

Article

Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering

Stephen L. Pepper[†]

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[†] Copyright © 1995 Stephen L. Pepper, Professor of Law, University of Denver College of Law. A.B. 1969, Stanford University; J.D. 1973, Yale Law School. Thanks to Albert Alschuler, David Barnes, Stephen McG. Bundy, Roberto Corrada, Stephen Ellman, Robert Gordon, Jamie Heller, William Hodes, Reed Elizabeth Loder, Ted Schneyer, and Robert S. Summers for helpful comments and suggestions. Thanks also to participants at faculty workshops at the Cornell Law School and the University of Denver College of Law, where earlier versions of this Article were presented.

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I. INTRODUCTION

A. *Summary of the Problem*

The primary job of the lawyer is to give the client access to the law in its multitude of facets. The litigator provides access to the dispute resolution mechanisms that are our civil and criminal courts and to the substantive law that they apply; the "deal maker" provides access to the structuring aspects of the law, regimes of contract, corporate law, securities, property, and trust; the family law lawyer and the estate planner provide access to systems of law that include both court resolution and structuring by legal mechanisms; and so on with all sorts of law and lawyers. Each of these functions combines the lawyer's knowledge of the law with the client's need for or ability to profit from access to that law. This is true across the spectrum of law, whether

procedural or substantive; whether concerning the mechanics and structures of various legal devices such as contracts, deeds, and trusts, or the legal entities that can be formed from combinations of such structures (a corporation or set of corporations, for example, or a condominium, the limited partnership that builds it, and the condominium association that will manage it).

The client often wants or needs to understand what the law is in order to evaluate options and make decisions about his or her life, and the most common function of lawyers (across specializations and areas of practice) is to provide that knowledge. Knowledge of the law, however, is an instrument that can be used to follow the law or to avoid it. Knowing that the speed limit is fifty-five miles per hour on an isolated, rarely patrolled stretch of rural highway will lead some to drive at or below fifty-five, but will lead others to drive at sixty-three miles per hour or faster. Similarly, knowing that the only penalty for engaging in unfair labor practices is back pay and reinstatement for individual harmed employees can lead the employer/client either to avoid such practices or to engage in them intentionally. Knowledge of the law thus is two-edged. When the lawyer is in a situation in which the client may well use the relevant knowledge of the law to violate the law or avoid its norms, what ought the lawyer to do? That question is the subject of this Article.

Two brief examples will set the stage. The client is negotiating a multiyear contract, anticipating that the first two or three years will be very profitable, and the subsequent two or three years significantly less so. This client's inquiries about the consequences of breach three years down the line and the docket delays in the relevant courts lead the lawyer to believe the client is considering breach of contract before he has entered into it. Or imagine the client whose elderly wife or parent is desperately ill and in immense pain, with no chance of recovery and no end in sight. The client wants legal advice about the possibility of consensual euthanasia, and the lawyer is wondering whether, in addition to informing the client that the substantive law would consider this to be murder, she also ought to include advice about the possibility of prosecutorial discretion or jury nullification. How ought these lawyers to proceed? Should they provide accurate information about the law that may well facilitate an intentional, planned breach of contract or a homicide? What guidance—what rules or principles—ought the profession or the law provide to lawyers in such situations?

Our legal system is premised on the assumption that law is intended to be known or knowable, that law is in its nature public information. The "rule of law" as we understand it requires promulgation.¹ (Consider for a moment the alternative possibility of secret "law.") And one fundamental, well-understood aspect of the lawyer's role is to be the conduit for that promulgation. In a

1. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 270–73 (1980); LON L. FULLER, *THE MORALITY OF LAW* 49–51 (1964).

complex legal environment much law cannot be known and acted upon, cannot function as law, without lawyers to make it accessible to those for whom it is relevant. Thus, in our society lawyers are necessary for much of our law to be known, to be functional. The traditional understanding is that lawyers as professionals act for the client's benefit in providing that access to the law. Under this understanding, lawyers do not function as law enforcement officers or as judges of their clients in providing knowledge of the law;² the choices to be made concern the client's life and affairs, and they are therefore primarily the client's choices to make.³

The limits on the assistance lawyers may provide to their clients have commonly been articulated and thought of as the "bounds of the law."⁴ The lawyer may not become an active participant in the client's unlawful activity, and does not have immunity if she becomes an aider and abettor of unlawful conduct. The difficulty arises in deciding whether providing accurate, truthful information about the law—the core function of lawyering—can also be considered active assistance in violation of the law in situations in which the lawyer knows the information may well lead to or facilitate the client's unlawful conduct. The answers or guides to that inquiry are disturbingly unclear. There are no reported cases of civil or criminal liability on the part of the lawyer, or of professional discipline, clearly based only upon providing the client with accurate legal information.⁵ On the other hand, the legal limits are not stated in a way to make it clear that providing such advice is within the proper bounds of lawyering. Nor do these limits provide much assistance in knowing when giving the advice is proper and when it is not.⁶ And while the case law does not ground liability on such conduct, courts have rarely held or clearly stated that such conduct does not provide a basis for liability. The case law is for the most part silent. Does the client as citizen have an entitlement to knowledge of the law? Or does the lawyer have an ethical or legal obligation not to provide that knowledge when it may facilitate violation of the law or its norms?

To begin, I set out several further situations to exemplify the problem and show its range. I then consider, in Part II, a series of possible distinctions that

2. The familiar phrase "officer of the court" has little substance to it and provides few limits on the traditional understanding that the lawyer primarily serves his or her client and not the system of law enforcement, including the court. See Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989).

3. See Edmund D. Pellegrino, *Trust and Distrust in Professional Ethics*, in ETHICS, TRUST, AND THE PROFESSIONS 69 (Edmund D. Pellegrino et al. eds., 1991); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 614 [hereinafter Pepper, *Amoral Role*].

4. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981) [hereinafter MODEL CODE].

5. See Joel S. Newman, *Legal Advice Toward Illegal Ends*, 28 U. RICH. L. REV. 287, 301-11 (1994) (surveying cases).

6. See *infra* part III. Some guides conclude that this advice is not proper under certain circumstances. See, e.g., GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, 1 THE LAW OF LAWYERING §§ 1.2:502, :506, :508 (2d ed. Supp. 1994); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.3.2, at 694-95 (1986).

might guide a lawyer, applying them to the original range of examples and to additional situations. Although helpful in analysis, few of these lines appear determinative, either alone or in combination. In Part III, I turn to the current law of lawyers' ethics, which is somewhat helpful but does not appear to provide clear answers to the problem. Finally, in Part IV, I consider the possibility that the problem is so multifaceted and arises in so many varying factual contexts that legal or ethical rules, principles, or guidelines are likely to provide only partial help. The ethics of dialogue, character, and virtue as a supplementary guide to these difficulties are therefore briefly considered.

The goal for this Article is twofold: (1) to provide guidance for lawyers in working with their clients in these situations and (2) to explore some of the difficult underlying questions of both law and lawyering entailed by the effort to provide that guidance. The elaboration and exploration of the problem will thus involve at least three dimensions: possible legal limits, possible ethical guidance, and underlying jurisprudential questions. In searching for and tentatively articulating possible limits and guides we become entwined in the jurisprudence.

If, for example, we start with the assumption that a primary purpose of law is to be known—and therefore that lawyers should start with at least a presumption that they ought to inform the client of what the law is—then what counts as “law” is important in determining what information the lawyer ought to presume is appropriate to give to the client. The basic jurisprudential inquiry of “what is law,” what are its defining characteristics, thus takes on practical import for the lawyer. While most jurisprudential inquiries have focused either upon the role of the judge or on the citizen's obligation to obey the law, surprisingly few have focused upon the lawyer. That shortcoming is an important one, for the lawyer's role and perspective are quite different. While we usually reflexively think of judges and legislators as those who make and interpret law, and thus as the appropriate actors to focus upon regarding the “what is law” inquiry, the significance of the issue we are addressing may well be that it is lawyers—in giving legal advice and access to “the law”—who are “making” and “interpreting” the law to an extent comparable to judges and legislators.

The inquiry is broader than simply “what counts as law” (and is thus presumptively permissible for the lawyer to communicate to the client), however. It is also possible that different kinds of law, or different kinds of potential client conduct, may well make a difference in the propriety of conveying information about the law. Thus, a second key factor may be whether the client's potential conduct that might be facilitated by knowledge of the law is morally wrong, in addition to being unlawful; and, if so, to what degree. Will it, for example, do significant harm to an innocent person? In some ways this issue is connected to the kinds or classification of the law at issue, but in some ways it is quite separate. Approaching the situation from a

third angle, the likelihood that the lawyer's advice about the law will in fact function as a cause of, or incitement to, unlawful conduct by the client also appears directly relevant to whether or not the lawyer ought to convey the information. These are the kinds of factors I consider in more detail in Part II.⁷

B. *A Range of Examples*

The lawyer is confronted with concrete situations, and to understand the lawyer's awkward position it helps to approach the problem in context. I present now a range of examples, starting with two extremes and then moving to the large middle ground. We will return to these examples throughout the remainder of this Article.

Breach of Contract. At one end of the continuum is advice about conduct that most lawyers would not categorize as "unlawful," but to which the law applies a sanction. Advice about breach of contract is the paradigm. The dominant modern understanding of contract law is that one is free to breach a contract, but may thereafter be required to pay compensatory damages. Absent very unusual circumstances, there will be no punishment. Although it is unclear whether the law regards intentional breach of contract as normatively wrong, whether such conduct is "contrary to law," it is clear that the message of the law is that breach of contract is not prohibited. Rather, it is conduct that may entail a cost imposed by the law. Not only do lawyers feel free to give this advice (which may well encourage or facilitate breach of contract), but it would probably be malpractice to fail to give it when relevant to the client's situation or to advise that breach of contract is prohibited by the law.

The Burdens of Civil Litigation. A closely connected example concerns advice about the costs and delays involved in the law's procedures. In counseling the client concerned about the legal consequences of a contemplated breach of contract, should the lawyer inform the client about the substantial burdens imposed upon the person who wants to collect compensatory damages for breach of contract? Should the lawyer inform the client of the three-year delay created by the current docket situation of the relevant court? Should the lawyer inform the client of the evidentiary burdens (or problems) the plaintiff may face in proving existence of the contract, breach, and damages? Should

7. Stephen McG. Bundy and Einer Elhauge analyze several of the questions explored here from the rather different perspective of "rational actor modeling." Stephen McG. Bundy & Einer Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261, 327 (1993). Their work is deployed at a more abstract and theoretical level than this Article and focuses less specifically upon the role of lawyers giving legal advice. See also Steven Shavell, *Legal Advice About Contemplated Acts: The Decision To Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J. LEGAL STUD. 123 (1988), upon which the Bundy and Elhauge piece is based. I discussed briefly several of the themes developed at greater length below in Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. B. FOUND. RES. J. 657, 668-73 [hereinafter Pepper, *Rejoinder*].

the lawyer inform the client of the probability that these burdens will lead the person to whom he is contractually obligated to accept a substantially discounted amount to settle the claim rather than litigate? If the lawyer concludes that this information will lead the client to breach the contract, should the lawyer refrain from giving the information? Or is it malpractice to fail to give it?

Criminal Conduct Involving Harm to Third Parties. At the other end of the spectrum is legal advice the client may use for clearly criminal conduct involving concrete harm to third parties. The classic example is the client who asks which South American countries have no extradition treaty with the United States covering armed robbery or murder.⁸

Criminal Procedure. What do you advise the lawyer whose childless, middle-aged, male client has just asked whether it is true that police and judges in the community consider children under ten to be incompetent to testify in sexual abuse cases? (Assume it is true.) A more timely example is the defendant in a murder case being informed by the lawyer that the maximum penalty for jury tampering is six months in prison and a \$1000 fine.⁹ Or imagine the client who consults the lawyer concerning the legality of and penalties for euthanasia. If the facts in the euthanasia situation are sufficiently sympathetic to make the advice relevant, may the lawyer inform the client of the possibilities of prosecutorial discretion and jury nullification?

Examples from the Broad Middle Ground. Assume an Environmental Protection Agency water pollution regulation, widely publicized to relevant industries, prohibiting discharge of ammonia at amounts greater than .050 grams per liter of effluent. The client owns a rural plant that discharges ammonia in its effluent, the removal of which would be very expensive. The lawyer knows from informal sources that: (1) violations of .075 grams per liter or less are ignored because of a limited enforcement budget; and (2) EPA inspection in rural areas is rare, and in such areas enforcement officials usually issue a warning prior to applying sanctions unless the violation is extreme (more than 1.5 grams per liter).¹⁰ Is it appropriate for the lawyer to educate the client concerning these enforcement-related facts even though it may motivate the client to violate the .050 gram limit?

A second, well-known example is the client who wants to file a tax return reporting a favorable outcome based upon an arguable interpretation of the law. The lawyer is confident the IRS would challenge the client's return if it became aware of this interpretation and would be highly likely to succeed in the event of litigation. If that were to occur, the penalties would likely be only

8. See MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 143 (1990).

9. Laurie P. Cohen, *Dirty Dozen? Tampering with Juries Appeals to Defendants Facing Steep Sentences*, WALL ST. J., Jan. 30, 1995, at A1. Even if successful tampering can be proved, double jeopardy protects the client from a subsequent murder conviction. *Id.*

10. Example adapted from Pepper, *Amoral Role*, *supra* note 3, at 627-28.

the tax due plus interest. The lawyer knows that in the past the audit rate for this type of return has been less than two percent, and knows that this fact is likely to lead this client to take the dubious position on her return. Ought the lawyer to communicate this information to the client?

C. *Law and Lawyering: Predictions, Manipulation, and Norms*

From the perspective of the dominant American understanding of law—taught in the law schools and practiced in the law offices—the enforcement-related facts in the last two examples would be considered part of the “law,” and thus appropriate information to convey to an interested client. This is an instrumental view of the law, which casts its net wide in defining “law” and in attempting to aid clients in their encounters with the law, whether the law functions in the particular circumstance primarily to limit or to empower the client. The American lawyer is likely to view law as a complex process embedded in human interaction and taking place over time. Written provisions, while an important part of law, are only a part. Human actors, from the potential plaintiff in the contract action, through the budget makers who limit the EPA’s enforcement budget and the IRS’ audit budget, to the prosecutor and the judge, make decisions throughout the process that affect clients as much as written provisions. Part of the lawyer’s job is to take account of and predict as well as possible the way both the written law and the conduct of legal actors will impact on the client’s situation.

Often called “legal realism,” this view of the law is in fact an amalgam of three major streams of American jurisprudence. First is the positivist understanding of the separation of law and morality. The lawyer sees law more as a set of facts concerning power and limitation than as a norm, an “is” at least as much as an “ought.” Second, and connected, this dominant view takes from legal realism the idea that law is at least as much a prediction of what officials with state power will do as it is verbal formulations that provide objectively determinable limits on conduct. The third and most recent stream is the process jurisprudence view, emphasizing law as an instrument of private planning and structuring and deemphasizing law as limit, as adjudication, or as prediction of the outcome of adjudication. While not denying conflict as part of law, process jurisprudence focuses elsewhere, stressing creation within the channels provided by “law” (including predictions of what both officials and private parties will do). These three views are compatible in seeing law as a complex factual matrix subject to both planning and manipulation. They are mutually reinforcing in bringing to the foreground the instrumental possibilities in law, while relegating to the background its function as a normative limit. Similarly, they work together in emphasizing the open-textured nature of law over its precision and its manipulability over its certainty.

This "legal realist"¹¹ understanding of the law is combined in American lawyering with the understanding that the primary job of the lawyer is to provide access to the law in service to the client's needs, desires, and interests.¹² From this perspective of service to the client, the dominant legal realist view of the law is functional: it empowers the client and gives the client the benefit of a sophisticated, realistic understanding of the processes of law. But as the hypotheticals show, it is not a view without costs. Under this lens, the law seems to transmute from a knowable limit to a rather amorphous thing that is dependent upon the client's situation, goals, and risk preferences.¹³

If the law becomes generally perceived as merely indicating a potential cost, a penalty that one is free to incur and to discount by the probability of its enforcement, then structuring our common life together through law becomes vastly more difficult and requires vastly more resources.¹⁴ For example, consider the last two situations, environmental regulation and tax. To the extent the client is led to perceive enforcement as a part of law, or, one might say, led to reduce law to the probability of enforcement, the power and effectiveness of the law as written, of the law as norm, has been reduced. Such a conflation of law with enforcement may be the untoward result of legal advice to the client under this "legal realist" view of the law. And the recently dominant jurisprudential trend in the law schools—law and economics—substantially reinforces this effect of legal realism by perceiving

11. I believe that the most common usage of the phrase "legal realism" by American lawyers and legal academics incorporates and connotes all three of these streams.

12. How primary is in some dispute in academic circles and is unclear in the evolution of the ethical rules. The Model Code stated in part: "A lawyer shall not intentionally: (1) Fail to seek the lawful objectives of his client through reasonably available means . . . (3) Prejudice or damage his client during the course of the professional relationship . . ." MODEL CODE, *supra* note 4, DR 7-101(A). Such general "serve and do not harm the client" provisions do not appear in the successor ABA Model Rules of Professional Conduct, which begins with the statement that "a lawyer is a representative of clients, an officer of the legal system, and a public citizen" and indicates no priority among those roles. MODEL RULES OF PROFESSIONAL CONDUCT pmbl. at 7 (1992) [hereinafter MODEL RULES]. (Perhaps the closest the Model Rules come to the quoted language from the Model Code is *id.* Rule 1.3 cmt.) In some ways the new code provides more substantial protection to the client, however, because it has simpler provisions that are easier to enforce. See, e.g., *id.* Rule 1.1 ("A lawyer shall provide competent representation to a client."); *id.* Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

13. In previous articles, I suggested a moral justification for the lawyer's primary role as service to the client and noted the problem created by the combination of that role with a "legal realism" understanding of the law. See Pepper, *Moral Role*, *supra* note 3; Pepper, *Rejoinder*, *supra* note 7. The observations in this Section are drawn from those works.

14. Bundy and Elhauge, with their focus on underdeterrence and overdeterrence, appear to assume such a view of law. See Bundy & Elhauge, *supra* note 7. For an empirical study finding that people perceive law in terms far richer than merely anticipated penalties or benefits, see TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990), which concludes in part:

The key implication of the Chicago study is that normative issues matter. People obey the law because they believe that it is proper to do so The image of the person resulting from these findings is one of a person whose attitudes and behavior are influenced to an important degree by social values about what is right and proper. This image differs strikingly from that of the self-interest models which dominate current thinking in law

Id. at 178. For an exploration of the difference between law as sanction and law as price from a law-and-economics perspective, see Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).

legal limits and rules as just another "cost," and clients as "profit maximizers," simply Holmes' "bad man"¹⁵ dressed in modern clothes.

The lawyer giving legal advice to a client who may use that advice to violate the law or its norms thus stands at an awkward moral focal point. Under the traditional understanding,¹⁶ she has not been delegated the legal authority to judge or police her clients. To the contrary, her role has been defined as serving her clients: to provide access to that public good that is the law; to equalize power and opportunity by making available to all citizens knowledge (and hence the power) of the law.¹⁷ But the modern lawyer's legal realist (and law-and-economics) view of the law may lead the client to respect the law less; to choose to violate the law and chance the consequences.

II. LEGAL ADVICE WITHIN THE BOUNDS OF THE LAW: SOME GUIDING DISTINCTIONS

I present below a series of distinctions that might assist a lawyer in deciding what information about the law to give to the client, and what not to give. Three of those connect directly to the "what is law" question (Sections A, C, and D). Two relate more to what *kind* of law is involved, exploring the degree or kind of wrongfulness of the client's unlawful conduct as a possible limit on lawyer assistance (Sections B and E). Finally, two distinctions relating to the likelihood that accurate advice about the law will function as incitement to unlawful conduct are considered as possible limits (Sections F and G).¹⁸

A. *Desuetude and Laws Rarely Enforced: The Law/No Law Distinction*

From the perspective of law as prediction of what officials with state power will do, legal provisions that have fallen into disuse are not law. Although desuetude is not recognized as a defense to criminal prosecution in this country, judges are not the only legal actors. Prosecutors and police are legal actors with substantial legally authorized discretion. A consistent decision over time not to enforce a particular legal provision looks a great deal like lawmaking, in practice if not in form, in action if not on paper. It also may have a significant relation to the law in form and on paper. The fact that

15. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

16. I refer to the tradition of the last 80 to 100 years. Thomas Shaffer argues that there is a quite different preceding tradition. Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988).

17. The equality part of this function is substantially undercut by the fact that access to lawyers (and hence to law) is not free. Some critics point out that you can get as much justice under our system as you can afford. For a brief discussion of this problem, see David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 643-45; Pepper, *Amoral Role*, *supra* note 3, at 619-21; Pepper, *Rejoinder*, *supra* note 7, at 667-68; see also William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1092-96 (1988).

18. The chart in Part II.H summarizes these distinctions.

enforcement does not occur removes the occasion for courts to interpret, apply, or otherwise deal with the legal provision and likewise removes occasions for the legislature to take notice of the law, thus making it less likely that the more traditionally recognized sources of law will modify or remove the provision. Particularly in the legislature, this removal of the opportunity to overcome inertia is a significant fact in determining the law as written.¹⁹

On two dimensions desuetude thus constitutes a form of "law," or at least approaches a kind of promulgation of "no longer law." First, it seems to a sufficient degree to be the result of intentional decisions by authoritative legal actors. Second, it suggests that other, more formal sources of law might no longer support the provision if the choice were before them. To the extent this is true, the conduct prohibited by the provision has moved from outside the "bounds of the law" to within that limit, and therefore has become a proper subject for legal advice from the lawyer even though it is advice from which the conduct itself might ensue. Here the perspective of the lawyer giving legal advice is extremely important. For the decision being made is not whether the written law will be violated, but whether the client will be informed of its desuetude and allowed to decide for himself whether this unenforced legal provision binds him and whether to violate it. Thus the question becomes: Is the decision as to whether this provision is still law to be an educated one made by the citizen (client) in consultation with the lawyer, or is it one to be made unilaterally by the lawyer?

Imagine a married couple residing together in a state where fornication is a crime prohibited by valid legislation, but where the legal authorities do not enforce this legislation. The couple is considering divorcing to gain tax advantages they have heard about, but intend to continue living together whether or not they remain formally married. The lawyer they have consulted concerning their business and tax matters is aware of (1) significant tax and other economic advantages that result if the couple is unmarried; (2) the fornication statute; and (3) the desuetude of the statute.²⁰ Should the lawyer refrain from informing them of the laws resulting in economic benefit to unmarried couples because this information is useless unless they violate the fornication statute? Or should the lawyer tell them of these laws and benefits, but also inform them of the fornication prohibition, and conclude that they would therefore have to live apart if they chose to divorce to take advantage of the benefits of the legal provisions? Would this last advice be providing access to the law, or would it be deceiving the clients as to the "real" law?

19. Recently in Connecticut, unhappy spouses pressed for enforcement of the state's generally unenforced adultery statutes, and several arrests occurred. Attendant publicity led to the repeal of the adultery provisions. Kirk Johnson, *Bill To Void Adultery Laws To Go to Weicker*, N.Y. TIMES, Apr. 4, 1991, at B7; *No Adultery in Conn.*, NEWSDAY, Apr. 17, 1991, at 16.

20. See THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 330-31 (5th ed. 1991).

Both the realist understanding of law and the quasi-legal effect of desuetude suggest that such advice would be deception, and thus is not the advice a lawyer should give. Rather, it seems appropriate for the lawyer to inform the clients of all three aspects of the law and assist them in their decisions in relation to that triangle of law.

That assistance—the lawyer’s counseling function in relation to the client’s legally related decision making—ought to be rather elaborate in this kind of situation because it may well lead to a violation of a still formally viable criminal provision. The lawyer would need to explain the fact that the conduct remains formally criminal and might result in criminal liability to the couple, including the possibility that the desuetude might cease at any time: a policy decision by the prosecutor, a change in prosecutor, or an arbitrary decision by a single police officer could lead to a criminal conviction.²¹ What would be lost in the event of a criminal charge or a criminal conviction would be material, including the expense of representation in a criminal matter and the possible stigma attached to a criminal charge or conviction. The penalty likely to be exacted in the unlikely event of prosecution and conviction would likewise be material, as would be the degree of unlikelihood of prosecution and the reasons that might explain the lack of enforcement. Finally, the kind and amount of financial benefit available from the unmarried status would be crucial, for that is the motivation for the questionable conduct.

1. *On the Obligation To Obey the Law, Paternalism, and Lawyer Sophistication*

Do such concrete factors exhaust the appropriate areas of legal counsel, or is there more? The extent of the general obligation to obey “the law” seems relevant to the client’s choice. If it is, whether or not the fornication statute is “law,” or the “kind” of law there is such a general obligation to obey, also appears relevant. If the lawyer is supposed to provide access to the law, and if what is “really” the law is sufficiently problematic, then advice about such abstract topics seems appropriate, albeit hard to imagine. The notion that through a lawyer a client ought to have access to a sophisticated understanding of the law leads to the conclusion that the lawyer ought to assist the client in determining to what extent he or she feels obligated to obey law just because it is law, and to what extent the fornication statute counts as law.²²

21. Jamie G. Heller, Note, *Legal Counseling in the Administrative State: How To Let the Client Decide*, 103 YALE L.J. 2503 (1994), begins with the report that Zoë Baird’s “lawyer had advised that while ‘civil penalties are technically applicable’ for hiring illegal aliens ‘no employer sanctions have ever been applied as a result of the employment of undocumented domestic workers in Connecticut.’” *Id.* at 2504 (citation omitted). While formal employer sanctions were not applied, Ms. Baird’s violation of the unenforced written provision resulted in her withdrawal as nominee for Attorney General.

22. Jamie Heller argues for just this kind of “full-picture” counseling, emphasizing that the lawyer ought to educate the client about the applicable law’s purposes as well as its letter, so that the client can

Such counseling would require a fairly sophisticated and able client and lawyer. And that thought may lead to at least three responses worth noting. First, this conversation sounds more like what we might expect in a college political science seminar than in a lawyer-client conversation. It simply goes beyond the conventions that most clients and lawyers would expect, and thus would be unlikely to occur; and, if it occurred, it would probably be uncomfortable for both sides. Second, and related, lawyers in general may not be particularly able or sophisticated in counseling about the nature of law and legal obligation. Jurisprudence is not a required course in most American law schools; desuetude is not something law students or lawyers are likely to have focused upon. The third response is that this is all extremely time consuming, and a significant proportion of less sophisticated clients will be unable to benefit from this education even given a substantial counseling effort. Moreover, many clients who might benefit would prefer not to; they are, in fact, paying the lawyer to make this elaborate analysis for them so they won't have to be bothered.²³ Thus both sides of the counseling dialogue imagined above may be either less interested or less able than assumed.

To the extent the foregoing convinces you that the lawyer's counseling in such a situation leads into a swamp, we may have come full circle. If such counseling is impracticable, or not worth the effort, the lawyer must decide for the client; the lawyer is forced to assume a paternalistic role.²⁴ But in this situation we still don't know what the lawyer ought to decide. Desuetude means that "the law" is unclear. From the perspective of malpractice, advising solely on the basis of the written law may be safest. But as noted above, it also seems deceptive. Advising to enhance the clients' material interests—and gaining the reputation of a lawyer who effectively does so—points toward advising the client of the advantages of violating the unenforced written law.

make more fully informed choices. *Id.*

23. This perspective has been summarized by Chesterfield Smith, a former president of the American Bar Association:

Clients before long get great confidence in me and they don't want me to tell them all of the alternatives. They want me to tell them what to do. I do it and charge them. [Laughter and applause] I do say they have to develop a confidence that I have thought of all of those other options and that I have rejected them myself. Once they have that confidence, they feel that I'm wasting their time if I make them make any kind of choices.

Panel Discussion, *A Gathering of Legal Scholars To Discuss "Professional Responsibility and the Model Rules of Professional Conduct"*, 35 U. MIAMI L. REV. 639, 643 (1981).

24. Paternalism pervades the professions, but lies beyond the scope of this Article. It can be noted briefly, however, that the premises of the lawyer role seem, at least in the first instance, inconsistent with lawyer paternalism. If the prime function of the lawyer is to provide access to the law, and if the purpose of this function is serving the client, then the client's freedom to make his or her own decisions seems to be at the base of the structure. I have articulated this in earlier work as serving the client's "autonomy." Pepper, *Amoral Role*, *supra* note 3, at 616–18. To my surprise, some understand autonomy as necessarily connoting isolation and atomism. My understanding of autonomy—the value of freedom and choice—is entirely consistent with the values of connection and community. See Stephen L. Pepper, *Autonomy, Community, and Lawyers' Ethics*, 19 CAP. U. L. REV. 939 (1990) [hereinafter Pepper, *Lawyers' Ethics*].

Neither paternalistic position seems clearly preferable to the swamp of honest and full counseling.

2. *Moving from Unenforced to Rarely Enforced Law*

It is possible that, in our fornication statute situation above, the law has been enforced on isolated occasions; for example, where the conduct was flaunted before the prosecutor in a fashion extraordinarily difficult to ignore (as in a "test case" scenario). Even where this has not occurred, the possibility of its occurrence remains present, and the possibilities for the instant change discussed above also remain present. Probability of enforcement is thus a continuum, with desuetude occupying one of the extremes. Are rarely enforced legal provisions sufficiently similar to desuetude to be assimilated for purposes of delineating the ethical limits on legal advice? That is, if we have concluded that full advice about the law in the desuetude situation is appropriate even though it may lead to formally unlawful conduct, is the same conclusion warranted in the case of rarely enforced law?

Consider, for example, the merchant who faces a Sunday closing law that is sometimes, but rarely, enforced.²⁵ Or imagine the trucker traveling through a western state with a fifty-five-miles-per-hour posted speed limit, and enforcement that occasionally, but only rarely, occurs between fifty-five and sixty-five miles per hour. In these situations, it is much less clear that actors with legal authority have made a consistent decision over time not to enforce, and therefore more difficult to conclude that the pattern of nonenforcement amounts to at least a kind of promulgation of "no longer law." The assimilation should probably, therefore, move in the other direction: cases of relatively rare enforcement should be approached under the more general question of how the lawyer integrates law with predictions about enforcement of law in giving legal advice. This distinction between law and its enforcement is discussed in Section C.

Before moving on, however, it is worth noting that desuetude, or something very much like it, may be involved in situations where one initially sees only some disparity between the law as written and the law as enforced. A case in point is the water pollution hypothetical above. We could perceive or categorize that situation as partial desuetude: between .050 and .075 grams per liter the law is consistently and uniformly unenforced.

25. See FREEDMAN, *supra* note 8, at 143-44.

B. *The Distinction Between Law as "Cost" and Law as "Prohibition"*
(*the Criminal/Civil Line*)

Legal provisions can convey at least three rather different messages. First, the law can tell you that if you want to accomplish *x*, you will have to do *a*, *b*, and *c* in certain prescribed ways. If you want to create a contract, you will have to have an offer, an acceptance, and consideration. If you want to create a corporation, the necessary actions are prescribed by statute. Second, the law can indicate that some specific conduct will have certain prescribed negative consequences; that some specific conduct creates liability for certain costs or penalties. Failure to comply with a valid contractual obligation renders one liable for some of the damages caused to the promisee and to a limited class of third parties. A corporation that fails to conduct its business as required by the state of incorporation, by not holding required annual meetings, for example, may forfeit some of the benefits of being a corporation, such as limited liability. Third, the law can indicate that certain conduct is prohibited and will not be tolerated by society. A person who murders or steals will be punished by being forcibly removed from society for some period of time, in part to demonstrate how serious society is about the prohibition and in part to prevent repetition of the violation. Legal provisions in the first two categories indicate that some conduct is favored and some disfavored, and legal consequences will reflect the differences, but the third category involves a different and stronger message.

The ethical line for legal advice could be based on this distinction. Under such a rule or guide, a lawyer could not give legal advice in a context in which that advice is likely to lead to conduct prohibited by law, but such advice could be given in a context in which it is likely to lead to conduct to which the law only attaches a cost or penalty. The distinction between criminal and civil law is traditionally understood as distinguishing the prohibited from the tolerated, the prohibited from the "merely" wrongful.

1. *The Ends of the Spectrum*

The principal advantage of this distinction lies in its apparent congruence with accepted legal culture and practice at both ends of the range of examples. Holmes' "bad man" understanding of contract law has become so descriptively accurate that few would contest the notion of a "right" to breach a contract,²⁶ and where a citizen has a right, it is difficult to envision a rule of lawyers'

26. At one point in time, the California Court of Appeals, in some limited circumstances, appeared to be in the process of creating a tort of "intentional breach of contract" or "intentional denial of the existence of a contract." See Stephen B. Katz, Note, *The California Tort of Bad Faith Breach, the Dissent in Seaman's v. Standard Oil, and the Role of Punitive Damages in Contract Doctrine*, 60 S. CAL. L. REV. 509 (1987); see also William Powers, Jr., *Border Wars*, 72 TEX. L. REV. 1209, 1215-33 (1994).

ethics that would prohibit a lawyer from informing the client of that right or a malpractice rule that would allow a lawyer to choose to leave the client in ignorance of a right she might profit from exercising. At the other end of the spectrum, it is hard to countenance the notion that a citizen (client) has a "right" to murder or steal, as long as she is willing to accept the law's penalty if she is caught.²⁷ The dominant legal rules and culture are certainly in accord with this perception. Legal advice that facilitates such criminal conduct may be prohibited by the current versions of lawyers' ethics,²⁸ and the lawyer is more likely to face tort liability for providing such legal advice than for withholding it.

Even at the ends of the range the distinction is not without problems, however. Breach of contract can cause serious harm, and our society (and perhaps our law) perceive some level of normative obligation not to breach contracts. It is not pleasant to contemplate a legal regime in which the primary message of the law as transmitted through lawyers is that breaching contracts is perfectly acceptable if it is to one's economic advantage to do so after having calculated potential compensatory damages as a cost, discounted by the probability and expense of enforcement by the promisee.²⁹ This is perhaps just another example of the two-edged nature of law with which we began: all law, not just breach of contract, can be used to harm or to wrong. Here, however, the law has specifically recognized the harm and the wrong and has placed a cost or penalty on it. (Is it inaccurate to refer to the sanction as a "penalty" because compensatory damages only include the cost of the damages one's "wrong" has caused, and there is no additional sum whose only purpose is to discourage the conduct? Note that torts are normally considered "wrongs," but are ordinarily "punished" only with "compensatory" damages.)

At the other end of the spectrum, the euthanasia example also gives pause. Here we have contemplated murder, surely one of the core examples that makes the criminal/civil distinction intuitively plausible, yet the notion that the client has a "right" to know the law under which her behavior will be judged and the procedures through which that law will be applied does not seem so far-fetched. To prohibit the lawyer from giving the advice means that the

27. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30, 48; see also Luban, *supra* note 17, at 647-48 (criticizing view of "Low Realism" that law merely predicts what human officials do).

28. See *infra* part III. Bundy & Elhauge, *supra* note 7, at 323-27, provides a possible theoretical justification for the current distinction, but it is expressly premised upon conditions that, as discussed *infra* part II.B.2, do not exist in the contemporary state of our law. To some extent Professors Bundy and Elhauge recognize this problem, Bundy & Elhauge, *supra* note 7, at 326 & nn.188-89, but they nonetheless support the distinction in their conclusion, *id.* at 335.

29. The down side of this understanding of the obligation of contract has found colorful voice in Connie Bruck's biography of Steve Ross, the creator of Time Warner. CONNIE BRUCK, *MASTER OF THE GAME: STEVE ROSS AND THE CREATION OF TIME WARNER* (1994). One of Ross' associates states, in regard to business transactions with the Mafia, that "I'd rather make a deal with them than with regular businessmen. With regular ones, a deal just means, whose lawyer can be cuter? But with them, a deal is a deal. And if you break it, there's simple justice." *Id.* at 43.

prosecutor has lawful discretion to apply the law to the facts in a fully contextualized, nuanced fashion and to choose not to prosecute; the jury has power to choose not to apply the law at all if it finds that the facts and justice lead that way; but the lawyer must keep the client in ignorance of these aspects of the legal system regardless of the specific facts of the situation.³⁰

2. *The Middle Range of the Spectrum*

The intuitive appeal of the criminal/civil distinction as applied to limiting lawyer advice about the law is substantially weaker when the examples come from the middle range. In that category, I would include nonobvious or nontraditional crimes, much regulatory law, and torts.

Indiscriminate usage of the criminal sanction creates a problem for drawing our line between civil and criminal wrongs. To the extent that conduct is criminalized when it is not intuitively obvious that the conduct involves a serious moral wrong, the justification for the criminal/civil distinction becomes obscure. The criminal sanction is supposed to announce that we are particularly serious about a legal rule, that we really *mean* a particular act is *prohibited*. But when applied to conduct that in no obvious way involves serious moral wrongdoing, the question irresistibly pushes up: why are we so serious about this? If no persuasive reason is available, we are reduced to the circular, positivist, formal justification: because it's *criminal*.³¹

A few years after the national speed limit of fifty-five miles per hour was imposed, the reason for the rule—conserving gasoline—no longer seemed to be a strong national priority. Imagine the small trucker in a spacious, flat western state who wants to reimburse his drivers for fines imposed for driving between fifty-five and seventy miles per hour. He has asked his lawyer if it is permissible to do so and if he could deduct such reimbursement as an expense of the business. Or imagine a retailer just within the border of a state with a Sunday closing law, in competition with stores just across the state line, who asks his lawyer about the penalties for remaining open. The lawyer finds out that the penalty is a criminal fine of only twenty-five dollars per Sunday. In

30. As to jury and prosecutor, see MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* 59–94 (1973) (suggesting theory of “recourse roles” that permit actors with role-authorized discretion to violate otherwise applicable rules). Interestingly, the jury is instructed to apply the law as articulated by the judge, but there is no penalty for failure to do so. In most jurisdictions, the lawyer may not inform the jury of this fact. This is one of the relatively rare situations of intentionally “secret law” and is itself an example of the difficulty of knowing what the law really is. See *infra* notes 53–54 and accompanying text.

31. See John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1882 (1992) (“[T]he central policy question on which I wish to focus [is the following]: can a civil/criminal distinction be resurrected? Or should we accept the two bodies of law as simply interchangeable means to the same ends?”); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 401–22 (1958). For a discussion of the increased role of punitive civil sanctions, see Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1844–61 (1992).

such situations, is the message sent by the law that the conduct is prohibited, that it is disfavored and comes with a cost, or some mixture that is difficult to interpret?³²

This problem is particularly pervasive in major areas of regulatory law administered by agencies. Here much conduct is "prohibited" by law, but the sanction can either be civil or criminal, at the discretion of the administrative agency, and civil enforcement is the norm, with criminal enforcement unusual.³³ In our water pollution example, this would mean that the lawyer does not even know which side of the criminal/civil line she is on until the agency has chosen to act and draw that line in relation to the client's conduct.

A final problem with the criminal/civil line is contemplated tortious conduct. Nineteenth-century tort opinions speak of negligent conduct not only as wrongful in a strong normative sense, but also often as if it were forbidden. The thrust of the shift in tort thinking over the last eighty years or so has been to drain tort law of much of its normative content, to move away from a focus on the "wrongfulness" of the conduct of defendant and plaintiff and toward allocation of the costs of accidental injury on the bases of compensation, loss spreading, and efficiency. Where the language of the courts once seemed to assimilate tortious conduct to criminal conduct, the language of much torts scholarship and at least some judicial opinions now seems to assimilate tortious conduct to breach of contract. One is free to be negligent so long as one is willing to pay compensatory damages to persons injured by that negligence. Tort law is *civil* law. Tortious conduct is not prohibited, but it may, after litigation, result in the imposition of an obligation to pay damages. And thus it would seem that the client is free to commit torts, has a right to commit torts (unless stopped by injunction), and the lawyer has an obligation to educate him about all this if the circumstances make it relevant.³⁴

32. In each of these situations, the message may be further diluted by partial desuetude. In several western states, it became common knowledge that enforcement of the speeding prohibition between 55 and 65 mph was extremely rare. And Monroe Freedman ends his Sunday closing example by hypothesizing that the client opens on Sundays and is never prosecuted. MONROE FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 59 (1975).

33. A U.S. Attorney in the Department of Justice must agree to pursue criminal enforcement; regulatory agency lawyers can secure civil enforcement on their own. To invoke the criminal sanction, "tax fraud must compete with postal theft and water pollution for the U.S. Attorneys' attention." Franklin E. Zimring, *The Multiple Middlegrounds Between Civil and Criminal Law*, 101 *YALE L.J.* 1901, 1905 (1992).

34. This is of course complicated by the possibility of punitive damages. By informing the client of the law, the lawyer might supply the "willfulness" or knowledge element needed for the jury to find a basis for awarding punitive damages. In *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Ct. App. 1981), evidence that Ford used a cost-benefit analysis in its design decision as to where to place the gas tank, and in doing so placed a money valuation on human life, was the basis for a jury award of \$125 million in punitive damages (reduced by the trial judge to \$3.5 million). Ironically, such a cost-benefit analysis is what the Learned Hand formula indicates a potential defendant *ought* to consider in determining whether conduct should be avoided because it imposes an "unreasonable risk," and is therefore negligent. And even if the defendant makes an error in the calculation and the conduct is later held to be unreasonable, negligence supports only compensatory, not punitive, damages. For a description of the facts evocative of why the jury may have decided as it did in *Grimshaw*, see DAVID LUBAN, *LAWYERS AND JUSTICE* 206-13 (1988), and sources cited therein. For a quite different view more focused on tort law and policy, see Gary T. Schwartz,

Imagine: The owner of a small chain of run-down motels has discovered that his twenty-year-old water heaters, all identical in make and model, are starting to malfunction and release scalding hot water with no warning. There is no way to know which one will go next. The owner does not have funds to replace all the units, and he already carries so much debt that financing to remedy the problem is unavailable. He has consulted his lawyer for legal advice concerning his obligations. The severity and foreseeability of potential injuries to guests using the showers probably make further use of the water heaters negligent, but the probability of suit is unclear because neither the injured party nor his or her lawyer will have reason to know of the pattern of malfunction absent suit and discovery. Also, the client's liability insurance is sufficient to cover likely compensatory damages. The lawyer knows that the client is very attached to his business, and that he may have no realistic option to avoid injuries except to close down—at least temporarily—and this is likely to be fatal to the enterprise. The client is free to commit the tort—has a right to commit the tort—and, under the criminal/civil dichotomy, the lawyer is free (and possibly obligated³⁵) to give the advice likely to lead to that result.³⁶

3. *Counseling: Advice in Addition to the Law*

It is important to note, somewhere along this path, that a lawyer is not limited to giving only legal advice, or purely positivistic legal advice unadulterated with other aspects of life. While the prime function of the lawyer is to provide access to the law, there is no requirement that the lawyer be legalistic in approaching clients or their situations. Lawyers can attempt to open clients' perspectives, pointing out the value of ongoing contractual relationships, or of a reputation for honoring one's obligations. A lawyer can (and should) engage in what has been called a "moral dialogue" with clients who are contemplating wrongful or harmful conduct. Lawyers who give advice about the lawfulness of breach of contract probably ought to be obligated to at least consider also giving advice that the conduct (1) is or may be morally wrong, (2) may cause unjustifiable harm to specific persons, and even—given

The Myth of the Ford Pinto Case, 43 RUTGERS L. REV. 1013 (1991).

35. The Model Rules point both ways on this question. See *infra* part III.

36. This kind of situation is substantially complicated by the fact that when the lawyer is counseling regarding possible future negligence, not only are punitive damages a possibility, see *supra* note 34, but the client's awareness of the risk of future harm may also provide the mens rea element necessary for the conduct to qualify as criminal. In the motel example, in addition to being tortious, the conduct might also meet the requirements of reckless or negligent battery and reckless endangerment. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 7.15(c) (1986); see, e.g., COLO. REV. STAT. § 18-3-204 (1990) (assault in third degree); *id.* § 18-3-208 (reckless endangerment). The situation is analogous to the regulatory area, where much conduct carries both civil and criminal penalties. The evidence that Ford used a cost-benefit analysis with the Pinto gas tank, *supra* note 34, was the basis for an unsuccessful criminal prosecution of the Ford Motor Company. See Richard A. Epstein, *Is Pinto a Criminal?*, 4 REGULATION 15, 19 (1980).

a perhaps unusual lawyer and client—(3) such conduct if followed generally might be harmful to the fabric of society.³⁷

In the motel situation, for example, I suspect many readers will feel at least some discomfort at the possibility that advice solely about the tort rules will be perceived by the client as encouragement to save the business at the cost of substantial risk of serious injury to innocent persons. That discomfort leads to a desire for a fuller conversation: an exploration of the value of continuing the business compared to the value of not injuring innocent customers, plus an exploration of possible alternatives that might serve both values (a little creative brainstorming).³⁸ Dialogue along this line is one of the substantial answers to the potential destructiveness of the combination of the two-edged nature of law with the lawyer's obligation to provide access to the law;³⁹ it is one of the main sources of meaningful moral life for the lawyer and meaningful moral connection between lawyer and client.

C. *The Law/Enforcement Distinction*

Is a distinction between law and enforcement of law the solution to the problem of legal advice that may facilitate unlawful conduct? The lawyer's obligation to provide access to the law could be considered to be fulfilled by informing the client concerning substantive law. The line would then be drawn at information about the various contingencies involved in the future application of that substantive law to the client's facts: advice about the enforcement rules or practices that might reveal to the authorities a violation of the substantive law and the legal procedures through which any enforcement or penalties would be applied would be out of bounds. The constraints that channel application of the substance of the law to the client would be information the lawyer could not convey to the client. To the extent the problem is the perception of law as cost—the conflation of law with enforcement—this seems the most direct answer for the lawyer giving advice.

37. Likewise, it would be a great disservice to the client contemplating consensual euthanasia to limit the conversation to only legal advice, even if it is "full" advice including prosecutorial discretion and jury nullification. This client's primary source of distress is not the law, and it may well be that the lawyer's best service will be a full conversation exploring the possibility that an alternative to euthanasia is possible and preferable. This possibility is explored further in Part IV (on the ethics of counseling and character). Some of the reasons such conversations (particularly the third possibility in the text) are hard to imagine are developed briefly in Part II.A.1.

38. We will return later to these possibilities in Part II.F and Part V. This discomfort might lead many lawyers in the opposite direction from a fuller conversation, however. Unwilling to allow the possible infliction of serious harm on innocent persons, and finding a basis for paternalism here that could not be found in regard to the cohabitation situation, *see infra* part II.A.1, they might provide "preemptory" advice that the client cannot continue using the water heaters (based on the fact that the conduct could be considered criminal, *see supra* note 36). *See* GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 136-49 (1978).

39. *See* Pepper, *Amoral Role*, *supra* note 3, at 630-32; *infra* part IV.

Imagine that lawyers have access to a bulletin board behind the counter at the police station with a weekly list of the frequency of patrol of city neighborhoods by day and time. The client, previously represented by a lawyer on burglary charges, wants to know the frequency for Chez Ultra neighborhood, Sunday, 2–4 a.m. Intuitively we know the lawyer ought not to supply this information. The law/enforcement dichotomy provides an explanation. The two-percent audit rate information in our tax return hypothetical appears to be directly analogous under the law/enforcement dichotomy, which would disallow this more generally accepted legal advice. The distinction also provides a plausible answer to the water pollution hypothetical, disallowing any advice beyond the written .050 gram per liter limit.

The law/enforcement distinction is not consistent with the two possibilities previously discussed. Desuetude is a matter of enforcement under this dichotomy, and thus not something the lawyer could communicate to the client. Likewise, the sanction for law violation, whether it be conceived as “cost” or as “prohibition,” falls on the “enforcement” side of the dichotomy and would therefore be out of bounds for lawyer advice.⁴⁰ Distinguishing between “law” and “enforcement,” while intuitively attractive, thus presents significant difficulties, several of which are canvassed below.

1. *The Problem of Disentangling Civil Law from Enforcement*

Imagine being asked to advise a client with a contract or tort problem, but being unable to discuss the nature of the sanctions or the mechanisms of enforcement for breach of contract or for tortious conduct. Could one communicate to the client the nature of contract or tort without telling her how they are enforced; without describing the nature of a civil lawsuit and civil damages? What would the lawyer say? Could you tell the client that breach of contract is “prohibited” by the law, or is “unlawful”? Could you characterize tortious conduct as “prohibited” or “unlawful”? Or are those characterizations sufficiently inaccurate that you would be misleading the client in giving such advice? The distinction between civil and criminal law is fundamental, and to a large extent it is a difference in the nature and mechanisms of enforcement. If discussion of future consequences is out of bounds, it becomes truly difficult to imagine the lawyer’s discussion with the client in the area of civil law.

Return to the situation of the client who owns the run-down motels with water heaters likely at some point in the future to seriously injure a customer.

40. In the three examples mentioned in the preceding paragraph, the reader may find the criminal/civil distinction intuitively more attractive: It rules out advice in the police bulletin board situation, but might allow it in the tax and water pollution situations. (Advice is allowable if the conduct is a civil violation only and not also criminal.) That intuition, however, probably is based more upon the *malum in se/malum prohibitum* difference, discussed in Part II.E., than on the criminal/civil distinction.

If it is not criminal under these circumstances to proceed with business at the motels, it would be misleading to tell the owner that the law "prohibits" further use of the water heaters, or that further use is "illegal" or "unlawful." And informing the client only that the conduct is "negligent" doesn't tell him much if he hasn't been to law school. To communicate adequately to the client the nature of liability for negligence will require the attorney to provide some account of a civil lawsuit and civil damages. But once one is conveying the nature of a civil lawsuit and civil damages, one has entered the area of enforcement, and that is not acceptable under the guideline we are considering.

The situation becomes even clearer if we imagine giving advice about the obligations of contract to one who is either contemplating entering a contract or contemplating breach of an existing contract. To convey that breach of contract is "prohibited" by the law (is "illegal" or "unlawful") is to suggest to the client that society does not tolerate breach of contract. This would be very misleading, however, because the regime of contract law clearly does tolerate breach. (Some would argue that on occasion it encourages breach.⁴¹) The message of contract law is nuanced, one might even say, conflicted.⁴²

Perhaps the example of bankruptcy makes the point most forcefully. What is bankruptcy law other than an elaborate set of procedures dealing with both the enforcement and the extinguishment of debt? If discussion and explanation of these procedures and their consequences is out of bounds for the lawyer, bankruptcy law could not function as intended.

It seems, then, that disentangling civil law from enforcement simply is not possible. That may be, of course, an underlying part of the fundamental problem we are examining. But it also suggests the law/enforcement distinction is not as useful for lawyers as it first appears. There are, however, three other possible understandings of the distinction that might be useful.

2. *Advice About Legal Procedures in Relation to Contemplated Conduct as Opposed to Pending Litigation*

Ethical Consideration 7-3 of the Code of Professional Responsibility distinguishes between the advocate role and the adviser role of the lawyer in relation to "doubts as to the bounds of the law."⁴³ Because the advocate "for the most part deals with past conduct and must take the facts as he finds them," he should resolve doubts about the law in favor of his client.⁴⁴ As an adviser, however, the lawyer "primarily assists his client in determining the

41. See Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1 (1989); Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982).

42. See generally Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (analyzing conflict between *ex ante* precision and *ex post* fairness in rules of property and contract).

43. MODEL CODE, *supra* note 4, EC 7-3.

44. *Id.*

course of future conduct,” and therefore must assess “the bounds of the law” in a more neutral fashion.⁴⁵ This Article is concerned with the lawyer as adviser, and with how advice about the law influences client behavior. Once the client has acted, however, that concern is no longer relevant. Thus if the law/enforcement distinction is to function at all there is at least one necessary adjunct. The prohibition on advice about enforcement, at least as it is related to civil and criminal procedure, would apply only in regard to advice about contemplated conduct by the client that might entail a legal sanction, and not to pending litigation that involves actions already performed.⁴⁶ Litigation is enforcement, and once the client is involved in litigation, legal advice is impossible if it does not deal with enforcement mechanisms and rules. If this additional distinction were not applied, the role of the lawyer in litigation would become totally paternalistic: the lawyer would make all decisions because participation by the client would require educating the client about the process, which would be prohibited. Such a nightmarish, Kafkaesque vision of the client in litigation clarifies that during litigation, at least, advice about legal procedures (enforcement) is not only entirely appropriate, but is a core function of lawyering. The client is allowed to have a lawyer (in the criminal context, there is a constitutional right to a lawyer) and the lawyer’s primary loyalty is to the client. This is the case precisely so that the party involved in litigation will not be solely an object of the legal process, but will also have some control over (and necessarily, therefore, some knowledge about) the process.⁴⁷

This distinction, in combination with the impossibility of disentangling civil law from enforcement,⁴⁸ yields an additional possibility. Our spectrum of examples begins with the effect on the client of learning about the limited sanction for breach of contract, and then moves to the additional effect of learning about the burdens of civil litigation entailed in enforcing that limited sanction for breach of contract. As a refinement of the law/enforcement dichotomy, one could educate the client about the nature of contract law but refuse to disclose information about the process of enforcing civil damages. Advice about civil procedure (and its attendant burdens and consequent discounts) would be out of bounds until litigation was pending or contemplated. Such a line might also function in the tort example of the motel owner. The nature and function of tort damages might be explained, but not the burdens imposed on potential plaintiffs by the discovery and litigation process.

45. *Id.*

46. For an argument supporting a similar distinction, see Louis Kaplow & Stephen Shavell, *Legal Advice About Information To Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565 (1989); see also Bundy & Elhauge, *supra* note 7, at 279–304 (summarizing and criticizing Kaplow and Shavell).

47. JACK L. SAMMONS, JR., *LAWYER PROFESSIONALISM* 5–12, 55–56 (1988) (suggesting that primary function of lawyer is to ensure meaningful client participation in resolution and prevention of disputes).

48. See *supra* part II.C.1.

Two other, previously explored examples help to illustrate this possibility. First, in the euthanasia situation, the substance of the law of murder (including the grades and defenses) can be communicated without elaborating on criminal procedure. The law/enforcement line as here modified would allow meaningful legal advice about the contemplated conduct and the punishment for law violation, but would rule out the whole area of advice dealing with how that law would be enforced (including prosecutorial discretion and jury nullification).

Second, application of this discrimination to bankruptcy is more difficult, but still conceivable. Consider the person entering into substantial debt, or a course of business involving constant, refinanced debt. Before the debt is undertaken, the client can certainly be advised of the civil nature of the various mechanisms for debt collection, and the various forms of security. But can the client contemplating debt be instructed on the possibilities of bankruptcy? That would seem to be advice about enforcement procedures (really, avoidance procedures) in regard to contemplated conduct, and thus would fall on the wrong side of this version of the law/enforcement line. The client already legally obligated and in a position to consider bankruptcy (or the client who is a creditor of such a person) could be told of the bankruptcy alternative—which debts could and could not be discharged—but could not be told of the elaborate procedures through which this would occur.

A large-scale Chapter 11 situation is more problematic under this distinction. The large corporate client with either large products liability exposure or an onerous labor contract might find a Chapter 11 bankruptcy beneficial.⁴⁹ But the outcome (“discharge”) and the process in such large-scale litigation in a relatively new area of law appear impossible to disentangle. Advice about the nature and outcome of such a bankruptcy without advice about the process would be so incomplete that it would necessarily be misleading. The same is true with advice to any tort defendant facing large-scale or mass liability: substance and process, legal “rights” and their enforcement, cannot be separated without misleading the client.

3. “Enforcement” of Law: Discovery of Underlying Conduct or the Procedures of Prosecution and Adjudication?

There is a clear distinction between two senses of “law enforcement.” On the one hand this phrase can refer to the process and procedures that will be applied to determine the legal consequences of a particular set of facts. Thus

49. See generally Martha S. West, *Life After Bildisco: Section 1113 and the Duty To Bargain in Good Faith*, 47 OHIO ST. L.J. 65 (1986); Margaret I. Lyle, Note, *Mass Tort Claims and the Corporate Tortfeasor: Bankruptcy Reorganization and Legislative Compensation Versus the Common-Law Tort System*, 61 TEX. L. REV. 1297 (1983); Barnaby J. Feder, *What A.H. Robins Has Wrought*, N.Y. TIMES, Dec. 13, 1987, at C1; *Safe Harbor of Chapter 11 Also Has Its Hidden Shoals*, WALL ST. J., Apr. 15, 1987, at 2.

the prosecutor's evaluation of a situation and consequent exercise of discretion as to whether or not to prosecute is an act of law enforcement, as is the police officer's decision as to whether or not to ticket a vehicle going four miles per hour over the speed limit. Similarly, the standard of proof that will be required to show future medical expenses or lost future income in a tort case is an aspect of the enforcement of law between two private parties, as are rules governing the number of persons who will serve on the jury and the rule as to whether lawyers' fees are included in compensatory damages. All of criminal and civil procedure are a part of law enforcement in this sense. On the other hand, "law enforcement" can refer to the *discovery* of a particular set of facts, which may then be subject to legal evaluation and process. The facts must be known—discovered, gathered, and reported—before the prosecutor can evaluate; the vehicle must be observed and its speed known before the police officer can decide whether or not to ticket. The person who has been injured by the tortious conduct of another must discover at least (1) the identity of the person whose conduct caused the injury, and (2) that the conduct was tortious.

Advice from lawyer to client about "law enforcement" in the first sense is intuitively far more palatable than is advice about law enforcement in the second sense to any lawyer educated in the post-legal realist era. How one's acts will be judged—the procedure of the law—does appear inextricably bound up with the substance of the law. On the other hand, the likelihood that one's conduct will become subject to legal evaluation appears much less a part of the law, although it is certainly part of the administration of the law. Advice about procedure (in the broad sense) may well be relevant to the client who intends to obey the law; advice about discovery is more likely of concern to the client who believes the conduct will be perceived as unlawful.

A possibly attractive alternative for giving content to a distinction between law and enforcement of law for use in limiting advice from lawyer to client is, therefore, to think of enforcement as discovery by government (or a potential civil plaintiff) of the client's conduct, and to prohibit advice concerning it. Under this alternative all other enforcement-related advice would be allowed. This has the obvious attraction of the notion that lawyers will not be in the business of assisting clients in hiding illegal conduct. For example, this form of the prohibition clearly covers the information on the police bulletin board about frequency of neighborhood patrol.

Unlike the previous two possibilities, one can imagine lawyers making useful distinctions under the guidance of this alternative, and it thus offers some promise. It would require, however, changes in currently accepted practices. For example, it would appear to prohibit advice about audit frequency in the tax context, advice that many tax practitioners give their clients. And in the motel example, one of the factors mentioned was that the probability of suit is unclear because neither the injured party nor his or her

lawyer will have reason to know of the pattern of malfunction.⁵⁰ This is the sort of fact that most lawyers would assume is appropriate to convey to a client. It relates, however, to discovery of a relevant aspect of the client's conduct by the plaintiff, the analogue to police and prosecutor in the civil context. Thus the criterion we are considering would prohibit the discussion of this factor with the client. In the water pollution hypothetical, the distinction cuts an interesting line. It rules out informing the client that EPA inspection in rural areas is rare, but allows advising that violations of .075 grams per liter or less are ignored. In sum, as applied to the police bulletin board and tax audit situations, the alternative appears to yield sensible results; as applied to the motel and water pollution situations, the sense of the distinction is less apparent.

4. *Intended and Unintended Lax Enforcement*

The water pollution hypothetical raises another problem with distinguishing between enforcement and law. It is possible that a disparity between a written rule and the way it is enforced is intended government policy, and thus amounts to a *de facto* amendment of the law by a governmental actor with the power to make such a change. On the other hand, it is also possible that the lax enforcement is not a matter of policy, but rather results from unintended circumstances such as budget limits, incompetence, or happenstance.

Imagine two possible reasons why enforcement inspections might be rare in rural areas. First, it might be that rural water tends to be significantly cleaner than urban water (at least in regard to ammonia) and that pollution, if it is occurring, is far less likely to be harmful in the rural environment than in the urban environment. Multiple sites discharging the same pollutant are also far less likely. These facts may have been known when discharge limits for the particular effluent were promulgated, but more detailed regulation defining "urban" as opposed to "rural" and articulating differential limits for the two types of area, or otherwise more accurately calibrating the limit to the environmental context, may not have been feasible. The agency thus may have framed the limit with the most typical area and the most serious harms in mind, with the intention of exercising regulatory discretion to fine tune the regulation to different areas and conditions. The regulation was promulgated with knowledge that it was intended more for urban areas than rural, and the enforcement disparity known to the lawyer might well be part of the regulator's policy. Alternatively, the .05 gram ammonia limit may be the regulator's best judgment as to the amount sufficiently likely to cause significant harm regardless of the presence of other effluents or multiple sites. The less frequent testing in rural areas may be attributed solely to insufficient

50. See *supra* text following note 34.

funds for enforcement, and the fact that it is less expensive to test in the urban areas.

In the first situation, it is meaningful to say that the .05 limit is not "really" the legal limit in rural areas. The source of law—the regulatory agency—has intentionally made the law-as-enforced different from the law-as-written for reasons related to its legal mission. (The situation is akin to the desuetude example where prosecutors refuse to enforce an anachronistic statute.) Since the harm the agency is to prevent is unlikely to occur in the rural area, even over the .05 limit, the agency has tailored the law through enforcement decisions. Such intentional use of enforcement policy for substantive reasons appears to break down the "law/enforcement" distinction; enforcement is part of the "real" law here. When, however, lax enforcement is based simply upon cost, incompetence, or inadvertence, rather than substantive reasons, the "law/enforcement" distinction retains meaningful content.⁵¹

If the lawyer knows the reasons for a significant differential between the law-as-written and the law-as-enforced, then the "law/enforcement" distinction might be used in deciding what information to convey to the client. Frequently, however, the lawyer does not know. Absent information, ought the lawyer to assume that such a differential is not substantively based? Or, is it more likely the case that in most such decisions substantive and cost factors are mixed in a complicated way? Is it likely that enforcement policy is usually partly law—that is, partly assessment of what is more and less important, more and less wrongful, and so on—and partly "just" enforcement? If the latter is true, the utility of the "law/enforcement" distinction is substantially diluted.

In sum, the distinction between law and enforcement has significant intuitive attraction. A citizen's access to the law ought not mean access to the means to evade the law; and distinguishing law from enforcement of the law appears to speak to that difference. Our exploration of the possible ways of framing and applying the distinction, however, reveals substantial difficulties. The distinction will assist a lawyer's understanding of the situation, but these difficulties render a thorough analysis complex and problematic.

51. It may often be even more complicated; budget constraints may well be the result of policy choices: "[A]bsolutist statutory requirements generate overbroad regulatory schemes . . . Since the requisite tradeoffs have not been made at the legislative stage, they must be made in the enforcement process, and the most basic and effective way of achieving this is through budgetary constraints." Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program*, in ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 105, 116 (Michael S. Greve & Fred L. Smith, Jr. eds., 1992).

D. *The Distinction Between Public Information and Private Information*

Imagine, once again, that you are the lawyer anticipating counseling your client concerning the ammonia effluent limits for her rural plant in the situation where: (1) .05 grams per liter of effluent is the written limit, (2) .075 grams per liter is the enforced limit, (3) inspection is infrequent in rural areas, and (4) in such areas violators are issued a warning (given a second chance) prior to any penalty. In deciding what information to convey to your client, ought it to be relevant whether or not a given piece of information is generally known to either lawyers giving advice regarding these matters or to the industry in general? If, for example, items (2) and (3) are generally known among lawyers for the industry, but you are the only nongovernment lawyer who knows item (4), ought you to convey all the information except item (4)?⁵² If so, we have yet another possible guide for what legal information to give and what to withhold from the client who may use the information to facilitate unlawful conduct.

Even though knowledge of items (2) and (3) may facilitate (or lead to) unlawful conduct by the owner of the rural plant, withholding such information might well put your client at a competitive disadvantage if the rest of the industry has the information. And if the industry knows, then the government must know that the industry knows, and continuation of the .075 gram limit and infrequent rural inspections then takes on the characteristics of a conscious "legal" decision by the agency, a policy it knows the regulated use as a guide. In other words, if the lawmaker knows its conduct is known by and guiding the regulated, that conduct looks and sounds like "law" to a contemporary lawyer. It doesn't seem fair to put your client at a disadvantage in regard to information available to her competitors, and part of why it doesn't seem fair is that what the competitors have access to and are being guided by looks a lot like "law."

On the other hand, if the industry does not know of the practice of giving a warning, there appears to be less reason for your client to know; it doesn't seem *unfair* for her not to know. Indeed, if the "second chance" practice is a government decision, it would appear to be unfair for *only* your client, and not the rest of the industry, to know. If it is a limit coming from the government—that is, if it is *law*—it is wrong for information about the penalty not to be publicly available. Thus, one distinction we could apply in limiting information about the law that lawyers ought to give to clients is whether or not the information is public. And this line dovetails with what we consider

52. As with the desuetude discussion above, there might well be many other factors the lawyer would want to discuss in such a situation: the risk of violating a written rule and relying on an informal unwritten practice, the harm (or absence thereof) caused by the anticipated level of pollutant discharge, and so on. See *supra* part II.A.1, and discussion of counseling, *infra* part IV.

law to be: rules and related conduct by the government intended to limit and channel behavior.

If the "secret" rural "second chance" practice is not law, however, what is it? It is certainly a line determining when a governmental actor with power will act, and thus seems to meet the fundamental legal realist definition of law. Meir Dan-Cohen has suggested that conceptually it is possible and legitimate to have secret law, positing the possibility of different rules (1) to guide the conduct of "the general public," and (2) to guide "officials" judging or administering that same kind of conduct. He believes that such a distinction clarifies several problematic areas of criminal law.⁵³ For example, the criminal law might well allow the defense of duress only in cases where the defendant was unlikely to know of the defense, thus minimizing the likelihood of conscious reliance on the rule by a potential criminal. The rule known by the public—or addressed to the public—would thus be a different rule than that applied by the prosecutors and the courts. The public rule usefully maximizes the deterrence of criminal conduct; the secret rule allows for greater fairness in avoiding punishment for nonculpable conduct. (This might be the justification for not informing the industry about the "second chance" policy.) For such differentials to function, there must be what Professor Dan-Cohen refers to as "acoustic separation": what the officials know, the public must not. Under his analysis, the probable presence or absence of conditions that allow for such "acoustic separation" will explain problematic distinctions in criminal cases that are otherwise unjustifiable. Significantly for our exploration, Professor Dan-Cohen assumes that information known by a lawyer will be transferred to the client. If the situation is one in which it is foreseeable that clients (potential criminals) will consult a lawyer, under this view it is an inappropriate area for differential rules because communication with a lawyer defeats acoustic separation.⁵⁴

The law of conflicts of interest makes the same assumption as Professor Dan-Cohen, that information helpful to a client will be conveyed to the client or used on his behalf. A lawyer will be prohibited from representing a current client against a past client if the two matters are "substantially related."⁵⁵ The reason for this is that if the matters are so related, it is likely that the lawyer

53. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 636-48 (1984).

54. Thus, in explaining a case in which the defense of duress was held not to excuse the violation of the duty to testify, Professor Dan-Cohen notes:

The decision about whether to testify is of a distinctively legal character: it is a decision about whether to participate in the legal process. It therefore focuses the individual's attention on the relevant legal duty in a way that most offenses do not. The decision about whether to testify is probably also the product of prolonged deliberation, in the course of which *the individual may seek legal advice* about the scope of her duty and the likely consequences of a failure to testify.

Id. at 642-43 (emphasis added).

55. WOLFRAM, *supra* note 6, § 7.4.1.

learned confidential information in the prior representation that could benefit the current client and correspondingly harm the past client. To protect the prior client's confidences—and to prevent the lawyer from being tempted to violate her obligation of confidentiality to that prior client—the law presumes such confidences were passed and will disqualify or discipline the lawyer who takes on such representation.

The same concern underlies the controversy over the “revolving door” between governmental service and service to clients regulated by the government. Lawyers gain familiarity with a body of regulatory law while working for an agency and then move on to use that expertise on behalf of clients regulated by the same agency, often in adversary proceedings against the agency or in which the agency is the adjudicator. Rules analogous to the “substantial relationship” test assume the lawyer will use information gained in government service to benefit subsequent clients, and there is an effort to distinguish situations in which confidential information is likely to be known—and thus the lawyer ought to be disqualified—from those involving only the kind of “general expertise” gained in government service that may be used to benefit private clients.⁵⁶

Note that these rules of conflict of interest support both sides of the distinction we are considering. They affirm our underlying understanding (or expectation) that lawyers will use all relevant information to help their clients. On the other hand, in recognizing the confidentiality interests of former government clients, they support the notion that some information about the law⁵⁷ ought not to be public, ought not to be available to future clients.

The public information/private information distinction would provide guidance analogous to, but quite different from, the conflicts provisions. The latter prevent information from being used to assist the subsequent client even in completely lawful and proper conduct, while the public/private distinction would be framed only to prohibit use of information about the law that would facilitate unlawful conduct by the client. Also, the conflicts and confidentiality rules only protect information acquired from a prior client, while the public/private guide would focus not upon how or where the lawyer received the information, but on whether it is generally known in the relevant client or lawyer community.

56. See MODEL RULES, *supra* note 12, Rule 1.11 & cmt.

57. It is conceivable that only factual information, legal strategy, and work product specifically related to some particular incident or conduct (accident, transaction, course of conduct, and so on) are protected by rules of confidentiality and conflicts, and not information concerning more general enforcement and administrative policies and procedures. But this is unlikely. Internal governmental practices—not just facts underlying any particular party's matter before a governmental entity—will often be at the core of information the government wishes not to reveal. The current ABA Model Rules may be read to protect only the former “factual information” in the conflicts provision, *id.*, but the latter “governmental practices” would appear to remain protected by the confidentiality provisions, *see id.* Rule 1.6 & cmt. para. 21 (“Former Client”).

Such a line confirms and helps explain our intuition concerning the behind-the-counter bulletin board in the police station with its information about frequency of police patrols. The "behind-the-counter" aspect of the bulletin board and the fact that it contains information useful to burglars both suggest that the police have no intention of making this information public. To the extent we can identify this aspect of information about enforcement as "law," it is clearly the kind of law for which the lawmaker intends "acoustic separation" to occur.

This public/private distinction also assists us in understanding tax lawyers' willingness to inform clients of the two-percent audit rate under circumstances in which that information may well facilitate unlawful underpayment of tax. Once the audit rate information has been published (by the IRS or someone else), it becomes public information about the way the law will be enforced. As such, it seems unfair for some citizens to have access to it, and others not. The IRS may not have wanted this information published and publicly available, but once known it is hard to suppress. Sophisticated clients can find it for themselves. As it is thus available to sophisticated parties (who can, in essence, do their own lawyering), a tax lawyer is likely to see this as information about the "law" that she is in the business of conveying to clients. Tax practitioners have in fact assumed it is appropriate to convey this information, and no legal constraint has been imposed (or, to my knowledge, even considered) on them. On the other hand, if one lawyer happened to find the audit guidelines inadvertently left in a conference room by an IRS employee, most lawyers would consider the propriety of that lawyer using the information for clients' benefit, passing it on to clients, or publishing it in an article or service to be questionable. In such a context, the lawyer's conduct approaches misappropriation of private information.⁵⁸

Although not likely to be precise, the public information/private information distinction provides helpful guidance for lawyers. It connects with both our notions of fairness concerning the government treating its citizen equally and our understanding of law as public. It appears legitimate for much information about the enforcement of law not to be available to the public. If such information has been successfully kept from the public, the lawyer would not have an obvious obligation to provide it to a client. The wide legal realist understanding of law, however, would certainly define such information as "law." Under that view, we have here a narrow category of justifiably secret law.⁵⁹

58. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 382 (1994); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 368 (1992); *Lipin v. Bender*, 10 ABA/BNA Law. Manual on Prof. Conduct 333 (N.Y. 1994); *Resolution Trust Corp. v. First of Am. Bank*, 10 ABA/BNA Law. Manual on Prof. Conduct 365 (W.D. Mich. 1994). But see *Acrojet Gen. Corp. v. Transport Indem. Ins.*, 22 Cal. Rptr. 2d 862 (Ct. App. 1993).

59. See *supra* text accompanying notes 53-54.

E. *Differentiating Malum in Se from Malum Prohibitum*

Intuitively we know that it is wrong to give the client information available to the lawyer from the police bulletin board about the frequency of police patrols in a particular neighborhood. That intuition explains, in part, the attractiveness of distinguishing between law enforcement as discovery of the client's possibly unlawful conduct and law enforcement as the procedures following such discovery. The fact that this distinction would also prohibit providing information about the frequency of tax audits in particular categories of returns or information about the frequency of testing of rural water effluent seems, however, to undermine significantly that intuition. What accounts for the difference? The answer is that there is a clear and strong consensus that burglary is wrong. On the other hand, whether or not it is wrong to discharge .060 grams of ammonia per liter of water effluent in a rural area is a question to which most of us would not have an immediate answer. For all we know, such a discharge could be quite harmless; or, if kept up for a period of five years, it may be likely to cause several additional cancer deaths in the next forty years. Knowing that the discharge is unlawful adds relevant information, and makes the conduct "wrongful" in at least one sense, but not on a parallel with burglary. The discharge may be a technical legal violation, but it may not be wrongful in any other significant sense. (It is quite possible, as noted above, that the lack of enforcement resources devoted to discovery of violations in rural areas is based upon the regulators' conclusion that the conduct is *not* harmful to a significant degree.⁶⁰) The difference between burglary and this instance of regulatory violation seems to be that the former is clearly wrong in its very nature in addition to being unlawful, and the latter is unlawful, but may or may not be otherwise wrongful.

That difference corresponds to the old distinction between crimes *mala in se*, wrong in their very nature, and crimes *mala prohibita*, crimes wrong only because prohibited by positive law. This distinction also helps in understanding our intuitions concerning the criminal/civil dichotomy. The latter seemed to fit in some circumstances, particularly at the ends of the spectrum. But it did not do so well with regulatory criminal law, as in the water pollution example.⁶¹ A prohibition on giving the client legal information that might assist in the commission of a crime rings the right chord when the conduct is something we perceive as "really criminal," but strikes quite another note with vast areas of regulatory law. The *malum in se/malum prohibitum* distinction appears, in older garb, to formulate the difference between law as true prohibition (that is, the identification of conduct not to be tolerated) and law as cost (that is, the

60. See *supra* part II.C.4.

61. See *supra* notes 31-34 and accompanying text.

identification of conduct to be penalized in some legal fashion, but which the citizen is still free to choose to do).⁶²

We have a strong sense that somehow lawyers' ethics must differentiate these two. For example, William Simon notes that lawyers "insist that a person has a 'right' to breach a contract," but "never argue that a person has a right to commit murder so long as he does not leave behind proof beyond a reasonable doubt of his act."⁶³ While the distinctions between criminal and civil law and between law and enforcement of law do not provide the ordinary practicing lawyer with an answer to Professor Simon, something like the *malum in se/malum prohibitum* distinction does.

Lawyers' ethical rules have already used what appears to be this distinction in one core provision. The ABA Code of Professional Responsibility allows a lawyer to reveal "[t]he intention of his client to commit a crime."⁶⁴ In the current ABA Model Rules of Professional Conduct, this has been narrowed to allow disclosure "to prevent the client from committing a criminal act that the lawyer believes is *likely to result in imminent death or substantial bodily harm*."⁶⁵ Although the organized bar may not have articulated its reasons this way, I suspect that the large and amorphous category of criminal conduct appeared to be too wide an exception to the obligation to keep information learned from the client confidential, and I surmise that no legal classification seemed to do the job better. So the drafters⁶⁶ appear to have been forced back upon an old distinction: if what the client is going to do is really wrong, you can reveal it. But that way of putting it is too vague—and too subject to individual interpretations of "really

62. For a brief discussion of this and related distinctions concerning lawyer assistance in illegal conduct, see Geoffrey C. Hazard, *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669, 672-75 (1981). Professor Hazard relies primarily upon Restatements and the Model Penal Code for his conclusions. For discussion of these sources, see *infra* notes 115-20 and accompanying text; see also HAZARD, *supra* note 38, at 148.

63. Simon, *supra* note 27, at 48. Simon's point deals with the tension between the aims of substantive law and those of procedural rights—between the needs for order and for discretion. David Luban has gone further, arguing that "counseling an industrial client that antipollution standards are rarely enforced and therefore need not be complied with is no different at all from counseling a client that the law against murder need not be complied with if the client can avoid getting caught." Luban, *supra* note 17, at 647. For a response foreshadowing some of the observations developed more fully in this paper, see Pepper, *Rejoinder*, *supra* note 7, at 668-73.

64. MODEL CODE, *supra* note 4, DR 4-101(C)(3).

65. MODEL RULES, *supra* note 12, Rule 1.6(b)(1) (emphasis added). Many states retained the wider Model Code language in their versions of Rule 1.6. See THOMAS D. MORGAN & RONALD D. ROTUNDA, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, MODEL RULES OF PROFESSIONAL CONDUCT, AND OTHER SELECTED STANDARDS INCLUDING CALIFORNIA RULES ON PROFESSIONAL RESPONSIBILITY app. at 132-40 (1995) (reprinting State-by-State Analysis of Ethics Rules on Client Confidences).

66. In this instance the language appears to have come from the American Bar Association House of Delegates, which amended the Kutak Commission's "Proposed Final Draft." HAZARD & HODES, *supra* note 6, § 1.6:302. That draft did not have the "imminence" requirement. It did include "substantial injury to the financial interests or property of another," and rectifying client crime or fraud in which the lawyer's services were used, in the short list of justifications for disclosure. Many states have adopted versions of Rule 1.6 that include these added exceptions to the obligation of confidentiality. *Id.* § 1.6:109, nn.6-7; MORGAN & ROTUNDA, *supra* note 65, app. at 132-40.

wrong"—to work well as a rule, so an operational definition was used: it is "really wrong" if it is going to kill someone, or hurt someone in a significant, physical way.

An attempt along these lines to translate the *malum in se/malum prohibitum* distinction into guidance for practicing lawyers in giving legal advice in situations where the client might use it for unlawful conduct could take a narrower or broader form. A narrow rule could be framed to simply track the one on confidentiality quoted above: when it appears likely that the client will use knowledge of the law to facilitate unlawful conduct likely to cause death or substantial bodily harm, the lawyer shall not provide that knowledge.⁶⁷ Alternatively, a rule could be formulated to track the underlying perception of the "wrong in itself" concept, and apply that concept to a larger area of potential client conduct. Such a rule might state: when it appears more probable than not that the client will use legal information or advice to facilitate conduct that (1) is clearly prohibited by law and (2) involves what is by clear societal consensus a serious and substantial moral wrong, the lawyer shall not provide the client with the legal advice or information.

Such rules effectively accord with our intuitions in ruling out advice in the most troubling situations. For example, the situation in which the childless, middle-aged client is interested in whether legal authorities consider children under ten years old competent to testify in sexual abuse cases easily fits within the prohibition if there appears to be no legitimate basis for the client to be interested in this information. The more general form of the rule also assists us in understanding our hesitance to rule out advice about possible prosecutorial discretion and jury nullification in the euthanasia hypothetical. Although the contemplated euthanasia is clearly criminal, the client's particular circumstances may make it unlikely that the conduct would be a "serious and substantial wrong by clear societal consensus."⁶⁸

Thus, a rule constructed along these lines to reflect the difference between *malum in se* and *malum prohibitum* could function to rule out advice from lawyer to client in the most egregious situations. A rule of this kind would be of value to practicing lawyers, reinforcing the intuition that certain advice ought to be out of bounds, and announcing at least one category of circumstances in which the client's right of access to the law is trumped by

67. A similar, but somewhat narrower rule is contained in the proposed *American Lawyer's Code of Conduct*, a code drafted primarily by Monroe H. Freedman under the auspices of the Roscoe Pound-American Trial Lawyers Foundation: "A lawyer shall not advise a client about the law when the lawyer knows that the client is requesting the advice for an unlawful purpose likely to cause death or serious physical injury to another person." AMERICAN LAWYER'S CODE OF CONDUCT Rule 3.3 (1980). This is narrower in that it requires a higher level of certainty on the part of the lawyer that the client will use the information for an unlawful purpose ("when the lawyer knows" rather than "when it appears likely").

68. The ostensibly narrower rule, copied from the Model Rules confidentiality exception, is in this example broader and less flexible. Euthanasia is a criminal act that will result in death, and thus the legal information could not be conveyed.

considerations that justify a refusal to allow the lawyer's knowledge to become instrumental to a violation of the law.

Note here that the suggested rules focus upon the results of the particular client conduct at issue, not on the classification of the legal violation or crime. "Murder" is certainly a category of crime we would normally consider *malum in se*. It is murder under the particular circumstances of the euthanasia example that perhaps is not wrong in itself. And the ABA exception regarding confidentiality refers not to the category of "crimes of violence," but to any criminal act (including, conceivably, a violation of the water pollution prohibition) "likely to result in imminent death or substantial bodily harm." Such approaches move away from the old *malum in se/malum prohibitum* distinction by moving away from legal categories, and looking more at the particular conduct at issue. The larger categories seem too large to function well for the basic right/wrong distinction we are considering.

Even having made this move, however, these possible rules are relatively narrow. They function to give support and justification where the lawyer is likely to know already, on one level or another, that under the circumstances the advice is improper. They would not function, however, to give guidance in the vast areas of legal advice that remain: contracts, much of torts, most criminal violations that are "only" *mala prohibita*, regulatory law (substantial parts of which include criminal penalties, but most of which would be classified *mala prohibita*), civil procedure, and so on. Relatively little advice in these areas of law would fall on the prohibited side of either of the two rules articulated above.

It is possible that the basic perception underlying the distinction could be extended to these less precise, more problematic areas. A flexible "standard" might be constructed according to which each lawyer must judge under the particular circumstances whether the client's prospective unlawful conduct is "really wrongful" in some fundamental or serious way, or is "merely penalized" in some legal fashion. Thus a client's intentional breach of contract that was likely to bankrupt the business of an innocent, unsophisticated individual might be treated quite differently from an intentional breach that would cost a Fortune 500 company \$100,000. The lawyer's decision to give all the relevant legal information in the motel example would depend upon that lawyer's categorization of the tortious conduct as "really wrongful" or as "merely penalized" with the cost of damages. The absence of the clear societal consensus that underlies the concepts of *malum in se* and *malum prohibitum* would mean that the guidance would be more subjective and contextually determined, but it would still provide the lawyer with a framework for considering the situation and making a decision. Because such a standard would move away both from clear societal consensus and from somewhat more objective lines, it might be that the direction given the lawyer would not be to withhold the legal information. The lawyer might instead be required to

provide the information only in tandem with the lawyer's assessment that the conduct not only would be "unlawful" in some sense or other (breach of contract, tortious), but also that it would be "really wrongful," and ought not to occur.⁶⁹

F. *Who Initiated Discussion of the Possibly Illegal Conduct:
Lawyer or Client?*

Many lawyers suggest that the ethical propriety of providing legal information that may lead to conduct contrary to law depends, at least in part, on whether or not the client has asked. Under this line of thought, if the client has requested information about "the law" or legal consequences, the lawyer's primary function is to provide that information. If, however, the client has not asked, providing the information may well amount to the lawyer's suggesting unlawful conduct, and thus would be improper.

Assume, for an initial example, that the client has suffered recent financial difficulties, and current contractual obligations entail further serious financial harm. The client has not, to the lawyer's knowledge, considered breaching these contracts, although the lawyer believes the consequences of breach will be significantly less deleterious to the client than will continuing to fulfill the obligations. Is it wrong for the lawyer to inform the client of the legal consequences likely to follow from breach, and of the lawyer's opinion that these would leave the client in a better position? Is it wrong to fail to give such advice? Is it malpractice?

Second, imagine that the client in our motel example assumes that because the malfunctioning water heaters may do serious harm to a customer he has a legal obligation to remove them, even though this is likely to lead to closure and loss of the business, a possibility he finds very difficult to face. Ought the lawyer educate the client concerning (1) the difference between the nature of the obligations of criminal law and tort law, (2) the difficulties and contingencies that an injured person would face in pursuing a claim (including whether he happens to consult a lawyer and the difficulties of discovery and trial), and (3) the significance of the client's liability insurance, including the insurer's obligation to defend? (Ought the more creative lawyer raise in addition the possibility of purchasing and installing the water heaters on credit, almost certainly defaulting on the obligations, and then working toward an extended payout with the creditors, knowing they would probably prefer such a workout to taking either the heaters or the motel, which are security for the debt? Is this advice merely anticipating the advice about breach of contract in the previous paragraph, or has it crossed the line to suggesting a future fraud?

69. See *infra* part IV.

Note that even if it is fraud, it appears to be a solution that prevents the substantial possibility of serious physical injury to an innocent customer.)

Finally, consider the affluent client who owns four investment condominiums, each with a federally insured mortgage, for whom it has become uneconomical (but possible) to continue payments. The lawyer knows that the client can walk away from the properties without paying anything further as long as he defaults on only one of the mortgages in any two-month period.⁷⁰ Is it wrong for the lawyer to provide information to the client about the government's enforcement policy, which is highly likely to lead to the client's breaching the contract and to substantial loss for the government? Is it malpractice to fail to give the advice? (Is it a form of fraud to "misuse" the operational definition distinguishing "investors" from "ordinary owners" that the government is attempting to draw with its enforcement policy?)⁷¹

Does it make a determinative difference, in each of these situations, that the client has not asked? Two quite different basic perceptions about the role of the lawyer point in different directions. First, for the lawyer to be the originator of conduct contrary to law certainly doesn't sound right. Law, to a large extent, is society's formal vehicle for channeling people into conduct the polity has judged beneficial in some significant way, and away from conduct it considers harmful or deleterious. For lawyers actively to counsel clients in opposition to that channeling would appear to be plainly antisocial conduct, the kind of conduct that earns lawyers the negative half of their image.⁷²

The strength of this perception, however, is dependent on all the factors discussed earlier in this Article: Is the legal provision really "law," or has it been eroded by desuetude or enforcement policy into something society appears not to be very concerned about? Is the conduct really prohibited, or just freighted with a legal cost or penalty? Is the conduct really wrongful, or just legally prohibited?

The second, quite different perception concerns the apparent unfairness of advantaging the more legally sophisticated client over the less knowledgeable client, or of advantaging the less scrupulous client over the more scrupulous one. (I assume here that the less sophisticated or more scrupulous client is less likely to initiate the problematic discussion with the lawyer.) The prime function of lawyers—providing access to the law—suggests that it may not be

70. This informal enforcement practice was conveyed to one of my colleagues in a telephone conversation with an official at one of the federal lending agencies. The practice was apparently intended as a rough device for distinguishing ordinary homeowners from investors. Given the reasons for "acoustic separation" with regard to such a practice, it seems curious that it was revealed to a private practicing lawyer.

71. We may have a sort of continuum here regarding the lawyer's advice: inciting criminality \Rightarrow hard ball \Rightarrow thorough competence \Rightarrow malpractice. We may know we don't want the two ends of the spectrum, but how to identify them is less clear.

72. Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379, 389 (1987); see Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 68-83 (1988) (presenting critiques and defenses of lawyers' ability to act independently).

fair. Law is intended to be a *public* good; the prospect of differentially available law is troubling.⁷³ Lawyers function to make law available and thus to equalize citizen access to one major *public* resource: use of the law.⁷⁴ The distinction considered here appears to subvert that positive role of lawyering. The person wise enough to ask gains access to the law; the less knowledgeable or curious or sophisticated client does not. Lawyers generally pride themselves on understanding that the client may not be knowledgeable enough about the law to know what he wants or needs. Frequently a lawyer must engage in skillful interviewing in order to discover enough about her client to educate him about where his situation and the law intersect. Lawyers often need to counsel the client to understand what options the law presents. In this way the sophisticated and unsophisticated are significantly equalized through the assistance of lawyers.

Just as with the first perception, however, the problem of what counts as "law" to which there should be equal access remains. We are cycled back to the questions considered earlier. If we knew which kinds of law a client has a "right" to violate and take the consequences, or under what circumstances clients have such an option as part of the law, then we might know when the lawyer could initiate discussion of such an option, and when it would, to the contrary, not be a legal option for the client, and hence not appropriate for the lawyer to raise. But such a taxonomy is not available to practicing lawyers.

G. *Probability that Advice Will Result in Lawful Rather than Unlawful Conduct*

Can we provide guidance to the lawyer based upon the likelihood that the client will use the lawyer's knowledge either to abide by legal norms or to violate them? To the extent the lawyer is unsure of the client's intention to violate the law or legal norms, it is difficult to categorize providing information about the law as assistance in unlawful conduct. Thus we could create an initial legal guide that suggests that if the lawyer has no reason to foresee that advice may be used to violate the law or a legal norm, she is free to provide the advice. On the opposite side of this guide, we might frame a rule prohibiting the provision of advice when the lawyer *knows* that the client will use knowledge of the law to violate it.

An effort could be made to further refine such guidance; that is, to find the line somewhere between these two extremes to determine when it is proper or improper to provide the advice. A line oriented toward protecting society's

73. Promulgation is thought to be a requirement of the "rule of law." See sources cited *supra* note 1. But cf. discussion *supra* part II.D.

74. One should consider, to the contrary, William Simon's observation that because legal service will always be a scarce resource, it is part of the lawyer's moral responsibility to decide which clients she will serve. Simon, *supra* note 17, at 1092-96; see also Pepper, *Amoral Role*, *supra* note 3, at 619-21.

interest in obedience to the law might provide that when there is a substantial possibility that the information will facilitate violation of the law or legal norms, the lawyer ought not provide the information.⁷⁵ (A corollary might be that in such a situation the lawyer may communicate further with the client to learn more about the client's intentions or probable actions,⁷⁶ but could not provide the information until he or she determined that it was highly unlikely that the information would be used to facilitate conduct contrary to law or legal norms.) A quite different, client-favorable line might say that the lawyer may give such advice—that is, may give the benefit of the doubt to the client—unless it is “very likely” that the client will use the information to violate the law or legal norms. A number of other “in between” variations are possible (“likely,” instead of “very likely,” for example). Or this approach could operate more like a standard: the more likely it is that the information will be used to violate the law or a legal norm the less appropriate it is for the lawyer to provide it.

Two factors should be considered in relation to this possible approach to limiting lawyers' advice. First, it is likely to be useful only in combination with one or more of the other factors canvassed above. Aiding in a foreseeable breach of contract may be perfectly acceptable whereas aiding in a foreseeable homicide would not. Thus if the criminal/civil line were to be adopted as the legal limit,⁷⁷ the question would be how probable (or how foreseeable) the client's possible criminal violation must be for the lawyer to be prohibited from giving the legal information that could facilitate it, and what kind of inquiry the lawyer would be required to make to clarify that probability. The same question would need to be answered if the *malum in se/malum prohibitum* line were accepted as the appropriate guide. Whatever line determined when the client ought not be given information about the law, one would still need a supplementary guide concerning how likely the client's wrongful (however defined) use of the law (however defined) would have to be to trigger the prohibition.

Second, this probability or foreseeability guide often will become entwined with the distinction discussed immediately above: who initiated consideration

75. A rule along such lines was proposed by the Kutak Commission in its discussion draft of the Model Rules of Professional Conduct: “A lawyer shall not give advice which the lawyer can reasonably foresee will: (1) be used by the client to further an illegal course of conduct” MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.3(a) (Discussion Draft 1980). The rule was rejected, and a quite different rule adopted, discussed in Part III. “Reasonably foresee will” apparently is based upon the developed notions of reasonable foreseeability in the law of negligence. “Reasonable foreseeability” in that body of law indicates that something (the foreseen) *might* happen, however, not that it *will*. Thus, the Kutak Commission's combining of the two usages is obscure. It is unclear what level of likelihood would be necessary to qualify as “reasonable foreseeability” that the client “*will*” rather than “*might*” engage in unlawful conduct.

76. See the illustrative case in HAZARD & HODES, *supra* note 6, § 1.2:506.

77. As it has been, in part. See MODEL RULES, *supra* note 12, Rule 1.2(d), discussed in Part III

of the possibly legally wrongful conduct?⁷⁸ This is because the lawyer's discussion of the legal effect of possible future conduct may itself introduce the possibility of that conduct to the client or otherwise substantially change the likelihood of the client so conducting herself. The very possibility of such conduct may not have occurred to the client because she did not understand its legal significance. For example, education of the client concerning the .050 grams per liter ammonia effluent level and its nonenforcement below .075 may substantially change the probability that the client will in the future discharge more than .050 grams of ammonia per liter. A second example is the classic *Anatomy of a Murder* situation in which education of the client concerning the possibility of an insanity defense, and the implausibility of all other potential defenses, substantially increases the likelihood that the client will lie to the lawyer—and later the court—in order to create arguable “facts” to support such a defense.⁷⁹ In framing a rule or principle based upon some variation of the probability that the client will use the information to assist legally wrongful conduct, one must decide whether the standard refers to the probability before or after communication of the legal information. Because our concern is with the effect of information about the law on a client's conduct, it would seem most sensible to focus on the likelihood of the conduct after the information is conveyed rather than before.

A focus on the effect of the information, the before-and-after question, could also lead one to suggest a more absolute limit: if conveying the information makes it more likely the client will violate the law or legal norm at issue, the lawyer ought not educate the client. Such a conclusion, however, would either deny the significance of the issues considered to this point in the Article, or it would send us back to them; back to ponder the client's “right” to breach a contract, to commit a *malum prohibitum* crime, or to know how the law in question is enforced.

H. *Distinctions, Guidance, and Complexity*

Having now canvassed seven distinctions, a number of permutations on those distinctions, and some rules derived from them, all in an effort to find some guidance for lawyers, where are we left? I would suggest that no single factor provides clear answers, except for some situations at the margins. Clear desuetude of a legal provision could be communicated to the client, for example. For another, the lawyer ought not facilitate conduct that is clearly and seriously *malum in se* by conveying knowledge about the law that will assist the conduct.⁸⁰ Aside from these important but marginal situations, the seven

78. See *supra* part II.F.

79. See ROBERT TRAVER, *ANATOMY OF A MURDER* (1958).

80. One of the two rules framed in Part II.E states:

factors are not determinative—they do not provide us with rules or with answers.

The civil/criminal line is the one most accepted and articulated by lawyers. But that acceptance and articulation are not particularly deep or thought through, as the water pollution and tax audit examples show. Each of these presents a situation in which formally criminal conduct may well be facilitated, yet most lawyers would think it appropriate to provide the client with information about the law. For that reason, among others discussed above, the criminal/civil distinction is not nearly as helpful as it first appears. The *malum in se/malum prohibitum* distinction may well be the most helpful, but it has several quite different formulations.⁸¹ The combination of one or the other form of the *malum in se/malum prohibitum* distinction with the criminal/civil line probably comes closest to the operational limit applied by most lawyers. Although the conduct at issue in the water pollution and the tax audit examples is possibly criminal, because it is not *malum in se*, most lawyers would provide the information.⁸² And when both criminality and clear moral wrongfulness are combined, most lawyers will hesitate and may well not provide the facilitating information about the law. Unfortunately, the *malum in se* characterization is itself both unclear and intimately connected to personal morality, and thus subject to great dispute and difference of opinion. Any combination of the two factors includes the weaknesses of both. Thus the combination does not provide clear or rulelike guidance, although it is more determinative and helpful than either distinction alone.

We can try to join the factors together—perhaps in a grid, as on the chart on the following page—but this does not generate clarity either. Rather, it provides us with a graphic demonstration of complexity: seven possible distinctions, each of which, as discussed above, has significant problems and variations within it. (An attempt at including those variations would make for an even more bewildering chart.) The lawyer facing the kind of situation explored here could, having considered each of the factors, place a check in each appropriate box of the grid. The more checks on the left side of the grid, the more concerned the lawyer ought to be about providing the client with

When it appears more probable than not that the client will use legal information or advice to facilitate conduct which (1) is clearly prohibited by law and (2) involves what is by clear societal consensus a serious and substantial moral wrong, the lawyer shall not provide the client with the legal advice or information.

Something like this rule ought to guide the conduct of lawyers, and thus ought to be included in the Model Rules.

81. See *supra* part II.E.

82. As noted in Part II.B.2, in the regulatory arena civil and criminal penalties are likely to overlap. In the tax audit lottery situation, the penalties are more likely to be civil. The responsibilities of tax lawyers in this type of situation have been the subject of much discussion. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 85-352 (1985); BERNARD WOLFMAN & JAMES P. HOLDEN, *ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE* (1985); George Cooper, *The Avoidance Dynamic: A Tale of Tax Planning, Tax Ethics, and Tax Reform*, 80 COLUM. L. REV. 1553 (1980); Michael C. Durst, *The Tax Lawyer's Professional Responsibility*, 39 U. FLA. L. REV. 1027 (1987).

information about the law. Or the lawyer, as she goes through such a process, might give a weight to each check mark (a number from 1 to 4, perhaps) based upon the importance of each factor to the situation at issue. Attempting such an exercise with one or two of the examples is surprisingly interesting. The checks spread out in no clearly determinative pattern (usually a significant number on each side), but the process of deciding which side the check goes on, and how important that factor ought to be, is clearly helpful even though it provides no direct answer.

Criminal Violation (Law as prohibition)		Civil Violation (Law as cost)	
Conduct <i>Malum in Se</i> (Conduct wrong in itself)		Conduct <i>Malum Prohibitum</i> (Conduct "merely" prohibited)	
Enforced Law	Rarely Enforced Law	Unenforced Law	
Enforcement of Law	Procedural Law	Substantive Legal Rules	
Private Information		Public Information	
Lawyer-Initiated Discussion		Client-Initiated Discussion	
Likely information will be used to assist unlawful conduct		Unlikely information will be used to assist unlawful conduct	

FIGURE 1. *Distinctions Discussed in Part II*

This suggests, in turn, that the value of the factors—or of the grid—is primarily in providing a process to help analyze problem situations. The distinctions draw the lawyer's attention to a number of different perspectives from which a particular situation can be seen, and allow for separate consideration of each. The process thus helps discipline a lawyer's consideration of the situation, providing a mechanism for initiating and refining the lawyer's intuition. Given the complexity and the lack of determinative

guides, refined and reflective intuition may be the most one can seek. One aspect of the situation, one factor in the grid, will just seem more important. Often it will be the *malum in se/malum prohibitum* distinction: is there something fundamentally wrong with the conduct the lawyer may be assisting? Or it may seem that the advice is not really about “law,” but is really about the enforcement of law and how to avoid it. And while the sense that one factor in the particular situation is more significant—that the conduct is *really* wrong (or not), or the advice is about avoiding detection rather than about more central aspects of “law”—leaves us relying essentially on the lawyer’s intuition, it is at least an intuition that has been forced to consider the situation from the vantage of a number of possible distinguishing factors, a number of possibly significant perspectives. Thus, the explorations to this point are substantially useful, although far from providing lawyers with a rule or set of rules to use when confronted with the problem. What follows in Part III is a brief exploration of the law to determine if it provides greater clarity of direction or guidance.

Before moving to the law, however, it should be noted that the questions we have been exploring could be consolidated and seen as aspects of three more inclusive questions. First, does the conduct of the client that may be facilitated involve real wrongfulness? The first two lines on the chart (the criminal/civil and *malum in se/malum prohibitum* distinctions) deal with that question. Second, is the advice or information to be conveyed about “law”? The middle three lines on the chart (dealing with the knot of issues connected to enforcement of law and with the distinction between private information and public information) are facets of that fundamental jurisprudential question, what is law? Third, will the advice or information incite the client to engage in the conduct? The bottom two lines on the chart (dealing with initiation of the subject and likelihood of the client acting unlawfully) relate to that final factor. My own sense is that such a consolidation masks more than it reveals, however. Each of the seven distinctions concerns a quite separate issue. For this reason, Part II of this Article has explored the issues from each of these distinct perspectives.

III. THE LAW

The law intended to govern and guide the conduct of lawyers addresses our subject quite directly. Rule 1.2(d) of the ABA Model Rules of Professional Conduct states: “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client”⁸³ If one assumes that “getting caught” and “getting punished”

83. MODEL RULES, *supra* note 12, Rule 1.2(d).

are "legal consequences," this rule allows a lawyer to provide a client with correct information about the law in *all* of the situations we have considered. The exploration in Part II shows that legal practice currently assumes consequences of this sort to be relevant information about the law in many substantive areas (for example, the labor law, contract, tort, and water pollution situations), and shows further that there are no obviously correct lines to separate some such advice as out of bounds.

The line drawn in Rule 1.2(d) is between directing, suggesting, or assisting in criminal or fraudulent conduct, on the one hand, and providing information about the law ("legal consequences") on the other. As the situations canvassed above show, however, it is frequently the case that educating the client about the law may function as the equivalent of suggesting or assisting in its violation. It is therefore important to note that the explicit phrasing of the rule appears to deal with this overlap directly and clearly by indicating that communicating "the law" is always acceptable, and by itself is not to be considered suggestion or assistance. A paraphrase would be: You may not suggest or assist, "*but*"—regardless of that prohibition—you "*may*" inform a client what the law is regarding "*any*" course of conduct.⁸⁴ In other words, "discuss[ing] the legal consequences of any proposed course of conduct" is permissible even if that discussion has the effect of counseling or assisting in criminal or fraudulent conduct. The rule so read sanctions providing the information across the spectrum of examples provided in Part I, including the extradition, jury tampering, and child testimony information examples. Significantly, the rule's phrasing also appears to clarify that the client may be informed about enforcement of the law: "Law" is not the operative language; "legal consequences" are what the lawyer is permitted to communicate regarding "any proposed course of conduct."⁸⁵

The Comment to Rule 1.2(d) does not recognize that this line is as bright as the clear black-letter language indicates. Paragraph 7 of the Comment states in part that "the lawyer is required to avoid furthering the [criminal or fraudulent] purpose, for example, by suggesting how it might be concealed."⁸⁶ If, however, that information is part of a "discussion" of the "legal consequences" of the concealing activities, then the "but a lawyer may discuss

84. That this is the intention of the rule as drafted is reinforced by the *rejected predecessor* of this rule from the Discussion Draft of the Rules: "A lawyer shall not give advice which the lawyer can reasonably foresee will: (1) be used by the client to further an illegal course of conduct" MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.3(a) (Discussion Draft 1980). This rule handles the overlap between providing accurate legal information and suggesting unlawful conduct quite differently than the language ultimately adopted.

85. Going one further step down this path, the rule also appears to allow advice about the police bulletin board, *see supra* part II.C., because apprehension by a police patrol would seem to be a "legal consequence." It is possible, of course, that the rule may be interpreted to exclude discovery of client conduct from the category of "legal consequences," but this would entail the difficulties mentioned in Part II.C.3.

86. MODEL RULES, *supra* note 12, Rule 1.2(d) cmt. para. 7.

the legal consequences of *any* proposed course of conduct” language of the black letter appears to be contrary to the Comment.⁸⁷ Paragraph 6 of the Comments to Rule 1.2, although not exactly contrary to the rule, elides the issue, stating in part: “There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.”⁸⁸ Here again, however, the black letter clearly indicates that overlaps of this “critical distinction” (discussion of information that could be considered to be both) are ruled by the exception; they are to be considered “analysis of legal aspects.”⁸⁹

On first glance, the provision thus embodies the conclusion that a citizen (the client) has a right to know the law, and therefore a lawyer may not be prohibited from providing truthful information about the law (including enforcement, which would seem to be part of the “legal consequences” of conduct). “Law is public information” appears to be the premise. Interestingly, this is not quite the rule, because the lawyer is not *required* to provide the client with information about the law. The lawyer is permitted—not required—to “discuss the legal consequences” with the client, and thus it appears that the *lawyer* has the “right” to inform the client, not that the *client* has the “right” to know. The purpose of the rule might therefore be simply to protect lawyers in this difficult area. A more palatable alternative understanding of the premise underlying the rule would be that these questions are simply too various and difficult for a rule, and are thus best left to lawyer discretion (a conclusion that I explore at greater length in Part IV).

It is also possible, however, that rules other than 1.2(d) require the lawyer to provide relevant information about the law and legal consequences; other provisions may embody, to some extent, the client’s “right” to know “the law”

87. *Id.* Rule 1.2(d) (emphasis added). This is not the only, or the most blatant, conflict between the black letter and the Comments in the Model Rules. Compare, for example, the black letter of Model Rule 3.2 and the final sentence of the Comment for that rule. It is clear that in cases of conflict, the text of a rule is intended to govern over a Comment. The “Scope” provision prior to the Rules states in part: “The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.” *Id.* Scope para. 9. “Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.” *Id.* para. 1.

88. *Id.* Rule 1.2 cmt. para. 6.

89. Professor Wolfram acknowledges the bright-line distinction made in the text of the rule, but asserts that “[s]uch a profoundly disturbing reading of Rule 1.2(d) would obviously be resisted by any body presented with the issue.” WOLFRAM, *supra* note 6, at 694–95. Given the dearth of authority regarding sanctioning a lawyer on the basis of such conduct only, *see infra* notes 109–20 and accompanying text, this is a curious assertion.

Professors Bundy and Elhauge resist the clear interpretation of the rule suggested in the text, relying on the “critical distinction” sentence quoted from paragraph 6 of the Comment to conclude that “advice that the conduct is unlawful is clearly permitted, but other types of advice are shadowed by uncertainty concerning the boundary between permitted analysis and prohibited assistance.” Bundy & Elhauge, *supra* note 7, at 324.

Professor Newman recognizes the clear distinction made by the rule. He assumes that the lawyer will be directing the client’s conduct, and therefore sees in the rule an emphasis on which of two forms the lawyer’s language can take: the “command form” or the “discussing the consequences” form. Newman, *supra* note 5, at 290–92.

governing her. Rule 1.4(b) provides that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."⁹⁰ Rule 2.1 states that "a lawyer shall . . . render candid advice."⁹¹ Rule 1.2(a) provides that a lawyer "shall abide by a client's decisions concerning the objectives of representation, . . . and shall consult with the client as to the means by which they are to be pursued."⁹² A portion of the Comment to 1.2(d) asserts simply: "A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct."⁹³ And the primary rule, 1.1, requires that the lawyer "provide competent representation."⁹⁴ A strong argument could be constructed that these four rules *require* that the lawyer provide the information about the law in the situations we have been considering.⁹⁵

Rule 1.2(d) also might be interpreted to distinguish between possibilities for conduct brought forward by the client and those brought forward by the lawyer. The rule states that a lawyer "may discuss the legal consequences of any proposed course of conduct," but it does not say "proposed" by whom. On initial reading, one likely would suppose that because the rule does not specify who does the proposing, and because it uses the word "any," the "course of conduct" the "legal consequences" of which may be discussed with the client could be brought up for consideration either by the lawyer or the client.⁹⁶ If, however, this provision is read to apply only to possibilities of fraudulent or criminal conduct brought up by the client and not to those brought into the conversation by the lawyer, the overlap between the two parts of 1.2(d) has been significantly narrowed. In other words, the occasions on which educating the client about the law will be the functional equivalent of counseling the client "to" violate the law will be far fewer if the proviso to the primary prohibition⁹⁷ is read as only applying to conduct "proposed" by the client. This understanding would track the distinction discussed in Section F of Part II, and would run into the difficult concerns raised there. It simply doesn't seem right that the lawyer should be the originator of client conduct contrary to the law. But it is also troublesome to say that those who know enough to

90. MODEL RULES, *supra* note 12, Rule 1.4(b).

91. *Id.* Rule 2.1.

92. *Id.* Rule 1.2(a).

93. *Id.* Rule 1.2(d) cmt. para. 6.

94. *Id.* Rule 1.1.

95. See generally Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980); Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049 (1984); Pepper, *Lawyers' Ethics*, *supra* note 24, at 947-49. A contrary interpretation is also possible, finding that a decision to violate the law (whatever that might be interpreted to mean) is not a "decision" the client is free to make, and is therefore implicitly excepted from any obligation under Rule 1.4(b). Cf. *Nix v. Whiteside*, 475 U.S. 157 (1986) (holding that lawyer's coercion to prevent client's perjurious testimony did not deprive client of right to effective assistance of counsel).

96. See FREEDMAN, *supra* note 8, at 146; Newman, *supra* note 5, at 292-94.

97. The rule is stated: "A lawyer shall not . . . , but a lawyer may"

ask will be given full access to the law while those (less sophisticated or more scrupulous) who don't know enough to ask will be screened from knowledge of the law. The general provision of 1.2(d) appears to honor the first perception; the proviso honors the second. The most obvious plain meaning of 1.2(d) in its entirety, including the word "proposed," is in accord more with the second perception—equal and full access to the law—than with the first.

Aside from the "right" to inform the client concerning "legal consequences," 1.2(d) also prohibits the lawyer from "counsel[ing] a client to engage" or assisting in "criminal or fraudulent" conduct. This language embodies a large unspoken proviso: the lawyer may suggest or assist in other tortious conduct, breach of contract, or other legally wrongful conduct. Consequently, in regard to suggesting or assisting conduct (as opposed to providing information about the law and legal consequences), the line drawn for the purposes of lawyer discipline is the civil/criminal line, with a little jog in the line to take in fraudulent conduct. This may be because fraud is enough "like" crime to cross the line. Or it may be that the line derives from the drafters' notion of the *malum in se*/*malum prohibitum* distinction, with fraud being like crimes in general, morally wrong in itself. This part of the rule means that the lawyer whose client is seeking advice concerning a multiyear contract likely to be very profitable the first years and far less so the later years may herself suggest to the client the possibility of breach following the profitable years. And the lawyer consulted by the motel owner may suggest the possibility of continued knowing usage of the faulty water heaters as possibly the least costly (in dollars) alternative.⁹⁸ (The rule does not determine whether such conduct by the lawyer in either case would itself be tortious, nor does it shield the lawyer from possible civil liability for the conduct.)

Model Rule 1.2(d) thus employs two bright lines: the civil/criminal line (or something very close to it) and the line between providing information about the law ("legal consequences") and other kinds of "assistance" to the client. To be prohibited the lawyer's conduct must be on the wrong side of both lines. The prior rule, Disciplinary Rule 7-102(A) (still governing in approximately ten states, including Massachusetts, New York, and Ohio), is ambiguous on both these axes: "A lawyer shall not: (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." Is providing correct information about the law "counsel" or "assistance"? The Model Rule clarifies that it is not, and adds further clarification by changing prepositions: the lawyer may not "counsel a client *to* engage" in the prohibited conduct. Is

98. The one example where advice would be prohibited would be the suggestion by the lawyer to the motel owner to buy new water heaters on credit, when the lawyer knows the owner could not fulfill the obligation. See *supra* part II.F. If such conduct were classified as fraud under the applicable state law, it could not be suggested by the lawyer under 1.2(d). Given that the alternative may well be serious physical injury to an innocent person, application of the rule to such a situation is troubling

tortious conduct or breach of contract "illegal"?⁹⁹ Use of "fraudulent" as an added category would seem to imply that "illegal" means "criminal," but the term itself can mean much more. (And an abundance of legal writing, of course, contains synonymous superfluous words, as "fraudulent" might have been interpreted to be.) The single definition in a leading law dictionary is far broader: "Illegal. Against or not authorized by law."¹⁰⁰ Neither breach of contract nor tortious conduct is explicitly "authorized by law," but then they are not expressly "prohibited" either.

Thus, under Disciplinary Rule 7-102(A)(7) it was quite possible that the two examples above "from the broad middle ground" would be prohibited. Providing the client with the relevant legal information about the (non)enforcement policy of the EPA in regard to the .050 per liter effluent limit and with the information about the two-percent audit rate could well be considered "assistance in illegal conduct." An added example from this broad middle ground, mentioned briefly at the beginning of Part I, further illustrates the difference between 7-102(A)(7) and 1.2(d) and suggests that the latter accurately reflects currently accepted lawyer practices. In labor law, lawyers specializing in the representation of management commonly suggest to employers wishing to fight a unionization effort or those attempting to "bust" an existing union that they violate provisions of the National Labor Relations Act (NLRA). By engaging in conduct defined by the Act as "unfair labor practices" the employer can often effectively defeat unionization or at least seriously demoralize those engaged in the effort. Adjudication by the National Labor Relations Board of allegations of unfair labor practices typically takes years, and the remedies are limited to back pay and reinstatement for specified workers who were the victims of the conduct. Once these facts about the law and its enforcement are laid before the employer, a simple cost/benefit analysis (frequently supplemented by the lawyer's explicit recommendation) often leads the employer intentionally to violate the provisions of the NLRA.¹⁰¹ This would seem to qualify under normal legal usage as "illegal" conduct by the client and, if it is, the lawyer is clearly "counseling and assisting" in that illegal conduct. But it is also clear that such violations of the NLRA are neither criminal nor fraudulent. Under 7-101(A)(7) the lawyer's conduct

99. See Hazard, *supra* note 62, at 674-75.

100. BLACK'S LAW DICTIONARY 747 (6th ed. 1990).

101. Robert Gordon discusses this common phenomenon of lawyers systematically subverting the intention of the law, particularly regulatory law, in Gordon, *supra* note 72, and Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990). It is a difficult question whether the fault here is that of the lawyers (as Gordon suggests) or the law. Ought lawyers (primarily) to educate their clients as to what the law is, or ought they (primarily) to further the purposes behind the law? They probably ought to be doing both, but which is primary is a very difficult question. I address it indirectly in Parts IV and V. In addition to Gordon, see Simon, *supra* note 17. In previous work I have suggested that the answer is "both," but that providing "access to law" is primary. See Pepper, *Amoral Role*, *supra* note 3, at 616-24, 630-32; Pepper, *Lawyers' Ethics*, *supra* note 24, at 947-61; Pepper, *Rejoinder*, *supra* note 7, at 662-72.

appears to be prohibited; under 1.2(d) it appears to be clearly protected. During the years 7-101(A)(7) was in effect and continuing through the present,¹⁰² such conduct by labor lawyers has been open, obvious, and unsanctioned.¹⁰³

Beyond this example from regulatory law, the range of possibly prohibited advice under the term "illegal" in 7-102(A)(7) was vast. Is it assisting in "illegal" conduct to educate a client concerning the legal consequences of inserting in a contract a provision held void by the courts? Is it assisting in "illegal" conduct to provide legal advice to an administrative agency in relation to continuing conduct held unlawful by the circuit courts of appeal?¹⁰⁴ Is it assisting in illegal conduct to provide legal advice about the consequences of continuing to manufacture a product held "defective" and "unreasonably dangerous" by all courts that have adjudicated the question? Most lawyers would agree that providing such legal advice is not prohibited (although they might disagree about the wisdom of providing such advice in various circumstances, and certainly would have different views about *how* such advice ought to be given, and what kinds of advice—or caveats—ought to be given in conjunction with it). Thus most lawyers would agree that 1.2(d) correctly reflects the accepted practices of lawyering and would also agree that the far broader possible limits under 7-102(A)(7) did not reflect those practices. In fact it is likely that the change from the old rule to the new was not intended to indicate a change of substance, but was instead simply a more precise and careful drafting of the understood limit on lawyers. The limited available case law under both rules is the same and supports this understanding.

Turning from the rules to published judicial opinions, one finds very little on the issues examined in this Article. I have not found a case in which a lawyer is disciplined or found civilly or criminally liable only on the basis of providing a client with correct information about the law or legal consequences, including information about enforcement. This is true of all the

102. The ABA Model Code was passed in 1969 and universally adopted by the states within a few years. STEPHEN GILLERS & ROY D. SIMON, JR., *REGULATION OF LAWYERS: STATUTES AND STANDARDS* at xv (1995). The ABA Model Rules were passed in 1983 and adopted by the states far more slowly. *Id.* at xvi. At this point 38 states have adopted the new rules, excluding a few prominent jurisdictions such as New York. *Id.*

103. By unsanctioned I mean not only that there are no reported cases of lawyer discipline (public reprimand, suspension, or disbarment) but also no other liability; lawyers *themselves* have not been found to have violated the NLRA by giving the advice, nor have they been held liable in tort for harming individual workers or the union, as in an interference-with-contractual-relations cause of action. See text accompanying notes 106–09.

104. In the early 1980's, the Social Security Administration (SSA) embarked on what became a well-known and controversial policy of "nonacquiescence": the Administration did not appeal certain circuit court opinions to the Supreme Court, but it also refused to follow them—it flouted the announced law within the circuit. Claimants with knowledgeable lawyers and means to appeal SSA decisions were governed by the law of the federal court. Those who did not were governed by the agency's contrary interpretation. The NLRB and the IRS have also engaged in nonacquiescence. See William W. Buzbee, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582 (1985); Steven P. Eichel, "Respectful Disagreement": *Nonacquiescence by Federal Administrative Agencies in United States Courts of Appeals Precedents*, 18 COLUM. J.L. & SOC. PROBS. 463 (1985).

examples in the previous two paragraphs as well as those framed earlier. It is also difficult, however, to find an opinion expressly holding such conduct permissible. The questions appear to have been rarely litigated. This suggests that the conduct is so clearly lawful that cases have not been brought. (Although lawyers would certainly find it more comfortable to have clear case law so holding.¹⁰⁵)

The one exception is the recognized privilege of a lawyer to induce a client to breach a contract or interfere with a prospective business relationship not yet rising to the level of contract.¹⁰⁶ Here there is a substantial body of case law recognizing that the lawyer (as well as other similarly situated agents) cannot be found liable for the intentional tort of interference with contract. This principle is often applied at the pleading and summary judgment stages. If (1) the lawyer is giving legal advice or recommending conduct within the scope of the professional relationship, (2) the communication is for the benefit of the client and not the lawyer as a separate party, and (3) the lawyer's motive is not "malice" toward the injured party, the privilege applies.¹⁰⁷ That

105. There is substantial reason for the discomfort given the recent development of what might be termed the "non-law of settlement" applicable to lawyer conduct. From O.P.M. in the early 1980's to Kaye, Scholer recently, there have been a number of well-publicized, very large settlements by law firms and their insurers despite the facts that liability was both denied and based upon no clear judicial precedent or other clearly established rule of law. See Hassett v. McColley (*In re* O.P.M. Leasing Servs., Inc.), 28 B.R. 740 (Bankr. S.D.N.Y. 1983); *Jones Day Settles OTS Claims on S & L, Will Pay \$51 Million*, 9 ABA/BNA Law. Manual on Prof. Conduct 109 (1993); Susan P. Koniak, *When Courts Refuse To Frame the Law and Others Frame It to Their Will*, 66 S. CAL. L. REV. 1075 (1993); Kirk A. Swanson, *Debate Continues on Ethics After Kaye Scholer Accord*, 8 ABA/BNA Law. Manual on Prof. Conduct 109 (1992); Steven France, *Can the Bar Regulate the Large Firms?*, LEGAL TIMES, Jan. 31, 1994, at 28 (discussing New York State Bar's finding of no basis for proceeding with disciplinary proceedings against Peter Fishbein of Kaye, Scholer); Amy Stevens & Paulette Thomas, *Legal Crisis: How a Big Law Firm Was Brought to Knees by Zealous Regulators*, WALL ST. J., Mar. 13, 1992, at A1. The allegations in these cases involved failure to reveal wrongful conduct by the client, overt false communication, and other overt assistance to wrongful client conduct well beyond the provision of accurate information about the law and its enforcement. The issues addressed in this Article did not arise and were not a basis for these settlements.

106. RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 6.23 (3d ed. 1989).

One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person

(a) truthful information, or

(b) honest advice within the scope of a request for the advice.

Id.; see also RESTATEMENT (SECOND) OF TORTS § 772 (1977).

107. See *Los Angeles Airways v. Davis*, 687 F.2d 321 (9th Cir. 1982) (summarizing and applying California law); *Worldwide Marine Trading v. Marine Transp. Serv.*, 527 F. Supp. 581 (E.D. Pa. 1981); *Schott v. Glover*, 440 N.E.2d 376 (Ill. App. Ct. 1982); *Beattie v. DeLong*, 561 N.Y.S.2d 448 (App. Div. 1990). In *Fraidin v. Weitzman*, 611 A.2d 1046 (Md. Ct. Spec. App. 1992), the court approved jury instructions on the privilege, the last two provisions of which directly restate the underlying problem addressed in this Article:

Accordingly, if you find that the defendant attorney simply rendered legal advice to his client within the scope of his representation of the client, and the legal advice is for the client's benefit and not solely for the lawyer's benefit, then your verdict concerning conspiracy to intentionally interfere with the contract must be for the defendant lawyers or law firms.

However, an attorney who has actual knowledge that his client is engaged in unlawful activity may not aid, assist or encourage the carrying on of that unlawful activity.

Id. at 1078.

the doctrine is formally recognized only in regard to interference with contract reinforces the intuition that this is the least objectionable context for advice that leads to violation of a legal norm. It is also possible, however, that this is the only area in which lawyers have become defendants with sufficient frequency for a doctrine to evolve. This may be so because it is in contractual and commercial situations, as opposed to situations involving tortious conduct or crimes, that potential litigants or their lawyers are likely (a) to surmise that legal advice led to arguably unlawful conduct and (b) to see significant advantage in adding a professional defendant with substantial liability insurance. The doctrine does appear to be expanding to cover advice that leads to an arguable violation of the antitrust laws, suggesting a more general applicability than to just the tort of interference with contract or advantageous business relationship.¹⁰⁸

Cases in which lawyers are disciplined or found legally responsible in some other way always include more active involvement in the client's wrongful conduct than the provision of correct advice about the law.¹⁰⁹ For example, in the well-known *In re Ryder* case, the court, relying upon the precursor of DR 7-107(A)(7), disciplined a lawyer for transferring a sawed-off shotgun and stolen money from his client's safe-deposit box to a nearby box rented in his own name.¹¹⁰ That conduct constituted active assistance in criminal conduct (concealing stolen property and receipt and possession of an unlawful firearm), assistance well beyond either giving accurate legal advice or keeping client confidences. A more typical situation, closer to the issues we have been considering, occurred in *People v. Calt*.¹¹¹ John Blosser was an employee of Gates Energy Products. He was about to be relocated, and was eligible for reimbursement of certain moving expenses connected with the sale of employee residences, including brokerage fees. Blosser, however, did not own a home; he lived with his sister. Blosser consulted Calt, who advised him to have the sister quitclaim the house to him and then "sell" it back. The sister refused and Calt then prepared and signed "a fraudulent statement of settlement" reflecting "broker's fees and other costs related to the imaginary sale of the residence." Calt received over three-fifths of the fraudulently

108. See *Brown v. Donco Enters.*, 783 F.2d 644 (6th Cir. 1986); *Tillamook Cheese & Dairy Ass'n v. Tillamook County Creamery Ass'n*, 358 F.2d 115 (9th Cir. 1966); *Invictus Records v. American Broadcasting Cos.*, 98 F.R.D. 419 (E.D. Mich. 1982); *Worldwide Marine Trading*, 527 F. Supp. 581 (allegations of both antitrust violations and tortious interference with contract).

109. See Newman, *supra* note 5.

110. 263 F. Supp. 360 (E.D. Va.), *aff'd*, 381 F.2d 713 (4th Cir. 1967). The court held that Ryder had violated former Canons 15 and 32. Canon 32 stated in part: "No client . . . is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are . . ." ABA CANONS OF PROFESSIONAL ETHICS Canon 32 (1908). Canon 15 stated in part: "But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law." *Id.* Canon 15. Ryder was suspended from practice before the federal court for 18 months. 263 F. Supp. at 370.

111. 817 P.2d 969 (Colo. 1991).

obtained reimbursement as his fee. Relying upon DR 7-107(A)(7) and three other disciplinary rules, the court disbarred him.¹¹²

Note that *Calt* did two things beyond merely advising about what would constitute a fraudulent claim, the legal consequences of fraud, and how it might be detected. He both advised Blosser to arrange the sham transactions *and* actively prepared fraudulent documents. The first goes beyond legal advice to overt recommendation of fraudulent conduct; the second goes well beyond legal advice and beyond communication with the client in general to active assistance and facilitation of the fraud. This is characteristic of the cases finding lawyer liability for assisting in unlawful conduct by the client. The lawyer has done more than just advise about the law, legal consequences, and enforcement of the law.¹¹³ In fact there are few reported cases of lawyer discipline or other liability based only upon the first wrong, recommendation of unlawful conduct, without some additional more active assistance.¹¹⁴ *Calt* is characteristic here as well in that the wrong goes beyond just recommendation into active assistance. It may be that this simply reflects the fact that lawyers usually do more than just communicate about the law, the client's options, and what the client ought to do; they follow such communication with active assistance in the conduct chosen by the client. Or it may mean that we have in practice a recognized line: the client can be told about "the law" in the broadest sense, even if that is functionally equivalent to suggesting or assisting in its violation, but the lawyer may not go beyond that communication with the client to some form of active assistance.

112. *Id.* at 970-71. In addition to DR 7-107(A)(7) the court relied upon DR 1-102(A)(3) (a lawyer shall not engage in illegal conduct involving moral turpitude) and DR 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). *Id.* Most cases of lawyer discipline similarly rest upon more than one rule, and usually this is combined with more than one kind of wrongdoing. A body of precedent made up of decisions with this kind of unclarified reliance on several rules and several wrongs renders it difficult to determine any clear judicial interpretation or gloss for individual rules.

113. In *Pierce v. Lyman*, 3 Cal. Rptr. 2d 236 (Ct. App. 1991), for example, a case concerning alleged dissipation of trust assets by the trustees and their attorneys, the court overturned the sustaining of demurrers against the lawyers, noting, "More than the simple rendering of legal advice to respondents' clients is alleged. More than mere knowledge of the breach of fiduciary duty are [sic] alleged. Active concealment, misrepresentations to the court, and self-dealing for personal financial gain are described." *Id.* at 243; see also *Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1080 (2d Cir. 1977) (finding New York doctrine that "an attorney is privileged to give honest advice, even if erroneous, and generally is not responsible for the motives of his client" inapplicable because privilege "does not create a license to act maliciously, fraudulently, or knowingly to tread upon the legal rights of others").

114. In *Townsend v. State Bar of Cal.*, 197 P.2d 326 (Cal. 1948), the lawyer was suspended for three years on the *stated* basis that he advised his client to make a fraudulent conveyance to frustrate a judgment he knew was about to be announced. The facts as laid out by the court, however, indicate that in addition to recommending the conduct he also prepared the deed (knowing it was to be used in a fraudulent fashion) and backdated it to facilitate the fraud. *Id.* at 327-29. In *Attorney Grievance Comm'n v. Kerpelman*, 420 A.2d 940 (Md. 1980), the lawyer was disciplined for advising a client to take his child from the mother contrary to an outstanding custody order. Several other wrongs were also the basis for discipline, however, and the lawyer had admitted advising many clients to engage in "child snatching." *Id.* at 958. Also, see *In re Bullowa*, 229 N.Y.S. 145 (App. Div. 1928) and the cases collected at CENTER FOR PROFESSIONAL RESPONSIBILITY, AM. BAR ASS'N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 39 (2d ed. 1992) (section entitled "Advising The Client to Engage in Criminal or Fraudulent Conduct").

Looking at the law from a different angle, the result is the same. The Restatements of Torts and Agency and the Model Penal Code contain language providing that one who assists another in unlawful conduct may be liable in addition to the principal, and do not provide an exception for the conduct of a lawyer.¹¹⁵ For example, a Comment in the Restatement of Agency states in part: "An Agent who assists . . . the principal to commit a tort is normally himself liable as a joint tortfeasor for the entire damage."¹¹⁶ Similarly, the Restatement of Torts states: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself"¹¹⁷ There are no cases reported under either section, however, that impose liability upon a lawyer whose only assistance consists of giving accurate legal advice.¹¹⁸ The situation is similar in criminal law. New York has a criminal facilitation statute that provides in pertinent part:

A person is guilty of criminal facilitation in the fourth degree [the lowest] when, believing it probable that he is rendering aid: 1. to a person who intends to commit a crime, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit a felony¹¹⁹

115. For a discussion of these provisions and their implications, see Hazard, *supra* note 62, at 677-82.

116. RESTATEMENT (SECOND) OF AGENCY § 343 cmt. d (1957). Section 343 itself states:

An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal, except where he is exercising a privilege of the principal, or a privilege held by him for the protection of the principal's interests, or where the principal owes no duty or less than the normal duty of care to the person harmed.

117. RESTATEMENT (SECOND) OF TORTS § 876 (1977).

118. Early in his article, Professor Hazard notes the "spectrum" of possible assistance, from only providing accurate information about the law ("expert definition of the limits of the law") to overt actions carrying out illegal conduct ("provid[ing] the means without which the client could not achieve the illicit purpose.") At this point he concludes: "The law clearly sanctions providing assistance at the least instrumental end of this spectrum. The law clearly prohibits conduct at the other end." Hazard, *supra* note 62, at 671. Near the conclusion, Professor Hazard correctly notes: "In most of the cases, the lawyer has overtly assisted his client in accomplishing manifestly illegal purposes." *Id.* at 682. The explicit conclusion of the article, however, conveys a contrary implication: If the "lawyer facilitates the client's course of conduct either by giving advice that encourages the client to pursue the conduct or indicates how to reduce the risks of detection, or by performing an act that substantially furthers the course of conduct," he or she is subject to liability. *Id.* (emphasis added). A careful reading of the cases cited by Professor Hazard suggests that it is the earlier conclusion that is more likely to be correct than the implications that could be taken from the latter. For example, *In re Feltman*, 237 A.2d 473 (N.J. 1968), is cited for the proposition that "courts have held that it is improper for a lawyer to give advice as to how to commit a crime or fraud." Hazard, *supra* note 62, at 682. The opinion, however, states explicitly that the reprimand is not based upon the advice given by the lawyer, but rather is due to the fact that the lawyer transmitted for signature an acknowledgment of service "untrue on its face." *Feltman*, 237 A.2d at 474. In this regard, also consider *In re Giordano*, 229 A.2d 524 (N.J. 1967) and *Townsend* (described *supra* note 114), both cited by Professor Hazard, *supra* note 62, at 682.

119. N.Y. PENAL LAW § 115.00 (McKinney 1987).

There are no cases under the New York statute concerning liability of a lawyer for the conduct of her client. Similarly, in the three other states that have adopted similar facilitation statutes, there is not one reported case involving the liability of a lawyer for giving legal advice.¹²⁰

In sum, the law provides little in the way of constraint or guidance in relation to the problem we have been exploring. The law does indicate that lawyers may not recommend or assist criminal or fraudulent conduct. The lawyer may, however, provide accurate information about the law (and "legal consequences"); and apparently may do so even if that information functions as recommendation or assistance. Short of criminal and fraudulent conduct, the law appears to indicate that the lawyer may not only educate the client about the law, but also may suggest conduct contrary to law. (There is, however, disturbingly little case law to reassure the lawyer of the propriety of such advice.) At its current state of development, the law thus appears to grant the lawyer a great deal of discretion in the situations we have been considering.

IV. COUNSELING AND CHARACTER

A. *Four Premises*

For the lawyer who has worked her way through all of the above, what guidance is there? The law tells her that she *may* discuss the legal consequences of all potential conduct with the client, but does not tell her that she must.¹²¹ The seven distinctions developed above provide a process to assist analysis, a mode for initiating, testing, and refining intuition. But they rarely yield a specific or concrete answer, presenting instead a picture of the complexity and difficulty of the problem. In sum, they usually provide significant clarification, but only partial guidance.

Aside from the lawyer's own devices and intuition, which are discussed briefly below,¹²² are there other premises or foundations that can provide guidance? Several such bases were mentioned in Part I, and a summary of these places to start may be helpful at this point. The first premise is that law is a public good that is intended to be available for individuals to use in leading their lives. In other words, the fundamental purpose of law is to be

120. ARIZ. REV. STAT. ANN. § 3-1004 (1989); KY. REV. STAT. ANN. §§ 506.080-506.100 (Michie/Bobbs-Merrill 1990); N.D. CENT. CODE § 12.1-06-02 (1985). Hazard, *supra* note 62, at 681-82, discusses §§ 2.06(1), 2.06(2)(c), and 2.06(3)(a)(ii) of the Model Penal Code (1985) dealing with accomplice liability, suggesting that such provisions might provide a basis for criminal liability for the lawyer. Annotations to the Model Penal Code provide no indication, however, that lawyers have been found guilty under such provisions for providing accurate advice about the law and how it will be enforced. As to the cases cited by Professor Hazard in this regard, see *supra* note 118.

121. Except to the extent required by Model Rules 1.1, 1.2, 1.4, and 2.1. See *supra* text accompanying notes 90-95.

122. See *infra* notes 148-53 and accompanying text.

available to guide conduct. This means that a client has a clear interest in, and perhaps even an entitlement to, knowledge of the law that governs her.¹²³ The second premise is that the primary function of lawyers as professionals is to assist their clients, and a core part of that role is to provide access to law that is otherwise inaccessible to most lay clients.¹²⁴ (A corollary of this premise is that judging or policing clients is not a primary lawyer role, although it may be appropriate at some margins.¹²⁵) The third premise is that a lawyer's assistance to a client is bounded by the limits of the law; a lawyer should not assist a client in unlawful conduct.

In the context of the situations considered in this Article, these three premises suggest a fundamental problem: determining the weight of the client's entitlement to knowledge of the law and balancing it against the weight of society's interest in preventing lawyers from assisting in the violation of law and legal norms. My own sense is that the notion of "secret law" is incompatible with a conception of citizens as free and equal and the government as the servant of the people. This understanding is subject, however, to the considerable difficulties and complexities of deciding what counts as "law" under what sorts of situations, which we have been examining. It is also subject to those considerations that may well justify "acoustic separation" in regard to some enforcement policies and practices. Thus, the seven distinctions factor in and complicate any reckoning of the balance. Limited by that very substantial caveat, I would still maintain that our democratic constitutional order presumes that persons do have something approaching a "right" to know "the law" that purports to govern them. (The notion of keeping the knowledge from them implies, disturbingly, someone or some institution on high deciding who is to know what about the law.)

In my opinion the first two premises therefore justify a rebuttable presumption that it is generally appropriate for the lawyer to educate the client concerning the law, and that is a significant starting point for the lawyer pondering what to do. The third premise and the distinctions explored in Part II strongly suggest, however, that there are occasions when that presumption is rebutted, and the client does not have the "right" to be

123. A substantial argument could be constructed supporting the proposition that there is a constitutional right to know the law that governs one's conduct. The argument would build by analogy upon cases such as *NAACP v. Button*, 371 U.S. 415 (1963), and *United Transp. Union v. State Bar*, 401 U.S. 576 (1971). In the latter the Court stated: "The common thread running through our decisions in *NAACP v. Button*, *Trainmen*, and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *Id.* at 585. Knowledge of a legal basis for a claim would appear to be a necessary antecedent to "access to the courts"; and in several ways the right would appear to be more fundamental than the one constructed in the *Button* line of cases.

124. This argument is developed further in *Heller*, *supra* note 21; *Pepper, Amoral Role*, *supra* note 3; and *Pepper, Lawyers' Ethics*, *supra* note 24.

125. William Simon and David Luban have framed justifications for a far greater amount of judging (or policing) in the lawyer role than has been traditionally understood or accepted. LUBAN, *supra* note 34, at 1-234; Simon, *supra* note 17.

informed of the law—or law-related information—that will govern or judge his conduct. These three premises taken together essentially restate our basic problem.¹²⁶ Reformulated as a rebuttable presumption in favor of the client learning relevant law and legal considerations, they suggest a beginning orientation (or bias), but they do not provide a methodology for determining when the lawyer should decide the presumption has been rebutted.

Reconsider for a moment (1) the motel owner and (2) the party negotiating a long-term contract and contemplating the possibility of breaching it several years down the line. A thoughtful application of the seven distinctions to each of these situations does not yield determinate guidance as to what legal information ought to be conveyed or withheld. Where does the lawyer turn next? Two observations related to the premises mentioned above seem apposite. First, although the lives of lawyer and client have come together here, the lawyer ought to remember that it is the client's life that is primarily involved. It is the client who owns and has invested much of his life in the motels; it is the client who will be making the choice about whether to continue in business with the defective water heaters. It is the client who will or will not enter into the long-term contracts, with or without the secret intention or inclination to breach (and maybe with breach as just one of several planned possibilities). This suggests that the decision to be made is primarily the client's, and that withholding arguably "legal" information is wrong.¹²⁷ On the other hand, there is, in each case, a potential victim to consider, a third party who may be significantly harmed by the client. Communicating only the law as expansively understood (the legal realist view) too often amounts (from the client's perspective) to encouragement to engage in wrongful conduct contrary to legal norms.¹²⁸ Thus, communicating only the law too often functions as assistance in unlawful conduct that may injure a third party.

I would therefore add a fourth foundation, a premise that will provide a different kind of perspective on the problem and will draw us toward a different kind of process for resolving it. That premise is that the lawyer ought not assume her client's goals or desires. She ought not assume that the client desires the maximum possible wealth or freedom.¹²⁹ She ought not assume her client is Holmes' "bad man, who cares only for the material consequences which [legal] knowledge enables him to predict."¹³⁰ The way to avoid such

126. They also restate, to some extent, the most apposite of the Model Rules. The first two premises are reflected in Model Rule 1.4(b), quoted in full in Part III; the third is embodied in Model Rule 1.2(d), discussed at length in Part III.

127. The extent to which this factor ought to be discounted if the client is a large corporation and not a person may be substantial, but is beyond the scope of this Article. See *infra* note 137 and accompanying text.

128. This was discussed briefly in Part I.C.

129. See Pepper, *Amoral Role*, *supra* note 3, at 630–31; see also Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1084–97 (1979); Pepper, *Lawyers' Ethics*, *supra* note 24, at 944–49.

130. Holmes, *supra* note 15, at 459.

disrespectful assumptions is to talk to the client, to explore with the client his situation, desires, and preferences, and to discuss how the law impacts or interacts with all of these. This strategy points toward the process of dialogue and counseling, an approach to the problem that supplements the factor analysis developed over the course of this Article. When confronted with situations raising the issues discussed in this Article, the lawyer ought not just think and analyze. In addition, the lawyer ought to *talk* with the client.

Does the client negotiating the contract really intend to breach it in three years? Or is she merely curious about that possibility? By conversing with her about the obligations contracts may entail aside from the law, and about the injuries she might be imposing upon the relying promisee, a lawyer may both learn and reveal pertinent information, and may also help the client shape her intentions and conduct. Similarly, the conversation with the motel owner may explore how severe an impact a serious burn can have on an accident victim, how important continued operation of the business is to the owner, and how these two relate. The more the lawyer learns from the client, the more she will know concerning how real her dilemma is. If it turns out that the client may use information about the law to violate it, she will have gained more information, more nuance, to assist her in an analysis of how she ought to proceed. In addition, such a conversation may itself alter the preferences or intentions of the client (and the lawyer), and thus may expand the possibilities.¹³¹

Imagine two different lawyers. One is the arm's-length lawyer, who wants a relatively brief and clear understanding of (1) the situation that has brought the client to the lawyer and (2) the client's desires. The second is the lawyer as counselor, who wants a fuller, more rounded and contextualized picture of the client and his situation, needs, and desires. Kenneth Mann in his book *Defending White-Collar Crime* discusses the common situation in which the client has documents useful in proving his guilt, but destruction of the documents would be an additional crime. One lawyer states:

131. What I am recommending here, I have called elsewhere the "moral dialogue" between lawyer and client. It is appropriate not just for the kind of situations examined in this Article, but for the entire relationship between lawyer and client. See Pepper, *Amoral Role*, *supra* note 3, at 630-32; Pepper, *Lawyers' Ethics*, *supra* note 24, at 944-50. This concept is derived from the work of Professor Thomas Shaffer. See, e.g., THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER (1981); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (1994). For examinations of some of the issues involved in client counseling, see SAMMONS, *supra* note 47; Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987); Thomas D. Morgan, *Thinking About Lawyers as Counselors*, 42 U. FLA. L. REV. 439 (1990); William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991). For an argument that counseling along these lines ought to be required of lawyers, see Peter Margulies, "Who Are You To Tell Me That?", 68 N.C. L. REV. 213 (1990).

There are many cases in which one would surmise that documents summoned from the client existed at the time the summons was issued. *My function in this procedure is a very limited one.* I, of course, do not want the client convicted of an obstruction of justice charge, and I do warn him of the dire consequences of such a happening. But in the end it is the client's choice. I have no doubt that clients destroy documents. Have I ever "known" of such an occurrence? No. But you put two and two together. You couldn't convict anyone on such circumstantial evidence, but you can draw your own conclusion.¹³²

Whom is the lawyer protecting here? And what kind of counseling image is conjured up? I see a lawyer with a straight arm up, keeping the client away, and I imagine a lonely client, a client getting cryptic, implied advice that he must interpret on his own, without direct help from his lawyer.

If you were the client in the water pollution or euthanasia examples, which kind of lawyer would you want? Would you prefer an "arm's-length" lawyer like the one quoted above, or a lawyer willing to connect and advise concerning the entirety of the situation, a lawyer willing to listen and assist you in coming to your own, perhaps difficult, conclusion? Imagine you have a dreadfully ill elderly spouse or parent with no chance of recovery and no end in sight soon. The ill person is in great pain and distress and has no desire for his or her life to go on; he or she wants and is ready to die. At wit's end, and perhaps having difficulty thinking as clearly as you usually do, you are considering finding a way to give your loved one his or her wish. You consult your lawyer, or a lawyer.¹³³ Which of the following lawyers would you prefer to meet? The first lawyer, who listens politely, asks a few questions and then tells you that ending your loved one's life would be murder: the conduct

132. KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME* 110 (1985) (emphasis added) (quoting lawyer on lawyer-client relationship in IRS procedures).

133. Given the public image of lawyers, *why* would you consult a *lawyer*, you may be wondering. Perhaps the doctors are not particularly sympathetic or easy to talk to; perhaps you do not have a family practitioner to assist you through the medical maze; perhaps you do not know a minister with whom you feel comfortable broaching this subject; perhaps you just cannot talk to whatever friends you have about this; or perhaps you want an "objective" or "professional" view of the matter. Maybe you want to know what guidance the law has for you, or whether such conduct is criminal. Maybe you think lawyers are smart, knowledgeable people; or maybe you knew a lawyer in the past whose judgment was good and who was helpful.

Clients will share things with their lawyers (and doctors), sometimes within the first five minutes, that they will not share with their closest friends. Sometimes they seek out a lawyer because the lawyer is not one of their friends. (One of us, Cochran, once had a steady stream of clients who came to him because he did *not* go to their church.) The sympathetic detachment of the lawyer may enable the lawyer to say things (moral things) to a client that the lawyer would hesitate to say to a friend.

THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *TEACHER'S MANUAL TO ACCOMPANY LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 30 (1994); *see also* Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 850-53 (1987) (characterizing lawyers' distinctive capacity for good judgment as combination of sympathy and detachment).

you are considering is criminal.¹³⁴ The penalties are severe. Silence. The second lawyer provides you with the same information about the law as the first lawyer. In addition, however, this lawyer seeks further information about the illness and prognosis, about the source for your conclusions that no end is in sight and no improvement is possible, that the pain is immense and the person would prefer to die. Having provided reasonably persuasive answers to his questions, this lawyer informs you that the situation is sympathetic, and that a prosecutor might choose not to prosecute on such facts. He tells you that such a decision would be far more likely if the event received no attention in the news media, and even more likely if it never came to the attention of the prosecutor. Even if you were prosecuted, he tells you, the situation is sufficiently sympathetic that a jury might well ignore the judge's instructions concerning the legal requirements for murder, and acquit you. Knowing of this possibility, and perhaps herself sympathetic, the prosecutor might offer an attractive plea bargain, possibly one involving no incarceration. The lawyer is for the most part willing to answer your questions and continue discussing all these legal aspects of your situation.¹³⁵

A third lawyer provides the same information as the first, and much of the information provided by the second. This lawyer, however, pauses to observe that you seem to be extremely upset. He suggests that perhaps there is some solution—some help—short of the drastic action you are contemplating. He asks about the assistance you are getting from the physicians involved; what kind of nursing care you have; whether you have *any* support in caring for your loved one; whether the hospital or physicians have connected you with a social worker or social agency that might be helpful; whether you have sought assistance from a hospice; what financial resources you might have to obtain the support he is suggesting. He asks whom you have to talk to about what you are considering doing and what alternatives there might be to doing it. He says that he would be willing to give you further legal advice along the lines you are asking, but first, if you are willing, he would like to make some phone calls to get you the names and numbers of people and institutions that

134. In most jurisdictions, assisting in a suicide is criminal, even if it is not murder. See Juliana Reno, Comment, *A Little Help from My Friends: The Legal Status of Assisted Suicide*, 25 CREIGHTON L. REV. 1151, 1175–83 (1992); Catherine D. Shaffer, Note, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348 (1986). For purposes of simplifying the alternatives, the distinction between murder and assisted suicide will not be included in our hypothesized legal advice.

135. When you ask about the significance of telling the truth or lying about your state of mind, the second lawyer tells you that lying would be perjury, and therefore he feels that he cannot give you further advice about that possibility. See TRAVER, *supra* note 79; see also FREEDMAN, *supra* note 8, at 156–58 (discussing TRAVER, *supra* note 79). I discuss this problem briefly above. See *supra* part II.G. When you pursue the possibility that your conduct might never come to the attention of the prosecutor, you get a similar answer. Hiding a crime is itself criminal, and the lawyer cannot assist you. Note that these responses are not clearly required under Model Rule 1.2(d), which allows a lawyer to discuss “the legal consequences of any proposed course of conduct.” MODEL RULES, *supra* note 12, Rule 1.2(d); see *supra* part III.

might be of some help.¹³⁶ If you feel unable to make such calls, he offers to talk to you about which services you might be interested in pursuing and to make some calls on your behalf. And, if you have no one else to talk with, or feel uncomfortable talking to anyone else, he offers to continue the conversation later in the day, or the next, whenever the two of you can schedule time together. In sum, he suggests that you work toward finding alternatives and that he is willing to assist.

How do you rank these lawyers? With which would you rather be dealing? The first two lawyers are dealing with the law, less and more expansively understood. The third lawyer is, in addition, willing to look beyond the legal aspects of the client's situation, to look beyond the client as a legal hypothetical to which the lawyer ought to apply the law, and to assist the client as a person first and as a legal problem second. The second conversation strikes me as more honest, fair, and helpful to the client than the first conversation. The dangers of the second conversation, with which this Article has been primarily concerned, can be significantly ameliorated by using the techniques of the third lawyer. The counseling mode for lawyers that I envision reflects some combination of the second and third lawyers. Information about the law as more expansively understood should be mixed with information about the client's problem or situation as more expansively understood. (It should be noted that such a mixture in many cases will mean that at the conclusion of the conversation it will no longer be possible to withhold information about the law; it will have already been conveyed as part of the ongoing exchange.)

Conversations combining the second and third lawyers' approaches can be imagined for each of the examples provided in this Article. Of course, the nature of the imagined conversation differs with each situation. It also differs quite significantly if we are positing a corporate client, with a legally and socially defined primary concern with profit and loss, rather than the more global and varied concerns of an individual human life.¹³⁷ But in the

136. The Comment to Model Rule 2.1 suggests the appropriateness of such referrals:

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

MODEL RULES, *supra* note 12, Rule 2.1 cmt.

137. When the client is a large corporation, it may be more likely that society or third persons or entities are vulnerable to the corporation than that the corporation is vulnerable in relation to the lawyer. That fact renders the traditional understanding of the professional role as protecting the client problematic. See Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 612-17 (1985). It also weakens the presumption in favor of revealing all relevant legal information suggested in the text at the beginning of this Section. Such considerations are relevant, but draw us beyond the scope of this Article. For a sketch of three basic dichotomies influencing how one perceives issues of lawyers' ethics,

corporate setting as well—or perhaps in the corporate setting particularly—the lawyer ought not to presume that the client’s interest is the greatest possible profit.¹³⁸ Imagine counseling the corporate officer in the water pollution case,¹³⁹ or in the case of the contemplated breach of contract and three-year docket delay.¹⁴⁰ There is certainly room in the water pollution case for inquiry about whether the .025 per liter additional ammonia discharge is likely to harm persons, animals, or property, and if so, how much and how likely. There is also room to discover to what extent the client values or feels bound by the law as written, just because it is the law. Further, the degree to which the client agrees with or feels bound by the purposes of the law (as opposed to the letter of the law) is relevant to the choices to be made, and will vary significantly from client to client.¹⁴¹ It would also be imperative to discover whether the client prefers to stay well inside any arguable legal line, or has reasons for risking a closer passage. If the client has such reasons, their importance can be explored and weighed.¹⁴² There is room in the contract situation for inquiry into (1) the nature of the relationship in which the contract breach is being considered, (2) what is to be gained by the breach, and the overall long- and short-term value of that gain, and (3) the extent of the injury the other party would suffer from the breach. If the other party would likely be bankrupted, causing the loss of jobs and income for long-term friends and acquaintances (as well as for a significant number of employees not personally known by the client’s managers), and the gain to the client is short-term and modest in relation to the corporation’s overall financial situation, the professional managers of the client may decide that short-term profits are not the determinative factor. Aside from such an unusual moral balance, the client may have a more normative understanding of the obligation of contract—as a binding promise—than contemporary contract law seems to have.

There are many lawyers who believe that such conversations are inappropriate for lawyers because they do not involve “legal” advice and expertise. As one reader of a draft of this Article put it: “You couldn’t bill for

see Pepper, *Lawyers’ Ethics*, *supra* note 24, at 939 n.1.

138. In fact, the relationship between corporate client and senior counsel is often long-standing and, for in-house counsel at least, “intimate.” Prospects for moral dialogue may be quite substantial in such contexts. See HAZARD, *supra* note 38, at 141–44.

139. See *supra* part I.B.

140. See *id.*

141. See Heller, *supra* note 21, at 2516–23.

142. In relation to regulatory compliance counseling—the kind of situation we have in the water pollution example—Robert Gordon suggests a “crude typology” of advice: “[L]awyers can choose among actual compliance, cosmetic compliance, nullification-by-resistance or the ‘Holmesian bad man’s’ strategy of violate-and-pay, or any combination of these.” Gordon, *supra* note 101, at 277 (citation omitted). He provides a more extended list of the possibilities in Gordon, *supra* note 72, at 26–28. The availability and appropriateness of all these possibilities depend on the context: the client’s needs, desires, openness to alternatives, receptiveness to lawyer counseling, the nature of the legal regulation and its enforcement, and so on. See also Heller, *supra* note 21, at 2514–30 (describing “full-picture counseling” and applying it to Zoë Baird case).

that at the firm I worked at.”¹⁴³ But note that the business manager might not mention such factors because she thinks her role is confined by allegiance to profits for shareholders; and the lawyer, similarly, might not mention them because to do so is to step outside the role of providing purely legal advice and assistance. As one of my students put it, the two may “play off” one another, avoiding issues that might be persuasive to each if they could be considered.

In this context I will mention briefly the well-known case of *Spaulding v. Zimmerman*,¹⁴⁴ reprinted in several professional responsibility course books. A lawyer represented a defendant driver in a suit for physical injuries suffered by the plaintiff in a car accident. The physician hired by the defendant discovered a potentially fatal aneurysm not discovered by the plaintiff’s physicians, and this was not revealed when the case was settled. The major point suggested in the books is: how could the lawyer have risked an innocent life for the financial benefit of the client? I wonder why we assume that the middle-level manager in the defendant’s insurance company—the person probably responsible for settlement decisions—is likely to be more concerned with company profits (or with his career advancement or security) than with the possible death of the plaintiff, or why we think that manager is likely to have less moral sensitivity than the lawyer. If anything can explain the facts underlying this case, it is probably the lawyer and client “playing off” one another: lawyer and corporate client¹⁴⁵ each assuming a “hardball” money-oriented stance, neither pausing to consider a wider context, neither urging such consideration on the other. If either had focused upon and articulated to the other the possibility that they might cause the death of an innocent person, they might have sought a more creative solution to their problem. (One also wonders about the ethics of the physician hired by the defendant who discovered the plaintiff’s aneurysm, but did not insist that someone inform the patient.)

For the lawyer who is not presuming her client’s goals or desires, for the lawyer who wants to counsel more in the third lawyer mold, there are many directions such conversations might take. One of the difficulties in taking seriously such a counseling model for lawyering is the fact that such imagined conversations have so many possibilities and it is difficult to track or

143. Both the Model Rules and the MacCrate Report, however, support discussing nonlegal considerations with clients. MODEL RULES, *supra* note 12, Rule 2.1 & cmt.; AMERICAN BAR ASS’N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 213 (1992) (“MacCrate Report”). The latter encourages lawyers to counsel clients “to take considerations of justice, fairness, and morality into account when the client makes decisions or engages in conduct that may have an adverse effect on other individuals or on society.” *Id.*

144. 116 N.W.2d 704 (Minn. 1962).

145. The insured was in fact the client, but the insurance company was almost certainly functioning as the client in regard to the relevant decisions.

hypothesize a complete conversation. Regardless of the specifics of any particular conversation, it should be clear that on some occasions a dialogue along these lines will lead to a decision by the client that removes the ethical problems explored in this Article. Sometimes the client will conclude that the potential conduct at issue is wrong under the circumstances, causes more harm than justifiable gain, or is just not worth the risks. If that occurs the lawyer no longer need be concerned that her advice about the law may facilitate violation of the law. Even if the problem does not disappear in this way, however, the lawyer who pursues something like the counselor-lawyer approach will know more about the situation than will a lawyer who does not. Perhaps more important, she will probably have gained more of a feel for her client, the situation, and her relation to the client.

B. *Marching into the Swamp*

The four premises just canvassed provide direction, information, and a process, but there will be many occasions when they do not delineate a clear solution to the kind of problems examined here. The law indicates that the lawyer may "discuss the legal consequences of *any* proposed course of conduct."¹⁴⁶ It provides that permission as an exception to a more general provision prohibiting assistance in unlawful conduct, and otherwise gives little further guidance. The seven distinctions discussed in Part II are helpful, but often will not be determinative. In working through those distinctions, and in trying to deal with this problem systematically, I have often felt as though I were marching into a swamp. The sensation from so many distinctions and ways of looking at the problem, none of which provides intuitively clear direction or solid ground underfoot, is that one's ideas are slowly spreading out and sinking.

This should come as no surprise. Moral questions are often too complex and multifaceted to lend themselves to rule-bound solutions.¹⁴⁷ But if basic premises, legal rules, and the analysis of relevant factors are not determinative, where does the lawyer turn? Where does her intuition (to be refined by consideration of the seven distinctions elaborated above) come from, and where does it go after the process of refinement is inconclusive? What provides her with a moral base from which to engage in dialogue and counseling with the client? The neo-Aristotelian understanding of ethics is attractive here, for it appears to provide descriptively accurate answers to such questions. This understanding suggests that both the lawyer's moral intuition

146. MODEL RULES, *supra* note 12, Rule 1.2(d) (emphasis added).

147. See, e.g., Stuart Hampshire, *Public and Private Morality*, in PUBLIC AND PRIVATE MORALITY (Stuart Hampshire ed., 1978); Reed E. Loder, *Tighter Rules of Professional Conduct: Saltwater for Thirst*, 1 GEO. J. LEGAL ETHICS 311 (1987). Hampshire argues that inarticulable (and perhaps unidentifiable) good reasons may be the basis for educated moral intuition.

and her choices after analytic refinement and education of that intuition will be determined by her character. Moral perception¹⁴⁸ and decision making are determined not primarily by rules or principles, not primarily by cognitively processed analytic choices, but primarily by character. Moral character in turn is made up of habits of moral perception and conduct.

How does one acquire such moral habits? From living and growing in a community that is itself part of a tradition, from parents, teachers, and mentors; in short, the way children grow into adults. Such inclinations or habits of perception and conduct—some call them virtues—grow out of, and are part of, larger-scale practices, which are themselves part of the larger tradition and community.¹⁴⁹ The interesting possibility for our problem is whether the practice of law can provide a locus for such “practices,” whether it can constitute the kind of community and tradition that can nurture virtue and character.

Thomas Shaffer recounts some of his early experience in the practice of law, suggesting that he found mentors who could provide the modeling necessary for the development of professional character (that is, the development of habits and a disposition that lead to knowing the right, the moral, way to behave in the kinds of situations explored in this Article).¹⁵⁰ If the analyses we have considered do not provide a clear answer, or a reliable path to the right answer, can I assume that my students will encounter in the

148. The perception comes before and may well determine the choice made (or the absence of awareness of a choice), and thus may be more important than the choice itself. Pepper, *Lawyers' Ethics*, *supra* note 24, at 953 (commenting and drawing on work of Thomas Shaffer).

149. My sketch of the neo-Aristotelian view of ethics is drawn primarily from Alasdair MacIntyre. ALASDAIR MACINTYRE, *AFTER VIRTUE* (2d ed. 1985). Thomas Shaffer has introduced this view to the discussion of lawyers' ethics. See, e.g., THOMAS SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES* (1991); THOMAS SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* (1985); SHAFFER, *supra* note 131.

By relying on MacIntyre and Shaffer, I do not intend to adopt their criticism of liberal political principles, such as pluralism, toleration, and rights. For an argument that the two perspectives are to a large degree compatible, see Pepper, *Lawyers' Ethics*, *supra* note 24. For the most part, I believe Jeffrey Stout is correct in this comment on MacIntyre:

Our society and its distinctive modes of public discourse are best viewed, I would argue, as the result of a manifest failure to achieve agreement on a fully detailed conception of the good—as the arrangements and conventions of people who contracted, in effect, to limit the damage of that failure by settling for a thinner conception of the good that more people could agree to, given the alternatives and until something better came along. The language of human rights and respect for persons can be seen as a conceptual outgrowth of institutions and compromises pragmatically justified under historical circumstances where a relatively thin conception of the good is the most that people can secure rational agreement on. I support MacIntyre's verdict on standard philosophical defenses of this language. I share his desire to rehabilitate talk about the virtues and the common good. But I am less suspicious than he is of the language of rights and respect itself. I am also less disposed to assume that talk about rights and respect cannot live in harmony with talk about virtues and the good.

JEFFREY STOUT, *ETHICS AFTER BABEL* 225 (1988); see also JOHN RAWLS, *POLITICAL LIBERALISM* (1993) (describing liberal political morality and its relationship to community). The lawyer's ethical role and obligations are quite directly formed as a result of the lawyer's position between the law and the client and her rights. See Pepper, *Amoral Role*, *supra* note 3; Pepper, *Lawyers' Ethics*, *supra* note 24; Pepper, *Rejoinder*, *supra* note 7.

150. THOMAS SHAFFER, *FAITH AND THE PROFESSIONS* 130–43 (1987).

practice of law an environment such as the one Professor Shaffer believes he found in his Indianapolis law firm in the early 1960's, an environment that will nurture in them the habits necessary to choose wisely when confronting moral problems and mentors who will exhibit and cultivate practical wisdom? The current state of the profession—reflected in the legal newspapers, the sociological and empirical literature, and the anecdotal literature—suggests that the answer is “no.”¹⁵¹ The primary interest in money and the connected increase in the number of billable hours expected of young lawyers appear to leave little time or inclination for the discussion and practices necessary for the nurturing of character. Worse, such developments may themselves reflect an absence of character and practical wisdom among lawyers.¹⁵² As Jeffrey Stout suggests, our professions and their institutions could be a place for cultivating virtue and other internal goods (as opposed to the currently predominant external good of money),¹⁵³ but there is little to indicate growth in that direction. It would be good to have more professionals and citizens who have developed the skills of practical wisdom (another way of referring to developed, educated moral character), but how we move toward building that skill—in our families, our law firms and corporate law offices, and the varied institutions throughout society and the profession—is far from clear.

V. CONCLUSION

I would suggest that the solution to the central problem of this Article consists of a combination of some tentative rules, derived from the four premises stated above, with a practical wisdom connected to the roles and tasks of our profession (to the extent it can be developed). The first rule or principle is that the client has a presumptive right to know the law governing his or her situation, understanding “law” in the widely defined contemporary sense. The second rule or principle is that the lawyer has a presumptive moral obligation to engage in a counseling conversation if there is reason to foresee that the client may violate the law or a significant legal or moral norm. When applying these rules, and in determining when and why the presumptions have been overcome, the seven distinctions developed in this Article will be helpful. In addition to that analytic assistance, however, lawyers working their way through these problems ought to be aware that what is necessary to reach a

151. See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER* (1993); Robert W. Gordon, *Bargaining with the Devil*, 105 HARV. L. REV. 2041 (1992) (reviewing RICHARD D. KAHLBERG, *BROKEN CONTRACT* (1992)). For one empirical study suggesting that the models provided in the law office are often the wrong ones, see Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students' Professional Values*, 4 GEO. J. LEGAL ETHICS 537 (1991).

152. I say “may” because the leaders in some firms might have felt compelled to follow the other firms due to the constraints of market competition; some senior lawyers with practical wisdom may have perceived no space in which to try to develop it in their juniors.

153. STOUT, *supra* note 149, at 266–92.

solution is the exercise and development of their own practical wisdom. In such deliberations, reliance on character—on implicit perception and evaluation, on moral habit—is unavoidable. For this reason, in working on the professional ethics of lawyering in the larger sense we—practitioners, teachers, the profession—ought to (1) formulate a set of such tentative rules and principles and (2) work to create a culture that will cultivate a professional practical wisdom for applying them. The dualism here is an effort to suggest the compatibility of a “rights”-oriented perspective, which views the primary job of lawyers as providing clients with access to the law to which they have something resembling a right, with a “virtue”- and “character”-oriented approach to the professional life of the lawyer. We need the rules and principles to protect clients who are often vulnerable or dependent in relation to professionals, and to protect, in turn, third persons who often are vulnerable in relation to the conduct of clients. We need practical wisdom because the rules and principles simply will not be sufficient to deal with the moral questions of lawyering.