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THE LAWFUL AND THE JUST: MORAL IMPLICATIONS OF UNEQUAL ACCESS TO LEGAL SERVICES

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The summer before I started law school, I remember standing in Kramerbooks in Washington, D.C., and getting involved in a conversation with a man who was also looking at some of the new books on display. In typical Washingtonian fashion, he asked me what I did for a living. I explained that I was about to begin studying law. He was not a lawyer, but had a great interest in constitutional law and civil rights. He asked me to keep my focus on "justice," rather than simply studying "law."[1]

That conversation came back to me as I was reading Stephen Pepper's paper in preparation for this conference.[2] In the beginning of his paper, Pepper talks about the shortage of legal services.[3] In light of the conversations held yesterday afternoon,[4] and in particular Anthony Kronman's discussion of the legal profession,[5] I do not agree that there is a shortage of legal services in our society. We would all agree that legal services are distributed in an unequal manner. But I will go further and assert that there is a *mal*distribution of legal services: a systematic distribution of legal services that benefits one class and harms others.

Pepper also discusses the difference between that which is lawful and that which is just.

> Rights "as law" mark off an area of individual autonomy; how the individual uses that autonomy may or may not be morally justifi-

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1. For a very interesting discussion of how law teachers can focus on justice, see Jane Harris Aiken, *Striving to Teach "Justice, Fairness, and Morality,"* 4 CLIN. L. REV. 1 (1997).

2. Stephen L. Pepper, *Access to What?* 2 J. INST. STUD. LEG. ETH. 269 (1999) (hereinafter *Access to What?*).

3. *Id.* at 269.

4. Ronald D. Rotunda, *Innovative Legal Billing, Ethical Hurdles, and Middle Class Access to Legal Services*, 2 J. INST. STUD. LEG. ETH. 221 (1999).

5. Anthony T. Kronman, *Professionalism*, 2 J. INST. STUD. LEG. ETH. 89 (1999).

> able. . . . A lawyer who enables a client to achieve or actualize her rights—to act within that area of autonomy—does not necessarily enable a morally justifiable result.[6]

In these two sentences, Pepper succinctly identifies the central moral problem for lawyers. When we assist our clients in doing something they have the legal right to do, we may be helping them to do something that is unjust.

Pepper's paper for this conference builds on his seminal article from twelve years ago, in which he argued that lawyers should not be held morally accountable for helping their clients achieve immoral but lawful objectives.[7] He now adds a gloss to that argument, and states that when a lawyer assists a client in achieving an immoral (or unjust) result, the lawyer has an obligation to engage in a moral dialogue with the client "to ensure that the client has indeed *chosen* to use the law in this [immoral] way."[8] He believes that this moral dialogue with a client effectively discharges the lawyer's moral responsibility with respect to her work.

I would not want to underestimate the moral significance—and practical difficulty—of engaging in such a dialogue. The only times that I have spoken with a "client" this way occurred when I was clerking for a judge. When I worked for a member of Congress and dealt with morally salient subjects (such as the death penalty), I engaged in this kind of moral discourse with my colleagues, but not with my client.[9] Certainly, a lawyer who does engage the client in this moral dialogue shows respect for the client as a moral being, rather than simply making assumptions about the client's value system.

But I believe that such a conversation does not immunize the lawyer from moral culpability for assisting a client in achieving immoral ends. In this way, I take issue not so much with the assertions that Professor Pepper makes in his paper for this conference, but in his assumptions, which are based on the arguments that he developed in his earlier work. There, Pepper articulated perhaps the strongest argument for insulating lawyers from moral responsibility for assisting clients achieve immoral goals, noting that in our "highly legalized" society, individuals need the

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6. *Access to What?*, *supra* note 2, at 274. For other discussions of the morality of lawyers' role, *see* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311 (1990).

7. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role*, 1986 AM. B. FOUND. RES. J. 613 (hereinafter *The Lawyer's Amoral Ethical Role*).

8. *Access to What?*, *supra* note 2, at 276 (emphasis in original).

9. Kathleen Clark, *The Ethics of Representing Elected Representatives*, 61 L. & CONT. PROB. 31, 42 (1998).

assistance of lawyers to accomplish their goals.[10] He argued that it would be improper for lawyers to filter their professional work through their own moral beliefs because such filtering would interfere with clients' autonomy.

But Pepper also argued—unpersuasively, I believe—that this refusal to engage in moral filtering also promotes equality of access to law.[11] This is a difficult claim to make, especially in light of the fact that financial resources and legal services are not distributed equally throughout society. Pepper acknowledged this underlying inequality, but argued that it is not significant because "[w]e live in a primarily market system, not a primarily socialist system . . . . Lawyers cannot magically socialize the economy [f]or legal services."[12] He noted that other commodities, such as groceries and housing, are also distributed unequally, and remarked that "there is much less disquiet over the moral role of the grocer [and] housing contractor . . than that of the lawyer."[13]

What Pepper did not seem to understand is that there is a good reason for this difference in attitude. Lawyers are in a different position than grocers and housing contractors. A grocer's decision to sell bread to one person does not aggravate another person's hunger. A housing contractor's decision to build a home for one person does not cause another person's homelessness. But a lawyer's decision to intervene in a legal matter on behalf of one party may actually make the situation worse for the parties who cannot afford legal services.[14] This is most obviously true in a legal dispute where an unrepresented party will be disadvantaged if the opposing party is represented by a lawyer.[15] It is also true where the lawyer is assisting the client in planning a transaction, and persons who may be affected by the transaction are not represented or even notified. Such is often the case with lawyer-lobbyists who obtain favorable tax or other regulatory treatment for their clients.

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10. *The Lawyer's Amoral Ethical Role*, *supra* note 7, at 617 ("The lawyer is the means to first-class citizenship, to meaningful autonomy, for the client.").

11. *Id.* at 618 (In addition to autonomy, another "significant value supporting the first-class citizenship model is that of equality. . . For access to the law to be filtered unequally through the disparate moral views of each individual's lawyer does not appear to be justifiable.")

12. *Id.* at 618-19.

13. *Id.* at 619.

14. *Access to What?*, *supra* note 2, at 272 (comparing a lawyer to "a military tank—a tool of destruction and harm to persons the client chose to aim it at.").

15. In such situations, the legal profession does impose the minimal obligation on a lawyer "not [to] state or imply that the lawyer is disinterested." AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 4.3 (Dealing with Unrepresented Person).

Pepper argued that "it does not make sense to compound that inequality with another."[16] Here he seemed to presume that any moral filtering by lawyers will tend to accentuate rather than diminish that inequality.[17] But I believe it is lawyers' *failure* to filter that accentuates inequality. While there is a natural tendency for lawyers to identify with and favor their clients' interests, such a tendency could be countered by a professional requirement to think through the effect of one's work on those not represented.[18]

Pepper was right in his claim that lawyers' refusal to engage in moral filtering promotes autonomy, but wrong in his claim that it also promotes equality. There is a tradeoff between autonomy and equality. People who value client autonomy over equality will conclude, like Pepper, that lawyers' non-filtering or "amoral" role is appropriate.

In light of the systemic maldistribution of legal services, I believe that lawyers cannot simply hand off all moral responsibility to their clients. Because of the unequal access to legal services, and because laywers can assist clients to accomplish unjust but legal ends, I believe that lawyers have a moral obligation

either	to systematically provide legal services to those who would otherwise be unrepresented or underrepresented;
or	to systematically consider the impact of their work on the unrepresented or the underrepresented.

As a profession, we have failed to take the first option. Therefore, as individuals, we have an obligation to take the second option. What I am suggesting is that we incorporate into our notion of professionalism some kind of "preferential option" for the unrepresented and the underrepresented.[19]

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16. *The Lawyer's Amoral Ethical Role*, *supra* note 7, at 619.

17. *Id.* at 620 ("To suggest that transforming the amoral facilitator role of the lawyer into the judge/facilitator role . . . would compound inequality upon inequality — first the inequality of access to a lawyer, then the inequality of what law that particular lawyer will allow the client access to.").

18. *Cf.* ABA Model Rule 3.3 (requiring a lawyer in an *ex parte* proceeding to provide all relevant facts and law — not just that favoring her client).

19. It is beyond the scope of this brief comment to develop fully the contours of such a moral obligation. *But see* David Fagelson, *Rights and Duties: The Ethical Obligation to Serve the Poor*, 17 L. & INEQUAL. 171 (1999); Karen A. Lash, Pauline Gee, & Laurie Zelon, *Equal Access to Civil Justice: Pursuing Solutions Beyond the Legal Profession*, 17 YALE L. & POL. REV. 489 (1998). For some religious writing about the moral obligation to consider the interests of those without power, *see* POPE JOHN PAUL II, CENTESIMUS ANNUS ¶ 58 (1991) ("It is . . . necessary that in evaluating the consequences of their decisions, [international] agencies always give sufficient consideration to peoples and countries which have little weight in the international market, but which are burdened

Lawyers tend to ignore the distinction between what the law entitles our clients to do and what justice requires our clients to do. Stephen Pepper challenges lawyers to engage in a moral discourse with clients about the choices that the clients make, and argues that such a discourse discharges a lawyer's moral responsibility for the client's action. I believe that lawyers must go further, and accept moral responsibility for the impact of our work on others who do not have equal access to legal services.

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by the most acute and desperate needs . . . ."); NATIONAL CONFERENCE OF CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL: A PASTORAL MESSAGE ¶ 16 (1986) ("As followers of Christ, we are challenged to make a fundamental 'option for the poor' — to speak for the voiceless, to defend the defenseless, to assess life styles, policies, and social institutions in terms of their impact on the poor.").