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Access to What

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I. "ACCESS TO JUSTICE"

What do we mean when we say "access to justice?" Most immediately we tend to mean access to the "system of justice." This in turn is meant to refer to our formal methods of dispute resolution: civil and criminal litigation. Because only lawyers are allowed to represent parties in litigated matters, "access to justice" in this sense often refers to the distribution of lawyer services in regard to litigation, and in the attendant negotiations of disputes prior to litigation. Our concerns in this area tend to focus on the shortage of such services, a shortage primarily rationed by a private market for lawyer services. Members of the middle and lower socio-economic classes have less access to our formal processes for dispute resolution as a result of the function of the market, and this is troubling in regard to what would appear to be a basic function of government.

Consideration of possible remedies for the problem tends to focus on four areas of concern. First, *pro bono* representation by lawyers is often considered a substantial answer, and how this might be increased, either voluntarily or by legal obligation, is a major concern. (This answer is frequently articulated by bar leaders as a primary element of professionalism, and more *pro bono* representation often cited as a way to maintain professional independence from outside interference by non-lawyers.) Second, various mechanisms to lower the cost of lawyer services are considered: advertising, clinical forms of practice, fewer years of legal education, more use of systems technology and mechanization, greater use of paralegals, and so on. Third, and blending somewhat into the second category, various ways of loosening the monopoly on legal services are considered: allowing the independent practice of paralegals,

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for example. Fourth, and quite different from the other three, public funding of legal services for the poor through the federal government has been significant, controversial, and diminishing.

A second meaning of access to justice is broader, focusing not just on litigation and dispute resolution, but on access to legal advice more generally. Information and assistance about how to form a corporation or draft a binding contract, about one's legal rights on the street ("street law"), one's rights under wage and hour laws or a union contract, how to sell or buy a house or condominium, and so on. Concerns about class inequality in regard to such access are prominent here as well, but somewhat less pointed than in regard to the central governmental function of court adjudication of disputes. The same three general remedies tend to be the most prominent, with more emphasis here on the third possibility.

Issues of access to legal services are of utmost importance. Over the past thirty years advertising for legal services, the development of "clinic" and "storefront" systems for marketing legal services, and greater competition among lawyers have all ameliorated the problem somewhat. Moving in the other direction, the problem has been exacerbated by substantial reductions in funding for the federal Legal Services Corporation. The problems of access for the middle and lower classes have been recognized for a long time, but neither remedies nor the will to construct solutions have been forthcoming. I will address neither the problem, nor possible solutions, however. My topic here will be different. I wish to address a secondary and perhaps less important problem: assuming a person is fortunate enough to have competent legal assistance or service, what is it that is being provided?

II. Access to Law

What do we mean when we say that lawyers provide "access to justice?" At least for those of us who are academics, I don't believe we mean the right outcome or the morally correct outcome, or even the substantively just outcome. The outcome determined by the law or legal procedures sometimes is just, sometimes not; sometimes it is the morally correct outcome, sometimes not. What we mean when we say that a person has been given "access to justice" is that her claims have been determined by the legally appropriate procedures, that she has been given "all that the law allows," or that her legal rights have been recognized. We are defining justice in procedural terms for the most part when we refer to "access to justice," and are willing to admit that the result may well be far from substantively just.

I would submit that it is more descriptively accurate, and more helpful, to say that what lawyers provide is access to law. In their most broad and basic function, lawyers provide knowledge of the law and the alternatives and constraints it presents to clients. They are the channels by which the law is most frequently transmitted to those it is intended to affect. In a somewhat narrower sense, lawyers provide access to legal devices such as contracts, the corporate form of enterprise, trusts, forms of property ownership and sharing, and so on. In a yet narrower sense (but perhaps the one most common to the public), litigators provide access to our formal methods of dispute resolution. When a dispute cannot otherwise be settled, an aggrieved party can turn to the state for an authoritative decision, and thereafter for the use of state force if necessary, to resolve the problem.

The results of all these uses of law may or may not be just. The criminal law sets a floor. But it is a low floor. Much conduct that is not criminal—that is clearly above this minimum and therefore lawful—is nonetheless wrongful. Much of the vast array of regulatory law is intended to serve, in one sense or another, the general welfare. OSHA regulations, securities laws, zoning, etc. are often intended to lead to good results in the aggregate. But in any individual case they may make little or no sense: they may clearly serve their good purposes, they may be morally neutral, or they may be perverse in their affect. That is the risk of general laws for general purposes. Worse, some argue that regulatory law is in its creation similar to market commodities, available for a price, and not necessarily intended to serve the general welfare. When we come to contracts, corporations, leases, trusts, wills, and so on we have a similar situation. In general they empower and assist people in what they want to do. But there is no reason to believe that the result of any particular usage of a contract or the corporate form will be just or morally correct. The motives, foresight, and self-restraint of people using these devices are as mixed as motives generally.

Over ten years ago as part of an argument that what lawyers justifiably do is provide access to law, I likened law to a large and complicated machine that the individual could not use without the help of someone familiar with the machine and trained in its use. The lawyer knows "the correct wrenches, meters, and more esoteric tools, and knows how and where to use them" to make the machine work for the client.[1] From the audience, after the presentation of this paper, Professor Tom Morgan

1. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role*, 1986 AM. B. FOUND. RES. J. 613, 623-24 [hereinafter *The Lawyers Amoral*].

suggested that the machine was all too often like a military tank—a tool of destruction and harm to persons the client chose to aim it at. When we say we provide, or want to provide, "access to justice," do we mean that tank and its destructive power?[2]

Some common examples. Lawyers can, and often do, use cross-examination to suggest that a truthful witness is lying or mistaken. Sometimes this leads to a result contrary to what the substantive law would call for if the truth were before the court. What do we mean when we call this access to justice? On occasion a lawyer will use the statute of limitations to defeat a debt that the client admits he owes. Is there good reason to call this "access to justice"? Excellent lawyers have labored with great success for many years to defeat product liability tort claims by injured smokers and their survivors. They have provided access to their clients to the "system of justice." Have they provided access to, or defeated, justice? The examples are legion.

III. Confusing Law and Justice

There are two ways we can, with a straight face, say that access to law is access to justice. First, we can use an operational definition for what we mean by justice. Under such a definition, justice is the result of our systems of laws and legal devices, procedural and substantive combined—whatever the "system of justice" and our laws (which it administers) deliver *is* justice. There is much to be said for this view. We structure, to the best we can, a fair and just procedural system and create substantive law directed for the greatest good, and we've done the best we can. To expect a legal system which must serve an extremely large and varied population living in a technically highly-developed and interdependent culture to deliver more perfect justice may be unrealistic and may devalue something which is itself a major accomplishment. (And it is in this sense that greater access to justice, more widely and fairly distributed access to the system of laws and its administration, is clearly a good thing.)

Second and related, we might mean that lawyers provide access to justice in the aggregate. OSHA law in the aggregate probably improves and saves lives, although individual instances of its application or expense of compliance may be far from just. Tort law, similarly, in the aggregate probably saves limbs and lives and improves our society,

2. Another apt analogy for law in this sense would be to public highways or other systems of infrastructure for communications and travel (the telephone system, for example.) Such structures are intended to empower and enable, but they empower the good and the bad alike—specific use is left to private choice.

despite many examples of unjust results in individual cases or unjustifiable expense required to avoid liability for highly unlikely or minor injuries. Similarly with criminal procedure. In the aggregate the system may well be just, despite those nine guilty people we let go free to ensure that a tenth is not wrongly convicted, and despite those who plead guilty when in fact innocent to avoid the risk of an incorrect conviction and significantly greater punishment.

Despite these two possible meanings for "access to justice," in the individual case most of us will admit that access to law may or may not result in access to substantive justice. Thus, lawyers on many occasions will work "injustice." And thus the attraction of the aggregate view or of the operational definition view. But the conceit that access to law is the same thing as access to justice, the conflation of law with justice (or the belief that procedural justice is all there is), although understandable, is not harmless. It is a confusion which can obscure from a lawyer what he or she is doing. I think it important that lawyers in their daily tasks and interactions with clients keep the distinction in mind, and that we who teach the subject of ethics to future lawyers provide them with an understanding which will assist them in doing so. Before turning more directly to how these two tasks might be facilitated, I will briefly delineate two additional ways we can conceive of this distinction between law and justice.

A. The Difference Between Right Conduct and Legal Rights

The fact that you have a legal right to do x does not mean that it is morally right for you to do x; a right to do x does not entail that x is the right thing to do. A great deal of speech protected by the first amendment, for example, is unjustifiably harmful to other people. Or you may have a right to enter into a contract to distribute cigarettes. It does not follow that entering into the contract and distributing cigarettes is the right thing for you to do. As patient or client you may have a legal right to file a malpractice suit against a lawyer or doctor. Under the facts and the law you might have a sufficiently colorable claim that a complaint would not be considered frivolous and subject to dismissal or sanction. Under those same facts, however, the likelihood of success might be so low and the absence of truly wrongful or negligent conduct on the part of the doctor or lawyer so clear that it would be a moral wrong for you to file the suit.

The communitarian critique of rights has focused on this distinction[3], a distinction which is in many ways the same as the gap between law and justice. Rights "as law" mark off an area of individual autonomy; how the individual uses that autonomy may or may not be morally justifiable. (And this is true even when the moral and political justification for the right is perfectly clear and generally agreed to.) 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. (And this is true even if there is general agreement that it is morally appropriate for the lawyer to assist the client to effectuate her rights. Thus, it may well be morally justifiable for the lawyer to enable the client to effectuate an unjust result.[4]) That a person has a right to behave in a particular way does not mean that a person is not subject to justifiable moral criticism for so behaving. This gap between what a client has a right to do and what it is right for the client to do is an unavoidable problem for lawyers.

B. Law and Morality

When we conclude that there is a gap between law and justice, do we mean something significantly different than that lawful conduct may well be morally wrongful, morally unjustifiable aside from its legality? For the purposes of exploring lawyers' ethics—my purpose here—I would say we do not. The first definition of "justice" in the AMERICAN HERITAGE DICTIONARY is: "a. The principle of moral rightness. . . b. Conformity to moral rightness in action or attitude." The sixth definition is: "The administration and procedure of law."[5] It is the gap between these two meanings of justice that I am concerned with in this essay. Although justice might connote something more formal, more systematic or more general than morality, development of such a distinction is unnecessary to explore the gap between law on one side, and justice and morality on the other.

IV. THE LAWYER'S FUNCTION IN THE GAP BETWEEN LAW AND JUSTICE

The lawyer's primary function is to provide access to the law (in its many and varied guises and ramifications), and there is frequently a gap between what the law allows or requires and what would be just under

3. *See* Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 1989 (1994) (offering an illuminating discussion and a critique of the critique).

4. *See infra* text accompanying note 8.

5. THE AMERICAN HERITAGE DICTIONARY 694 (2d ed. 1982).

the circumstances. What is the lawyer's responsibility in regard to that gap?[6] Over ten years ago I articulated a moral justification for the lawyer providing access to the law, a moral defense of providing such access even when the client might be using the law for morally wrongful conduct.[7] This argument was clearly based on effectuating client rights even if their use was not morally right, on law over morality in the individual instance.

In a nutshell, the argument was quite simple:

> Law limits, channels, and empowers. It is a formal creation of society; unlike the help of a spouse or a friend, it is by its nature intended to be available to all. In a highly legalized society, access to this formal public good greatly affects one's capacity to act effectively (one's "autonomy"). And most significant to the issue at hand, access to the law can be had *only with the help of a lawyer.* The system of law is in form available to all, but the lawyer is the only instrument for access to the system, the only instrument through which law becomes actually accessible. Lawyers are therefore more appropriately thought of as part of the formal legal system than as part of the informal social web surrounding each of us. To see lawyers as being on the informal side of the line—like spouses or friends, free to assist or not assist on the basis of their total personalities, their idiosyncratic personal convictions and their whims—is to put law itself on that same side of the line, and to determine access to the law on the same unequal, highly contingent, often whimsical basis. To do that is to informalize and subjectify law. It is wrong. Both autonomy and equality are served in our society by lawyers acting on the basis of a role-specific ethic which creates a kind (and perhaps degree) of formal obligation quite different from the informal ethical roles of spouse or friend.[8]

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6. My focus here is on the day to day work of lawyers in representing clients. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1969) states in part that "A lawyer should assist in improving the Legal System.". This "extra-representational" role is important and merits examination, but is not what I am concerned with here.

7. *See The Lawyer's Amoral, supra* note 1. The theory was based upon and similar to that of Monroe H. Freedman. *See, e.g.,* MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975); MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS (1990); *See also* Charles A. Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

8. Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. B. FOUND. RES. J. 657, 666. This particular review of the argument was in the context of responding to Professor David Luban's criticism. *See* David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637 (suggesting that lawyers simply refuse to assist in morally wrongful conduct by clients, along the model of a spouse's freedom to refuse to assist the other spouse).

Because the core purpose of law is to be known so that it can shape, enable, guide or limit conduct, lawyers serve the purposes of the law—as well as their clients' rights and autonomy—by providing access to the law.

I remain persuaded that lawyers ought to have a role-specific ethic under which their primary obligation is providing clients with access to the law. This "amoral" ethic is both morally and politically justifiable and appropriate, and in many ways admirable. From this perspective lawyers are not responsible for the gap between law and justice. Responsibility lies with the lawmakers who have created the law in question, and with the clients who have chosen to use that law in the particular circumstances. What the lawyer can be responsible for, however, is to ensure that the client has indeed *chosen* to use the law in this way. The lawyer can be held responsible for ensuring that the client knows there is, in the given situation, a gap between law and justice, and that it is *the client*—not the law and not the lawyer—who will be primarily responsible for injustice if it occurs.

Thus, the lawyer's *primary* job is providing access to the law. There ought to be, however, a *secondary* obligation: When the gap between law and justice is significant, it ought to be part of the lawyer's ethical responsibility to clarify to the client that she has a moral choice in the matter. It ought to be part of the lawyer's ethical obligation to clarify for clients that merely because one has a legal right to do x, doing x is not necessarily the right thing to do. The lawyer ought to ensure that the client is aware that x, though lawful, may well be morally unjustifiable. In other words, although the lawyer is not directly morally responsible for assisting the client's wrongful or unjust conduct within the bounds of the law, the lawyer is responsible for ensuring that *the client is morally responsible for that conduct*, that the client has chosen it knowing of the moral dimension of the choice.

Such a conversation would be part of what I have, following Professor Thomas Shaffer, called the moral dialogue. It has its risks. The lawyer may intimidate, manipulate, embarrass or even humiliate the client.[9] Such a conversation may, on occasion, be a significant barrier to the client's obtaining access to the law. All the good reasons for providing "amoral" access to the law—autonomy, equality, effectuation and availa-

9. *See* Stephen L. Pepper, *Autonomy, Community, and Lawyers' Ethics*, 19 CAP. U.L. 939, 944-57 (1990) (offering a fuller discussion of the risks involved in the moral dialogue). In addition to risks to the client, there may be risks to the lawyer. The client may be uninterested in what the lawyer has to say, or find it officious, meddling or offensive. The client may, unfortunately, decide that she prefers a less forthcoming lawyer. This is discussed briefly at part VI below.

bility of the law—thus suffer a discount to some extent as a result of such an obligation on lawyers.

But the discount is justified by the risks on the other side: a confusion of law with justice, a confusion of that to which there is a legal right with that which is right. The client comes in with a human problem—family, business, corporate—and the lawyer distills it down to a legal problem. Because the lawyer is in the business of providing legal assistance, the lawyer will define the problem in legal terms, usually involving a legal goal and legal means. This will tend to distill, to some extent, the moral (and more human) elements from the situation. In addition, the lawyer, as part of this process, often will presume the client's interests are the "usual interests": maximization of wealth and maximization of freedom (or avoidance of incarceration). The end point of such a process sometimes can be unpleasant to contemplate:

> The upshot is that a man whose business it is to act for others finds himself, in his dealings on his client's behalf with outsiders, acting on a lower standard than he would if he were acting for himself, and *lower, too, than any standard his client himself would be willing to act on*, lower, in fact, than anyone on his own.[10]

The possibility of that end point requires the discount as remedy. A role-specific morality which favors access to law over just outcomes is so powerful, and so dubious, that the discount is warranted. For both lawyer and client to point at one another in regard to moral responsibility is intolerable.

Assume the client is being sued on what she admits is a just debt, and she is able to pay with no significant sacrifice. Assume further that under the facts the lawyer knows there is either a statute of limitations or statute of frauds defense which will succeed. The lawyer certainly ought to inform the client of the valid defense. To tell the client there is no defense and to fail to assert it would be both to mislead and to deny access to the law. For the lawyer to assume that the client wishes to take advantage of the defense, however, is to be disrespectful to the client and to make too much of the law. The lawyer should point out to the client the moral wrongfulness of avoiding a just debt on the basis of a "technical" defense. It may, in addition, be appropriate (and possibly persuasive) to explain the reasons for the defense—why we normally require the obligation to be in writing, what is the purpose of statutes of limita-

10. Charles Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 6 (emphasis added) (1951).

tions—and that these reasons do not apply in the case of this debt.[11] Because the client in this case admits the debt and that it is justly owing, the purposes behind the defenses do not apply. Thus, it does not serve the purpose of the law, nor does it serve justice, to invoke the defense to defeat this debt.

Whether the client is persuaded not to exercise her legal right is the client's choice and the result is the client's responsibility. The law has created the defense and made it available. (Presumably the lawmakers knew that the general rule would, on a significant number of occasions, defeat just debts. In the aggregate the benefit of the defense must have been thought worth the costs.) The lawyer has communicated the law to the client, and made it available for her use. In addition, the lawyer has communicated to the client the gap in this particular instance between that which is legally available and that which is just. The choice, given the existence and inflexibility of the defense, ought to be the client's.[12]

V. Law School Ethics Education and the Gap Between Law and Justice

William Simon believes the law school course encompassing legal ethics usually turns out to be "dull and dispiriting," "boring and insubstantial." This is so, he maintains, because of the "two prevailing conceptions" of the field. The first conception understands the subject to be primarily, if not exclusively, the rules of the disciplinary codes. The second focuses upon the professional role obligations of lawyers and the conflicts they entail with "the private or personal moralities of individual lawyers."

> The trouble with the disciplinary rule conception is that it does not have much to do with ethics or responsibility; the trouble with the personal morality conception is that there is nothing especially legal or professional about it. The first treats legal ethics as merely a set of rules; the second as purely individual values.[13]

There is an available conception for the structure of the ethics course quite different than that evoked by Professor Simon, a conception

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11. Jamie G. Heller, Note, *Legal Counseling in the Administrative State: How to Let the Client Decide*, 103 Yale L. J. 2503 (1994).

12. The general nature of such conversations is not difficult to imagine; often the specifics are very hard to imagine. For some further examples, *See* Thomas L. Shaffer and Robert F. Cochran, Jr., Lawyers, Clients, and Moral Responsibility (1994); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 Yale L.J. 1545, 1600-1607 and sources cited there.

13. William H. Simon, *The Trouble with Legal Ethics*, 41 J. Legal Educ. 65, 65-66 (1991).

related to the gap between law and justice which we have been exploring. It is a structure based upon two explorations, one concerning access to law, the other concerning the relation between access to law and personal morality and justice. If one begins the course by constructing a model of lawyers' professional ethics under which the primary function of the lawyer is to provide individual clients with access to the law, and the moral and political justification for such a model,[14] both of Professor Simon's "troubles" with the course in the quoted passage tend to disappear, or are at least substantially ameliorated.

First, such a model provides a context from which the individual rules can be understood and critiqued. How does this rule function in relation to the overall goal of providing access to the law for individuals? Does it protect the vulnerable client from the more powerful and knowledgeable professional? Or does it function to maximize the income of the profession as a whole (or individual lawyers), rather than facilitating access to law or protecting clients? Does the rule favor the interests of elite lawyers (commonly those who serve large corporate clients) over the non-elite portion of the profession (commonly those who serve individuals or small businesses)?[15] Questions such as these provide a meaningful context into which to integrate the individual provisions of the disciplinary codes. In addition, the model provides a starting place for consideration of alternatives. Each student can be encouraged to use the course as an occasion to construct their own professional ethic. Alternative models can be considered. The tour through the rules assists in motivating and enabling these considerations as well.

As an aside, it is interesting to note that the Code of Professional Responsibility articulated more directly the client-centered "access to law" model. Ethical consideration 7-1 stated:

> The duty of a lawyer, *both to his client and to the legal system*, is to represent his client zealously within the bounds of the law. . . In our government of laws and not of men, each member of our society is *entitled* to have his conduct judged and regulated in accordance with the law; *to seek any lawful objective through legally available means;* and to present for adjudication any lawful claim, issue, or defense. (Emphasis added.)

14. *See* text accompanying Section V. *See also The Lawyer's Amoral, supra* note 1, at 615-24.

15. *See, e.g.*, Philip Schuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244 (1968); JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1994).

Ethical considerations 7-1 through 7-10 elaborated a coherent client allegiance model, including the moral dialogue (EC 7-8). Model Rule 7-101(A)(3) contained a general "do not harm the client" provision.[16] These general "client allegiance" and "access to law" provisions have disappeared with the new Model Rules of Professional Responsibility, which present a far more ambiguous message and appear to have no conceptual core in relation to allegiance. What was lost in coherence and concept may have been more than made up for, however, in regard to black letter protection for clients. Model Rules 1.1 through 1.4 and 1.6 may well create more effective, practical benefits for the client than the hazier Disciplinary Rule provisions and "aspirational" Ethical Consideration provisions of the Code. In addition, Model Rules 1.2, 1.4, and 2.1 *require* far more in the way of client counseling than anything in the Code.

Having constructed for the class a model of lawyers' ethics which is client-centered and based on the function of providing access to law, a foundation is in place for considering the gap between law and morality or law and justice. The lawyer's role in providing access to law under this vision is supported by substantial moral and political justifications. On those occasions when the legal result is not just, is morally wrongful, the moral values which lead to such a conclusion in the particular situation can be articulated and compared with those justifying the general role and approach. The general can be balanced or compared against the particular; conclusions can be sought. Some of those conclusions might be: The general role is unjustifiable. This particular rule is wrong. In this case the result is wrong, but the general values outweigh the wrongfulness of this particular result. The wrongfulness of this particular result is so substantial that the generally justifiable values supporting the general role are overcome. And so on. In this way the second of Professor Simon's concerns is substantially ameliorated. The "purely individual values" have been engaged with (and perhaps to some extent incorporated in) the more general ethic, and shown to have genuine and substantial weight in relation to it. These values have been publicly articulated and probably reinforced as legitimate. To the extent they are shared, which is probably substantial, they are no longer individual, but communal.

16. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7-101(A)(3) (stating "A lawyer shall not intentionally: (3) Prejudice or damage his client during the course of the professional relationship. . .") 7-101(A) prohibited a lawyer from failing "to seek the lawful objective of his client through reasonably available means. . ." *See id.*

The next step is consideration of how to deal with the gap between law and justice as a practical matter in the context of some particular example of client conduct and lawyer service. To the extent the "access to law, client centered" ethic is the one accepted, the moral dialogue (as developed in part IV above) is the obvious first step—a step which respects client, lawyer, and effected third parties. The lawyer can engage the client in regard to the possible wrongfulness of the contemplated conduct or result (and this can be done in light of the answers developed in the previous paragraph.) Conscientious objection to the role may be the appropriate answer. Perhaps the lawyer should withdraw. Or, under Model Rule 1.2(a), refuse to take the action in question.[17] Or take other steps to prevent the client's intended actions, such as revelation to authorities or intended victims.

Class consideration of the gap between law and justice along these lines is quite likely to involve the "type of creative, normatively charged judgments [which are] the distinctive ethical component of the ideal of professionalism." Under this vision, "professional judgment [is] a complex and creative effort to apply general values to particular circumstances. . ."[18] For reasons which remain obscure to me, Professor Simon believes that the "individual" and "moral" nature of the justice side of such considerations somehow render them inappropriate for or unlikely to generate "creative, normatively charged judgment" and discussion.[19] Both in theory and in my classroom experience it seems that quite the contrary is true. The gap between law and justice, or between and law and morality, has been placed in a coherent normative context which

17. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (stating that a lawyer must "abide by a client's decisions concerning the objectives of representation," but need only "consult with the client as to the means by which they are to be pursued.") In addition, under Rule 1.2(c) the lawyer can "limit the objectives of representation" if the client consents following consultation. *See id.*

18. *See* Simon, *supra* note 13, at 66.

19. *See id.* at 69. Professor Simon places "personal morality" and "subjective norms" together in one category and assumes that "general social values" and "universal interests" are found only in an entirely separate category. Similarly, in an earlier work Professor Simon endeavored to draw a significant distinction between quite general and non-codified or non-specified legal values and norms on the one hand, and moral values and norms on the other. He expansively defined the former to such an extent as to leave little room for the latter. *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1113-23 (1988). In reality, however, there is no bright line distinction (other than the procedural positivist one which Professor Simon rejects); personal morals, values and norms are highly likely to overlap with the legal. I believe Professor Simon and I are really disagreeing on tactics in this area more than on substance. Does assimilating moral norms to legal norms facilitate ethical conduct by lawyers by making it easier for them to justify their non-assistance to clients, or their manipulation of clients, as "legal"? Or does that assimilation make it more difficult to perceive and criticize an immoral legal result, masking the gap between law and justice?

involves certain specified general values and obligations on one side and a group of different values and obligations on the other (perhaps more individual and particular, but perhaps not). Discussion, deliberation, and comprehension have each been facilitated by the structure. The model thus provides a perspective from which the student (or lawyer) can evaluate both her obligations to provide access to the law and her possibly countervailing moral obligations to justice under the particular circumstances. From this perspective legal ethics is unlikely to be seen as either "merely a set of rules" or as dealing with "purely individual values."

This approach denies neither side of our problem; it provides a view wide enough to see both law and justice and the gap between them. The complicated normative deliberation, judgment, and communication it contemplates coincide with what Professor Simon thinks professional ethics ought to be: "The attractive implication of this notion of professionalism is that lawyers, not just in exceptional moments of public service, but in their everyday practice, participate directly in furthering justice."[20]

VI. Risks of Moral Discourse

Earlier in this discussion I observed that moral discourse has substantial risks, among them that it might "intimidate, manipulate, embarrass or even humiliate the client." The image this most clearly calls to mind is of an individual client, one with less power or prestige than the lawyer. It could also be true for the corporate client embodied in the particular situation by the corporate manager or "contact" with whom the lawyer is communicating, or with a rich or powerful client. With that kind of client—large corporate or otherwise powerful or prestigious—the more frequently contemplated risk, however, may be for the lawyer. The client may respond with disdain or irritation; the client may perceive the advice as not requested and inappropriate.

> I submit that whether or not employers choose to treat their employees with respect is none of my professional concern. Labor and employment laws define any counsel. Policy choices are for the employer. . . My counsel was recently sought in a major corporate relocation entailing potential displacement of several thousand employees. The shutdown was planned for Christmas Eve (seriously), and because of age and other considerations the majority of the work force would experience substantial difficulty in obtaining reemployment. Certainly time affected emotions and therefore relocation practicalities, just as poten-

20. *See* Simon, *supra* note 13, at 66.

> tial unemployability affected severance pay negotiations. My observations went further, however, and I briefly lamented the "moral" improprieties involved. My value judgments were greeted with stony disapproval, then disregard—and rightly so. My lapse in professional self-restraint was inappropriate; I exceeded the scope of both my retainer and my skill and rendered suspect the objectivity and therefore quality of my legal counsel.[21]

This kind of situation calls into question *whether* the gap between law and justice should be addressed with the client. In addition it calls into question *how and when* the dialogue should be pursued. As to whether it should, earlier sections of this essay have addressed and answered that question in the affirmative, although perhaps too summarily. Robert Lawry has recently observed: "[O]ur consciences are our own. Our advocacy can be hired. Not our consciences."[22] Clients have something like a right to access to the law, and they can only get this with the help of a lawyer. So the lawyer—or some lawyer—ought to be obligated to provide that help. But the client does not have a right to access to the law free from any criticism or assessment of the moral merits of what the client proposes to do with the assistance of the lawyer. That kind of "free pass" for the client functions far too often as tacit approval and encouragement to wrongful use of the law, as encouragement for injustice. Paraphrasing Lawry, I would say: Access to the law we may be obligated to provide; silent complicity with wrongdoing we are not obligated to provide.

Having concluded that the lawyer ought to provide moral perspective in regard to the gap between law and justice on at least some occasions, we can move to the questions of when and how. Sometimes the lawyer should be more concerned with access to law for the client, sometimes the lawyer should be more concerned with the gap between law and justice. I would suggest three considerations.

First, the kind and size of the client is relevant The stronger and more independent the client, the less likely it is that moral advice will be overbearing, embarrassing or manipulative. The stronger and more independent the client, the less the lawyer has to worry about harming the client and the more she has to worry about harming herself: about disdain, her own embarrassment, and her own possible unemployment in the matter or in general. This leads to the conclusion that the larger and

21. Lee Modjeska, *On Teaching Morality to Law Students*, 41 J. LEGAL EDUC. 71, 73 (1991).

22. Robert F Lawry, *Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering*, 100 DICK L. REV. 563, 581 (1996).

stronger the client, the less the lawyer need be concerned about the appropriateness of the moral dialogue. I would suggest a spectrum:

> *Large Corporation —> Smaller Corporation —> Close Corporation or Partnership —> Well educated, independent individuals —> Less educated, more dependent individuals*

The further one is to the left, the more comfortable one can be with raising moral issues regarding contemplated conduct, and correspondingly the less concerned about denying access to the law. The further one is to the right, the more one should be concerned with being overbearing or self-righteous and possibly denying access to the law. It is interesting to note that the comfort level of the lawyer is likely to be the reverse: the more to the right, the easier it is to raise justice concerns; the more to the left, the more awkward.

In the context of the large corporation—that is a corporation which is not an alter ego for a particular individual, or a legal device used by a particular individual—the moral dialogue may be particularly appropriate for two reasons. First, the corporation has its own amoral role, analogous to the amoral role of the lawyer. The corporation's function is to make a profit for shareholders; it has a single, identified goal, unlike the much more mixed motives and nature of individual human beings. This defined purpose may make the corporation particularly likely to take advantage of the gap between law and justice, and to do so either thoughtlessly or without guilt. Neither the thoughtlessness nor the absence of guilt would seem to be particularly good. Awkward and uncomfortable as it might be for the lawyer to remedy these absences, she is well-situated to do so. Second, freedom and autonomy for individuals provide strong moral (or policy) weight to the "access to law" argument for the lawyer's "amoral" ethical role. Freedom and autonomy for a corporation provides strong moral (or policy) weight to the "access to law" argument only in a derivative way: only to the extent the corporation empowers an individual or group of individuals, only to the extent it serves the freedom and autonomy of identifiable individuals. The larger the corporation, the less it looks like and behaves like an individual. The larger the corporation, the less justification there is to consider its freedom and autonomy analogous to that of an individual human being.

The second consideration overlaps the first substantially and can also be thought of in terms of a spectrum, a range of legal sophistication:

> *sophisticated or experienced repeat players —> unsophisticated (often one time) legal actors*

The more sophisticated or legally experienced the client, the less concerned the lawyer need be that pointing out the gap between law and justice will somehow unfairly deter that client from obtaining access to that which the law allows.[23] Conversely, the less sophisticated or legally experienced the client, the more vulnerable he or she is likely to be to lawyer manipulation or influence, and therefore the more the lawyer should be concerned with functioning as a screen or veto to access to the law.

It is also true that the more unsophisticated and inexperienced the client is, the more often he or she may come to the lawyer with an assumption that law and justice, or law and morality, are essentially the same, or at least will be substantially aligned. This often places the lawyer in the position of clarifying that what the law allows the client to do may or may not be just or fair or moral.[24] In that situation, however, it is all too easy for the lawyer's elucidation of what the law allows to appear as encouragement or legitimation of otherwise wrongful conduct, and therefore something like the moral dialogue may be necessary to clarify for the client that what is legal may not necessarily be right. Education regarding the gap between law and justice may be particularly significant, but also particularly difficult, in that situation.

The third consideration can also be thought of in terms of a spectrum:

> *clear concrete harm to identifiable individuals —> less certain or more abstract harm to less specific or more aggregate interests*

Again, the more the situation falls toward the left side, the more concerned the lawyer ought to be about counsel concerning the gap between law and justice. Here the spectrum is more vague and general than with the two prior concerns, and perhaps somewhat misleading. What I am aiming at here is the degree of moral wrongfulness involved in the proposed client conduct. The clearer the wrong, the more the need to explicate it and ensure that the client is aware and willing to take moral responsibility.

Once it is determined that the conversation ought to occur, the question of how to do it comes to the fore. That question is both beyond the scope of this paper and, unfortunately, beyond the expertise and experi-

23. *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974-75).

24. Or, perhaps more likely but not the subject of this paper, what the law allows someone else to do to the client may not be just or fair or moral.

ence of most of us who teach professional ethics.[25] Initially it should be noted that denominating the issue as "moral" is not necessary. Often that overt categorization may be off-putting and counterproductive. It can be a "policy" question, a "sensitivity" question, even a "political" question in the more general and less partisan understanding of that category. Or, taking a different tack, one can ask simply "Would it be right to do this?" or "Wouldn't it be wrong in relation to x to do this?" without appearing self-righteous.

Also a sense of time and place and tone are important. In the excerpt above about the Christmas Eve shutdown, the lawyer "briefly lamented the 'moral' improprieties involved." The interjection appears to have been both half-hearted and not well thought out. The lawyer must first decide whether the discussion is worth the risks. On all three spectra mentioned above, in that example it appears to have been appropriate to raise the issues. But it should have been done with greater deftness and firmness, and at an appropriate time and to the appropriate person. It might still have been greeted with "stony disapproval" and "disregard." Possibly this could have occurred because the corporate actors were acutely aware of what they were doing and unhappy about it, but had decided that under the circumstance it was the morally correct course nonetheless. Or, given an awareness of the probable injustice of what they were doing, they might have chosen to go ahead anyway, perhaps feeling guilty, perhaps not. Under either of these scenarios, as well as many others, a more deft approach would be less likely to lead to awkwardness for lawyer and client.

Even if the awkwardness and discomfort, or even "stony silence" and disregard, cannot be avoided, the effort is worth the risk for three reasons. First, it is likely that the conversation will significantly modify the contemplated conduct in the right direction often enough to be worth it. Second, the conversation improves the moral life of the lawyer substantially. The primary "amoral role" is morally justified, but difficult and troubling. The secondary role of "moral dialogue" ameliorates in a genuinely meaningful way that which is morally troubling about providing access to law rather than access to justice. Third, the dialogue engages the client's moral perception, making it more difficult for the moral dimension to fade from our common life.

Albert Alschuler has recently observed:

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25. For some preliminary exploration, *see* Stephen L. Pepper *Lawyers' Ethics in the Gap Between Law and Justice*, 40 SOUTH TEXAS L. REV. 181, 196-204 (1999). *See also supra* note 12, for references to discussions and examples of how to engage in moral discussions with clients.

> Repairing the legal profession's frayed cultural norms is not easy. There is no recipe, and you can't just pass a law. Moreover, what is wrong with the profession is also what is wrong with America—a sense that most of the people around us are looking out for themselves and that we will be suckers unless we become a little bit like them.[26]

The moral dialogue is one route to repair on both fronts—the profession's norms and the more general sense of disregard for others.

VII. CONCLUSION

> Are rules linguistic entities or behavioral phenomena? Is the force of a rule located in its meaning or in its sanctions or in the attitude of its addressees?[27]

What the lawyer provides access to is a very complex structure of rules, institutions, individuals and attitudes. Much of it is, in practice, dependent upon the approach and understanding of the lawyer. He or she, to a quite meaningful degree, *is* the law to the client—the primary individual who determines what the law in action, the combination of all the factors, is. The lawyer is thus a highly significant "addressee" of the law, and in turn a principal shaper of that which is conveyed to those primarily intended to be affected by the law. This paper has dealt with how lawyers perceive the gap between law and justice, and how they translate or communicate that gap to their clients. Primarily it has been an argument that they ought to communicate the gap, that they ought not ignore or elide it.

Law ought to be in part both justice and morality. We can hope (or assume) that most lawmakers and law appliers are guided, to a significant extent, by visions of justice and morality. But, even assuming good intentions, there are substantial problems. First, law makers and appliers are fallible, and they are sometimes guided and motivated at least in part by things other than justice and morality. Second, much law is made in advance, and how it will work when applied to the infinitely complex and varied universe of human events is impossible to predict with precision. Third, and perhaps most significant, law is made to apply in the aggregate, and how it applies in any particular case may or may not make much sense. Thus the gap, and sometimes a wide and disturbing gap, between law and justice.

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26. Albert W. Alschuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 MCGEORGE L. REV. 291, 320-21 (1998).

27. FREDERICK SCHAUER, PLAYING BY THE RULES 10 (1991).

This paper envisions a role within a role for lawyers, the two jobs in significant tension. A lawyer's function is to provide access to the law as it is for their clients. Lawyers ought not be responsible for mending the law to the occasion as justice might demand. When, however, what the law allows or enables is not just, is morally wrong, the lawyer ought to have a further responsibility. She ought to ensure that the client understands there is a difference between that which is lawful and that which is moral. And, further, she ought to clarify that it is the client who must make the choice, that it has not been made already by either the law or the lawyer.

This paper has not dealt in any depth with two topics which are important parts of that secondary role, each of which ought to be on the agenda for at least some of us concerned with lawyers' ethics. First, lawyers become relatively adept at the primary role, learning and conveying the law as it is to their clients. They do not receive training or help in the second role, counseling concerning the client's responsibility for the gap between law and justice. The mere phrase "moral dialogue" is off-putting to many, awkward in the mere contemplation for both lawyer and client. We ought to begin to work at identifying some of the necessary skills and learning how to develop them in law students and lawyers. Second, the connections between law, justice and morality are complicated and contested. Studied in jurisprudence primarily either in the abstract or from the perspective of the judge, there is relatively little focus on the perspective of the lawyer. It would help us—lawyers, law students, teachers of lawyers' professional ethics—if we could develop a clearer vision of what we mean with these three concepts in relation to the work of lawyers.