . Ultimately, we reserve our autonomy from our stations and their duties so that we have the freedom to respond to persons *qua* persons—to obey what one may call the *morality of acknowledgment*. The situation is curiously asymmetrical: we are bound to extend to others a courtesy we are bound to refuse to ourselves. It is a delusion to think of *myself* as just a person *qua* person, a "me" outside of my social station; but when the chips are down, it is immoral to think of you as anything less.[74]

Calling the extra-social self a "delusion" is strong language; like the suggestion that our independence from roles "kicks in" only when we are confronted by a fellow human being in trouble, whose trouble could not be assuaged were we to remain in our role, it clearly signals that only in exceptional circumstances concerning the distress of others should we step out of the duties of our station, provided of course that those duties are morally justifiable. And that is just to say that our "station," our role, assumes the default

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73. *See* D. LUBAN, *supra* note 1, at 125.
74. *Id.* at 126-27 (emphasis in original).

position in our moral lives.[75]

A few additional words about the "morality of acknowledgment" may perhaps be appropriate at this point. Although I currently am presuming in favor of the duties encapsulated in our recurrent roles, I do not regard duty as the primary concept of morality. Rather, I join with many contemporary feminist writers in insisting that the primary moral experience is that of responding to, or sympathizing with, the situation of particular other people. We often will have reasons for holding that response at arm's length, and among those reasons the demands of roles, as explicated through the fourfold root, will figure prominently. Yet the claim of other people upon us is never absent; as Martin Buber wrote, "All actual life is encounter."[76] The suffering of others magnifies and amplifies that claim, calling upon us to acknowledge the other person in ways that our roles cannot anticipate. Deontological moral systems, by contrast, typically shift the focus from our connection with others to our self-relation as expressed in the concept of duty.[77] Yet I think this inevitably leads us to set our sights too low; as Brian Barry nicely expresses it, "a good man cannot be defined as one who obeys certain minimum standards of duty. Victorian novels and biographies are thickly populated with self-righteous prigs who never did anything wrong . . . but still managed to make life hell for everyone around them."[78]

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75. I am unsure whether this conclusion brings me into disagreement with Postema, *Self-Image, Integrity, and Professional Responsibility*, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 286 (D. Luban ed. 1983); I am confident only that a reader who finds the question of professional integrity compelling ought to read Postema's essay.

76. M. BUBER, I AND THOU 62 (Kaufmann trans. 1970).

77. This conception of deontology motivates the important analysis of legal ethics in Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); expanded and republished in C. FRIED, RIGHT AND WRONG 167-94 (1978) (retitled "Rights and Roles").

78. Barry, *And Who Is My Neighbor?*, 88 YALE L.J. 629, 643 (1979) (review of C. FRIED, *supra* note 77). I cannot refrain from offering as a companion to Barry's point a letter from Kant to his own brother:

> Dear brother,
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> Mr. Reimer, the bearer of this letter, a relative [nephew] of your wife's, my dear sister-in-law, visited me, and I could not refrain from putting aside my tremendous chores (which I seldom do) in order to send you greetings. Despite my apparent indifference, I have thought of you often and fraternally—not only for the time we are both still living but also for after my death, which, since I am 68, cannot be far off. Our two surviving sisters, both widowed, the older of whom has 5 grown and (some of them) married children, are provided for by me, either wholly or, in the case of the younger sister, by my contribution to St. George Hospital, where provision has been made for her. So the duty of gratitiude [sic] for our blessings that is demanded of us, as our parents taught us,

III. ANARCHY IN THE U.K.

In chapter three of *Lawyers and Justice*, I addressed, briefly and no doubt inadequately, one of the most ancient philosophical problems about law: the problem of determining whether laws are ever a source of moral obligation.[79] The heart of my solution to this problem is that whenever laws amount only to a "vertical" relation between government—"the state"—and its subjects, they create no moral obligations. They amount to nothing more than commands. However, whenever laws can rightly be viewed as (instituting) cooperative schemes among citizens—when they establish "horizontal" relations—the possibility of obligation arises, generated out of solidarity with our fellows and respect for them.[80] Some laws establish horizontal relations among us, but some do not. As a result, some laws are a source of moral obligation, but some are not. To the extent that lawyers disrupt valid legal cooperative schemes, they wrong their fellows, and thus, the principle of partisanship, which requires lawyers to treat all laws as mere obstacles to or instruments of client interest, cannot be correct.

Wasserman accepts my four basic points: (i) that "vertical" laws—commands—are no source of moral obligations; (ii) that "horizontal" laws—social cooperative schemes—can be a source of moral obligation; (iii) thus, that we lie under an obligation to respect some, but not all, laws; and (iv) that the principle of partisanship therefore fails. He differs from me over the exact conditions under which horizontal laws create moral obligations.[81]

In a sense, then, I suspect that Wasserman's differences with me are not major. Indeed, I believe that we may agree even more than Wasserman thinks, for some of the differences he finds with my ar-

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will not be neglected. I would be pleased to receive news of your own family and its situation.

Please greet my dear sister-in-law. I am, ever affectionately,

Your loyal brother,
I. Kant

Letter from I. Kant to J.H. Kant (Jan. 26, 1792), in KANT: PHILOSOPHICAL CORRESPONDENCE, *supra* note 52, at 185. Every detail of this letter is delectable, but none more so than the signature. With commendable restraint, the editor comments, "Judging from this letter, Kant's feelings for his siblings were not exceptionally warm." *Id.* at 185 n.1.

79. *See* D. LUBAN, *supra* note 1, at 32-47.

80. I offer related arguments about the primacy of horizontal over vertical relations in the theory of national sovereignty I developed in *Just War and Human Rights*, 9 PHIL. & PUB. AFF. 160, 167-69 (1980) and *The Romance of the Nation-State*, 9 PHIL. & PUB. AFF. 392 (1980). I further develop these themes in *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152 (1989) [hereinafter Luban, *Difference Made Legal*].

81. Wasserman, *supra* note 14, at 404-14.

gument in *Lawyers and Justice* are based on what I take to be a misreading. As before, the fault here is mine, for my argument was excessively elliptical. I wish here to elaborate it. In another sense, however, the differences between us may run deep; at the end of this Essay I shall speculate about those differences.

In the subsequent discussion, I will focus on one example from *Lawyers and Justice* that Wasserman discusses at some length. "On a trip to London, you observe people queuing up at a bus stop. How nice! you think. How unlike Manhattan! Forthwith, you cut into the front of the line."[82] You have done something wrong, but what? What rules out anarchy in the U.K.? I argue that the obligation to participate in the queuing arrangement is like the obligation to obey horizontal laws; I offer the queuing example to motivate my argument that some laws create legitimate moral obligations. Wasserman locates the source of obligation in this example elsewhere, and concludes that the example has little bearing on the obligation to obey the law.[83] As we shall see, this difference is quite important.

I claimed in *Lawyers and Justice* that cooperative schemes create obligations when

(1) they create benefits;

(2) the benefits are general: they accrue, in a sense I shall explain subsequently, to the whole community;

(3) widespread participation in the scheme is necessary for it to succeed;

(4) the scheme actually elicits widespread participation; and

(5) the scheme is a reasonable or important one.

I should note that my argument in *Lawyers and Justice*,[84] including the three examples to which Wasserman directs his criticism, aimed primarily at showing that (5)—the reasonableness of the cooperative scheme—should be substituted for the stronger requirement that

(5') the benefits actually are accepted by citizens (either tacitly or explicitly).

This is a highly significant substitution, for it yields a significantly more paternalistic account of legal obligation than (5'): on my view, we may lie under an obligation to participate in reasonable, generally beneficial cooperative schemes even without accepting their benefits. Many theorists, and indeed several American subcultures—the "rugged individualists," the libertarians, the survivalists,

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82. D. LUBAN, *supra* note 1, at 40.

83. Wasserman, *supra* note 14, at 408-410.

84. D. LUBAN, *supra* note 1, at 39-42.

the Ayn Rand devotees—insist on (5') rather than (5); they view compulsory cooperative schemes with suspicion, as attempts by the collectivized multitudes to shanghai free individuals into press gangs to further alien and often stupid and unnecessary ends.[85] In my view, by contrast, the invention of such cooperative schemes lies at the heart of the human condition. They are not merely conveniences, or merely optional; and communitarians harping on "the social nature" of human life are not simply whistling Dixie.

Where does law fit into this picture? Cooperative schemes involving many people are hard to organize. Sometimes they require coordinating the behavior of multitudes; sometimes they require breaking deadlocks; and sometimes they face collective action problems. In many such cases, people acting on their own will find it virtually impossible to achieve the optimal result—in the language of game theory, there may be no equilibrium, or the equilibrium may not be optimal—but an external authority can create a stable and optimal outcome. This the authority does through law.[86] Strictly speaking, such laws are not themselves cooperative schemes; rather, they are instrumentally essential to cooperative schemes. Thus, still speaking strictly, laws themselves have no moral authority, though they may be necessary for the creation of schemes that possess moral authority.[87] In *Lawyers and Justice*, I ignored this distinction, but for my purposes both there and here it is unimportant, and I happily accept it.

I argued in *Lawyers and Justice* that noncompliance with a cooperative scheme morally wrongs our fellows who participate in it to the extent that it expresses disrespect for them. Sometimes noncompliance expresses no such disrespect, and in that case the moral wrong of noncompliance disappears.

From my point of view, the most characteristic, important, and interesting such case arises when people engage in conscientious disobedience to discriminatory laws, as was the case in the civil rights movement.[88] Discriminatory laws fail to obligate us because

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85. This is the theme of A. Rand's enduringly popular novels FOUNTAINHEAD (1943) and ATLAS SHRUGGED (1957).

86. Here I am generally following J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 231-52 (1980). For a mathematical elaboration of the highly restrictive conditions under which authority can be dispensed with, see M. TAYLOR, THE POSSIBILITY OF COOPERATION (1987).

87. *See generally* Regan, *Law's Halo*, 4 SOC. PHIL. & POL'Y 15 (1986).

88. I described my theory as a generalization of Martin Luther King's *Letter from the Birmingham Jail*, a letter he wrote in vindication of his conscientious disobedience to a court order enjoining him from protest activities in Birmingham, Alabama. *See* D.

they violate condition (2), the "generality requirement," which insists that the benefits of a law accrue to the whole community. In my characterization of the five necessary conditions for legal obligation, the generality requirement functions as a kind of equal protection clause, as I intimated in *Lawyers and Justice*:

> The complexities involved in applying the equal protection clause of the Constitution's Fourteenth Amendment graphically illustrate how hard it can be to determine when a legislative classification, which inevitably produces an unequal distribution of burdens and benefits, has done so fairly. A precise statement of the generality requirement will demand at least the complexity of a plausible theory of equal protection, and that is very complex indeed.[89]

This is put too obliquely, and I fear that Wasserman as well as other readers missed an implication of this analogy that I should have spelled out. The textbook summary of equal protection doctrine will serve to make the point clear. Faced with an equal protection challenge to a legislative classification, a court must first ascertain that the classification does not discriminate against historically victimized groups (suspect classes). Having ruled out that possibility, the court next asks whether the statutory scheme establishing the classification bears a rational relation to legitimate state ends; if so, the classification will be upheld even though some individuals lose by its establishment. To take a familiar example, a law restricting the practice of optometry—creating a licensing system that classifies citizens into those permitted to sell eyeglasses and those not—was upheld by the United States Supreme Court because requiring eyeglass prescriptions bears a rational relation to promoting public health.[90] In my terminology, this statute is generally beneficial *even though some people—those who wished to practice optometry without a license—emerged as losers*. A law may be *generally* beneficial, that is, even if it is not *universally* beneficial. This does not mean that distributive issues or fairness are unimportant: it means only that schemes can be fair even though they create some losers.[91]

LUBAN, *supra* note 1, at 46. I discuss this case, and King's argument, in detail in Luban, *Difference Made Legal*, *supra* note 80. *See* King, *Letter from Birmingham Jail*, in WHY WE CAN'T WAIT 77-100 (1963).

89. D. LUBAN, *supra* note 1, at 43-44.

90. *See* Williamson v. Lee Optical Co., 348 U.S. 483, 489-90 (1955).

91. This will come as no surprise to Rawlsians, who understand fairness to include the "difference principle," which maintains that inequalities may be justified provided they make the worst-off members of the group better off than they would be otherwise, nor to proponents of wealth maximization, who believe that a statute counts as generally

It may seem like doublethink to insist that a law can count as generally beneficial even though it renders some people worse off. Let me add a few remarks to make this idea more palatable and also to ward off misunderstandings.

I said earlier that we lie under an obligation to respect some, but not all, laws. I thus reject an all-or-none approach to the moral authority of law. It may seem that the only alternative to all-or-nothing legal obligation is an atomistic approach, according to which our obligation to respect a given law is determined by examining that law alone. This alternative, however, cannot be right either. For I have just argued that any given law, taken in isolation, may satisfy the generality requirement even though a certain person or group loses; and, in theory, the same person or group could lose as a result of every law, even though each law satisfies the generality requirement. In that case, however, the losing person or group has been treated so unfairly in a cumulative sense that no legal obligation should be recognized. The atomistic approach cannot account for this cumulative sense of unfairness.

The point is that even though we must not simply lump all laws together by asking about our obligation to obey "the law" (meaning every law), we *should* assess the fairness of each law against the background of other laws as well as on its own terms. The cumulative fairness of a whole set of laws requires dispersing the losses imposed by them among all the various groups and members of society: the same group that has lost out through the licensing of optometry should not lose out in most other statutorily-imposed classifications as well. Thus, the fairness and generality of a law means that the inequalities it creates are not in and of themselves unjustified, but also that they are cancelled out rather than reinforced by other laws. If the enactment of each new law makes the rich richer and the poor poorer, the legal system is not fair even if its component laws seem fair taken individually; or, to put it more accurately, the component laws are not individually fair even if they seem to be when they are scrutinized out of context.[92] When the

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beneficial even if it creates losers, provided that the winners could compensate the losers. In my view, however, an appropriate concept of fairness must take into account the positions of other members of society than the worst-off member (Rawls) or the average member (wealth-maximization and, generally, average utilitarians). *See also* McClennen, *Constitutional Choice: Rawls vs. Harsanyi*, in PHILOSOPHY IN ECONOMICS 93 (J. Pitt ed. 1981).

92. The view of fairness that I am proposing here has much in common with the view that Michael Walzer calls "complex equality." On this view, equality may be satisfied even though individual goods are distributed unequally, provided that winning the lion's

whole system is fair in this cumulative sense, it seems more plausible that a single law can be fair even though it creates losers.

The important point to take from this discussion is that a law may satisfy (1)-(5), and thus impose moral obligations upon us, even though we do not benefit from it. Wasserman errs, therefore, when he attributes to me the view that our duty of fair play rests on the benefits we receive from cooperative schemes[93] and thus that "our indignation at the person who cuts in front [of a queue] is aroused by her ingratitude" at the benefits conferred by the queuing arrangement.[94] Indeed, I intended my argument as an *alternative* to the Socratic theory that we owe obligations of gratitude to the state for benefits received.[95] The role of benefits—condition (1) above—in my argument is more indirect than Wasserman suggests. Only if a legally-created scheme creates benefits (for someone) does it make sense to regard noncompliance with the scheme as an expression of disrespect for our fellows; as I wrote in *Lawyers and Justice*, "If the members of my community . . . choose to stand immersed up to their necks in the outhouse tank, it is hard to see why I have good reason to go along with them."[96] The creation of benefits is necessary for us to regard the plan as a morally significant scheme of social cooperation; but having established that it is such a scheme, the moral obligation to participate follows from the requirement to respect our fellows, regardless of the actual receipt of benefits by any particular person.

It follows that when Wasserman protests that "[w]e would be equally indignant [at someone skipping in queue] even if the circumstances denied her any short- or long-term advantage from the queuing arrangement"[97] he has not raised an objection to my view but to a gratitude-based theory of legal obligation that I reject. On my view, the short- or long-term advantage you derive from a queuing arrangement need have nothing to do with whether you lie under an obligation to wait your turn. Wasserman and I agree completely about this case.

Wasserman, however, disagrees with me about the more gen-

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share of any particular good carries no implications for how one will do in the distribution of other goods. M. WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 3-30 (1983).

93. *See* Wasserman, *supra* note 14, at 413-14.

94. *Id.* at 409.

95. I did, however, criticize the argument from gratitude explicitly. *See* D. LUBAN, *supra* note 1, at 37.

96. *Id.* at 44.

97. Wasserman, *supra* note 14, at 409.

eral moral basis for queuing. I suggest that queuing establishes a cooperative scheme satisfying (1)-(5), and thus that the fairness and reasonableness of queuing obligate us to respect the arrangement, whereas Wasserman believes that the force of the example derives from "our pre-existing duty to defer to those who have arrived first. A rule of 'first come, first served' equalizes the burden of waiting in settings in which variations in need are relatively slight and impractical to ascertain. . . ."[98] Wasserman finds, we may say, a kind of natural law basis for the queuing arrangement: queuing is merely a scheme that "allows us to honor our pre-existing duty to defer to those who have arrived first."[99]

If morality or natural law truly mandated first-come-first-served, however, we ought to regard all other schemes for equalizing the burden of waiting as morally objectionable. To take the most common alternative to single-line queuing, we ought to condemn the multiple queues at supermarkets and fast food outlets on moral grounds, since they do not follow the "natural law" of first-come-first-served.[100] That seems odd to me. Suppose, moreover, that I reach the counter at Benny's Burrito Barn before a person in the next line who I observed coming in before me. If we truly recognize first-come-first-served as an antecedent duty, we ought to agree that I am obligated to offer that person the opportunity to go before me. Perhaps so; but here again my intuitions do not lead me to think anything of the sort.

Indeed, I detect an inconsistency in Wasserman's own views over just this point. Wasserman at one point likens multiple-line queuing arrangements in fast food outlets to a kind of lottery in which customers take "the luck of their lane."[101] That is precisely how it seems to me as well; but in that case he should acknowledge either that first-come-first-served is no natural law antecedent duty or else—a more complex view—that it is a peculiar sort of natural law duty that arises only when it is realized in a cooperative scheme and disintegrates when the cooperative scheme actually in place fails to institute it. I do not know exactly what to think about the latter alternative, other than that it differs from my own view only in a rarified and metaphysical way.

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98. *Id.*

99. *Id.*

100. In conversation, Wasserman has painted the memorable picture of Moses descending from the mountain to confront the Israelites carousing about the Golden Calf, bearing a stone tablet carrying the legend "First come, first served!"

101. Wasserman, *supra* note 14, at 410.

Why might Wasserman insist that queuing arrangements merely fulfill an antecedent duty of fairness rather than creating such a duty as I argue? My guess is that it is because first-come-first-served seems like the *only* fair scheme for allocating "the burden of waiting in settings in which variations in need are relatively slight and impractical to ascertain."[102] Perhaps he is right about this; perhaps there really is something morally deficient about multiple-lane queuing in the supermarket. After all, we might reflect, the persuasive force of the queuing example lies precisely in the fact that we all agree on the intuitive moral force of queuing; if queuing were just one of many equally fair patterns for boarding a bus, we probably would not find the example compelling. When there is only one fair scheme it seems to pre-exist the practical arrangements that realize it.

In that case, however, I think that we should shake free from the example long enough to recall that the overwhelming majority of community purposes can be realized fairly in a variety of ways. Consider the income tax. Most of us agree that tax burdens ought to be distributed fairly, but what does that mean? Does it mean equal tax rates? Equal loss of utility? Equal loss of percentage of utility? Clearly, arguments can be made for various such schemes, and even after settling the general question it would be strange indeed if only one possible tax schedule filled the bill.[103] Or consider bankruptcy. Is it really plausible that only one set of bankruptcy laws fairly distributes the losses among creditors?[104] Indeed, even natural law proponents deny that natural law dictates uniquely justifiable solutions to legal problems. In the words of John Finnis,

> in Aquinas's view, the law consists in part . . . of rules which are "derived from natural laws like implementations [*determinationes*] of general directives." This notion of *determinatio* he explains on the analogy of architecture (or any other practical art), in which a general idea or "form" (say, "house", "door", "door-knob") has to be made determinate as this particular house, door, door-knob, with specifications which are certainly derived from and shaped by the general idea but which could have been more or less different in many (even in every!) particular dimension and

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102. *Id.* at 409.

103. *See* Young, *Progressive Taxation and the Equal Sacrifice Principle*, 32 J. PUB. ECON. 203, 212-13 (1987); H. Young, When Is a Tax Increase Fairly Distributed? 5-12 (July 1987) (unpublished manuscript) (copy on file with author).

104. *See* J. FINNIS, *supra* note 86, at 188-93.

aspect.[105]

In the vast array of cases in which many different fair *determinationes* of the same collective end are possible, we will lie under no antecedent duty to bring our behavior into line with any one of these *determinationes*. Only after one of them has been enacted legally will we find ourselves obligated by fairness to respect the law. In such a case, I think, we will not be tempted to locate the obligation of fair play in antecedent duties.

Wasserman writes, "In both the bus-queue and blocked-lane cases, the obligation we feel to comply with the cooperative scheme is contingent upon our acceptance of the priority rule it enforces."[106] With the above observations in mind, I would recast his point in the negative: the obligation we feel to comply with the cooperative scheme is contingent on our not finding the priority rule it enforces morally objectionable. Or, in the terminology I introduced earlier, the obligation is contingent on our not finding the priority rule unfair, unbeneficial, or unreasonable. When only one fair priority rule exists, then Wasserman's phrasing and mine coincide: if we do not find a rule unfair and only one rule is a candidate, then we morally agree with it. But in the case of real-life laws, when many reasonable schemes are possible, then Wasserman asks too much: he conditions the moral obligation to comply with a cooperative scheme on its unique suitability, rather than its generally beneficial reasonableness.

In the end, I believe that this seemingly-minor difference may run very deep. When we admit that our fellows hold the power to obligate us to participate in schemes with which we disagree—schemes that may not be utterly brilliant or maximally fair—we have made an important concession of our own liberty. We acknowledge that we can be bound by social practices and histories that are imperfect and largely arbitrary. Few of us will derive comfort from this acknowledgment, for we all harbor a profound rebelliousness.[107] The desire to restrict our obligations to those legal schemes that are

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105. *Id.* at 284. For Finnis's entire discussion of this theme, see *id.* at 284-87.

106. Wasserman, *supra* note 14, at 410.

107. The writer and political scientist Victor Alba, who fought on the republican side in the Spanish Civil War, once told me a story that beautifully illustrates this rebelliousness. Reminiscing about the anarchists, Alba recollected that they were wonderful but impossible. Often an anarchist wandering the lines at night would give the wrong password and be met with a fusillade of bullets from the sentry. The sentry invariably missed (Alba: "Anarchists were terrible shots"), and when the wandering trooper approached and was asked why he had given the wrong password, he would answer: "Why? Because I have free will, that's why!" According to Alba, this happened not once but many times.

uniquely reasonable may not differ much in the end from the libertarian's desire to restrict our obligations to those schemes whose benefits we have explicitly accepted. Both arise from a kind of revulsion at falling into the clutches of other people, though we recognize at the same time that "no man is an island."

Earlier, I argued that the dilemma between role and individuality, constraint and freedom, rule and act, amounts to an irresolvable conflict within human life. It is romantic excess to insist on absolute freedom, but every surrender to constraint is a loss of something precious. If we can find no way out of this dilemma in practice, perhaps we should not be surprised to find it recurring, in one guise or another, throughout moral and political theory.