MORAL CONTEXTS

Randal N. Graham*

1. Ethics, Morals and Law

Ethics permeate the law. The core of any legal system is an array of ethical standards setting out the rights and duties of those it governs. These ethical standards are comprised of reciprocal expectations that allow us to predict the actions of our fellow citizens. The law is an extension of our ethical code, meting out rewards and punishments in an effort to ensure that we abide by our moral obligations. Whether the law is just, whimsical or methodically unfair, our decision to adhere to the law or to seek its modification constitutes an ethical choice. In every encounter with the law we are faced with ethical issues, challenging our moral convictions and our commitment to the law.

The intersection of morals, law and ethics is nowhere more evident than in the daily affairs of those who practice law.[1] Every aspect of the practice of law tests the moral mettle of those who purport to act as agents of the legal system. Whether a lawyer drafts a limited-partnership agreement or seeks the acquittal of a serial killer, the lawyer's role has unavoidable ethical implications. Indeed, every act of "lawyering" carries ethical implications, placing lawyers in positions that test their moral fibre.[2]

Surprisingly, lawyers often fail to recognize the moral dilemmas that routinely arise in their professional lives. Lawyers go about the business of drafting pleadings, merging companies, interviewing witnesses and arguing cases without reflecting upon the ethical implications of their actions. Indeed, many lawyers seem

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* Assistant Professor, University of New Brunswick. I would like to thank Kenneth Landa and Joan Montgomery-Rose for their assistance in the preparation of this paper.

[1] Some interesting reviews of the intersection of morals, ethics and legal practice are found in A. C. Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law, 1999); C. W. Wolfram, *Modern Legal Ethics* (St. Paul: West Publishing Co., 1986); G. MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Scarborough: Carswell, 1993); and L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969).

[2] Hutchinson, *ibid.* at 198. As Hutchinson notes, "Everything that lawyers do, from the selection of clients to their involvement in civic affairs, implicates and reflects a lawyer's approach to and understanding of what it means to be an ethical lawyer."

oblivious to moral and ethical issues that are obvious to most outside observers. This lack of moral acuity was highlighted in the recent case of *R. v. Murray*,[3] in which the accused lawyer (Kenneth Murray) actively concealed videotape evidence that implicated his client (Paul Bernardo) in repeated, vicious, sexual attacks against young women. In determining what should be done with the tapes in question, Murray "made only a token effort to find out what his obligations were",[4] and ultimately decided that the issue was "tactical rather than ethical".[5] To put it bluntly, Murray believed that the suppression of "hard evidence" of attacks by a serial rapist raised no ethical concerns. It seems unlikely that non-lawyers would have shared in Murray's belief.[6]

Sadly, Murray's distorted view of his ethical obligations comes as no surprise. This lack of moral sensitivity is common among lawyers, arising (in part) from the traditional conception of the lawyer's role. This traditional view of lawyering paints a picture of the lawyer as a systematically amoral agent of the client. By virtue of the lawyer's role within the legal system, the lawyer is insulated from moral considerations. According to this traditional view, a lawyer is nothing more than a morally neutral tool pursuing the goals of whichever client pays the bills. It is not the lawyer's place to assess the morality of the client's cause. On the contrary, the lawyer turns a blind eye to the social value of the client's projects, using the lawyer's skills in whatever legally-authorized manner might advance the client's aims. According to Gerald Postema:

> The good lawyer is one who is capable of drawing a tight circle around himself and his client, allowing no other considerations to interfere with his zealous and

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[3] (2000), 48 O.R. (3d) 544.

[4] *Ibid.* at 575.

[5] *Ibid.* at 552. It should be noted that, at the time that Murray allegedly felt that his actions had no ethical implications, he had not yet viewed the videotapes in question. He had, however, secretly removed the videotapes from the scene of the crime and hidden them from the police at the request of his client. These actions raise important (and rather obvious) ethical concerns, concerns which apparently eluded Murray.

[6] In February of 1997, Murray's actions in connection with "the Bernardo tapes" gave rise to allegations of professional misconduct, leading to a complaint issued against Murray by the Law Society of Upper Canada. Based (in part) on Murray's acquittal in a trial for obstruction of justice (also stemming from Murray's dealings with the Bernardo tapes), the Law Society ultimately decided that, rather than proceeding with the complaint against Murray, the Law Society could best serve the public interest by clarifying the responsibilities of lawyers faced with ethical dilemmas. As a result, on November 15th, 2000, the Proceedings Authorization Committee of the Law Society directed that the complaint against Murray be withdrawn

> scrupulously loyal pursuit of the client's objectives. The good lawyer leaves behind his own family, religious, political, and moral concerns, and devotes himself entirely to the client.[7]

Under this traditional view, the lawyer makes no moral decisions. Indeed, as long as the lawyer acts within the bounds of his or her institutional role, there are no moral decisions to be made. "The legal system" makes the moral and ethical calls, deciding what the lawyer can and cannot do. Provided that the lawyer's actions are authorized by this system, the morality of the lawyer's conduct is beyond reproach.[8]

The traditional account of the lawyer's role is troubling. Contrary to the belief of many lawyers, "the legal system" is incapable of insulating lawyers from countless deeply troubling moral issues. In an attempt to challenge the traditional view of legal amorality, this paper begins (in section 2) by making the rather obvious point that every moral judgment is dependent upon context: no action can be "morally assessed" until that action has been situated within a broader framework. Section 3 of this paper describes "the lawyer's context"; the framework upon which lawyers traditionally rely to justify their morally dubious acts. The fourth and fifth sections of this paper consider the difficulties inherent in any appeal to context, focussing on the particular difficulties involved in any attempt to define or rely upon the legal system as a source of moral comfort. Finally, the concluding sections of this paper call upon lawyers to acknowledge their role in defining the legal system and delimiting the activities that the institutional task of "lawyering" permits. The aim of this paper is to prevail upon lawyers to accept responsibility for their actions. Rather than laying their ethical choices at the feet of "the legal system", lawyers must acknowledge their role in shaping the moral boundaries of their calling.

2. The Importance of Context

Morality is context-dependent.[9] When assessing the moral and ethical implications of an action, it is necessary to situate that action within a broader context. Consider the simple example of a woman raising her hand. In the absence of a broader moral context, the physical act of hand-raising is a morally neutral gesture — the action involves nothing more than a series of muscular movements that effect a change of

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[7] G. J. Postema, "Moral Responsibility in Professional Ethics" (1980) 55 N.Y.U.L. Rev. 63 at 78.

[8] This view of the lawyer's role is dealt with in greater detail in section 3 - "The Lawyer's Context".

[9] There is a wealth of literature on the "contextual nature" of morality and ethics. An excellent (and somewhat whimsical) survey of the literature can be found in D. Robinson and C. Garratt, *Ethics for Beginners* R. Appignanesi ed., (Cambridge: Icon Books Ltd., 1996).

bodily position. This change in position, in and of itself, appears to have no ethical implications. If we place this physical act into a broader context, however, the act of hand-raising takes on a different moral value. If our hypothetical hand-raiser is signalling her support for a murderous tyrant or volunteering to help a friend in need, the simple physical gesture loses its morally neutral status and takes on a moral value born of context. Our "moral assessment" of the act of hand-raising (together with our assessment of the person making the gesture) is dependent upon our assessment of the context in which the gesture is made. Only once the action has been placed in a broader context can the ethical worth of the action be assessed.[10]

The "contextual dependence" of morality holds true even in cases involving acts that seem intrinsically immoral. Consider infanticide. The killing of an infant seems (at the very least) to be a morally suspect act. Even this shocking action, however, might be morally justifiable by reference to the intentions, culture or religion of the actor. According to Richard Posner, "It is a moral fact of our society, and of societies like ours, that infanticide is immoral unless, perhaps, the infant is acephalic

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[10] While the raising of one's hand is an obviously "value neutral" gesture, there are other, more morally complex actions which appear (at first glance) to be assessable without the need for contextual information. Acts of charity and self-sacrifice seem like ethically worthy acts regardless of any framework in which they might occur. Hate speech, slavery and violence against children, by contrast, seem obviously immoral, again without the need for any inquiry into context. These morally-charged examples seem to challenge the assumption that morality is dependent upon contextual information. This challenge can be answered in several ways. First, each of these "morally charged examples" is already heavily laden with contextual information. Take the example of hate speech: in order to qualify as "hate speech", the underlying words must be uttered with the intent to promote hatred. Words that *could* constitute hate speech (when accompanied by the requisite intention) may be spoken in a morally-neutral way: one may be describing words spoken by another, one may be participating in a role-playing exercise with an educational purpose, or one may simply be playing the devil's advocate. In these circumstances, words which (in another context) might amount to "hate speech" are not truly hate speech at all. In order to qualify for the vituperative label of "hate speech", the underlying speech-act must be placed in a broader context that includes the speaker's intention to spread hate. Simply put, the characterization of a particular speech-act as "hate speech" presupposes a contextual inquiry. The label of "hate speech" carries contextual information that accompanies the underlying act and informs our moral assessment of the action. The same can be said with respect to "charitable acts" or "violence against children": before qualifying as *charity* or *violence*, the underlying actions have already been situated within a broader moral context. In order to count as "charity", the underlying act (the giving of money, for example) must be accompanied by a charitable intention. In order to qualify as "violence", the underlying action must be accompanied by an intention to do harm --- all that separates "dismemberment" from "surgical amputation" is the intention of the perpetrator or surgeon. In each case, the labels given to the underlying actions (hate speech, charity, or violence) carry with them an abundance of contextual information. If no appeal to context is required for an assessment of the morality of such actions, that is simply because the necessary contextual inquiry has already taken place.

or otherwise profoundly defective; but I shall assume a normal baby."[11] Note the qualifications in Posner's statement. Infanticide is immoral, but only in "our society" and "societies like ours". Even if the inquiry is restricted to our society, Posner contends that infanticide may be cast in a different moral light if the victim is a profoundly defective child. Posner goes on to point out that infanticide "is abhorred in our culture, but routine in societies that lack the resources to feed all the children that are born."[12] While Posner's contextual factors may be open to objection, they do reveal an important truth. Actions that appear to be intrinsically immoral may be viewed as moral (or at least "less immoral") when placed in a context that takes account of the intentions, cultural background, world-view and religious beliefs of the actor.[13] While one may argue that none of the foregoing factors serve to justify the act of killing a child, it is difficult to argue that these factors have no bearing on our ultimate moral assessment of the act. No matter how "obvious" the moral value of an action may appear, our assessment of that action's moral value is unfinished until we have situated that act within a broader moral context.

While the contextual dependence of morality may seem like an obvious point, it does carry important implications. One of the most interesting of these implications is the "textuality" of moral and ethical concepts. Because the moral or ethical value of an action must be interpreted by reference to a surrounding context, morals and ethics can be seen as "texts" that are deciphered through a process of construction. Our assessment of the moral value of an action is an act of interpretation during which we turn to context as our key interpretive aid. Like every mental construct, the concepts of "morals", "ethics" and "context" are simultaneously constituted and limited by our use of linguistic symbols. As John Searle notes:

> For all but the simplest thoughts, one has to have a language to think the thoughts. I can, without words, believe that it is raining or feel hungry, but I cannot believe

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[11] R. A. Posner, "The Problematics of Moral and Legal Theory" (1998) 111 Harvard Law Review 1637 at 1643. In this article, Posner takes issue with the moral theory (or "academic moralism"), which he casts aside as a generally useless endeavour. For excellent responses to Posner's view of academic moralism, see R. Dworkin, "Darwin's New Bulldog" (1998) 111 Harvard Law Review 1718 and C. Fried, "Philosophy Matters" (1998) 111 Harvard Law Review 1739.

[12] Posner, *ibid.* at 1650.

[13] Grouping "intention" with the other contextual elements mentioned above may be slightly controversial: arguably, intention forms part of the underlying act, rather than part of the surrounding context. The difficulty of separating an act from its context, along with the general difficulty of defining the boundaries of "context", is discussed in section 4 of this paper.

> that it will rain more frequently next year than it did this year, or that my hunger is caused by a sugar deficiency rather than an actual absence of food in my system, without words or equivalent symbolic devices with which to think these thoughts.[14]

Complex mental constructs such as "law", "morality", "ethics" and "context" are constituted by language – they do not exist independently of the words by which they are framed. They are limited and constructed by linguistic signifiers that are inevitably open to re-construction. We need language to assess the moral value of an action and to define the context in which the relevant act has been performed. Ethics, together with morals and the contexts that define them, are part of a complex language game; creatures of the mind that cannot be thought of independently of the linguistic signifiers by which they are described. As textual entities, the concepts of ethics, morals and context are inevitably open to construction, subject to the same weaknesses and problems that infect any interpretable text. The textuality and interpretability of morals, ethics and contexts raise concerns that must be addressed in any thorough account of the lawyer's role. These issues will be addressed in greater detail in the fourth and fifth sections of this paper.

Whether one considers a simple act of hand-raising or a morally complex action such as infantcide, one must situate the act within a broader moral framework before committing to a moral assessment of the action. This is equally true of acts performed by lawyers. Our moral assessment of a lawyer's decision to represent an unpopular client, like our view of a lawyer's decision to suppress material evidence, will inevitably be coloured by the context in which those decisions are made.[15] This is not a startling revelation. Lawyers often defend ostensibly immoral actions by appealing to the context in which the acts took place. The context by which lawyers have traditionally defended morally dubious acts can be referred to as "the lawyer's context". That context is the topic of the following section of this paper.

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[14] J. Searle, *Mind, Language and Society* (London: Weidenfeld & Nicholson, 1999) at 153. On this view of language, language is not merely a tool developed for the purpose of communicating ideas. Instead, language is a constitutive element of complex ideas, allowing the user of language to "think thoughts" that, absent language, the thinker would be unable to develop. Thought does not precede language, but is intertwined with linguistic symbols that allow complex thought to take shape.

[15] This point is alluded to by Wolfram *supra* note 1 at 70-72.

3. "The Lawyer's Context"

(a) Introduction

The institution of "the legal system" provides a peculiar context that is said to justify some rather nasty behaviour. Acting within the so-called bounds of this institutional framework, lawyers act in ways that could be regarded as despicable in any other context. Lawyers mercilessly attack the credibility of nervous, truthful witnesses. Lawyers assert technical defences (such as limitation periods) in order to help their clients avoid repaying lawful debts. Lawyers engage in "stall tactics", stretching out judicial proceedings in the hope that impoverished parties will abandon valid claims or that elderly parties will die before a matter goes to trial. Lawyers foreclose on orphanages, help polluters, challenge democratic elections, humiliate victims of crime and defend monsters. Based on any "non-legal" standard of morality, lawyers do a lot of dreadful things. Despite the morally charged nature of these actions, however, many lawyers believe that these actions are insulated from moral censure as a result of the context in which the acts occur. "The lawyer's context", it is argued, immunizes the lawyer from rebuke so long as he or she acts within the lawyer's institutional role.[16] As noted above, this role-based immunity flows from the traditional conception of the lawyer's calling.

(b) The Traditional Conception

Whenever a lawyer seeks the acquittal of a hate-monger, incorporates a company that will wipe out acres of rainforest or takes any other action that (while arguably legal) seems morally indefensible, the lawyer typically looks for refuge in the safety of an institutional role. For one reason or another, the lawyer believes that the institution of the legal system provides a context that justifies the lawyer's ethically questionable behaviour. Perhaps the lawyer believes that the legal system approves of the lawyer's actions by casting responsibility for those actions on the client. The lawyer merely acts as the client's agent, making the client aware of legal options but making few decisions regarding the manner in which the client will proceed. According to this view of the lawyer's role, the lawyer is a morally neutral tool who bears no responsibility for any unethical actions that the lawyer may commit in the client's name. It is the client who makes the lawyer draft an agreement to close a factory, destroying a rural community's only industry. It is the client who uses the

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[16] See W. H. Simon, "Ethical Discretion in Lawyering" (1988) 101 Harvard Law Review No. 6 1083, for an excellent account of the conventional view of "legal amorality".

lawyer to undermine the reliability of DNA evidence that places the guilty client at the scene of a violent crime. It is the client who insists upon the invocation of legal technicalities that will save the client from paying a debt that he or she is morally obligated to pay. The lawyer bears no personal culpability for these actions. On the contrary, the lawyer is merely a morally neutral tool who plays an essentially passive role in implementing the client's will.

The "neutral agent" model, while a common source of moral comfort among lawyers, seems inherently unpersuasive. After all, even if the lawyer is not directly responsible for the client's morally questionable activities, the lawyer is *helping* the client commit a morally discreditable act. The decision to help another person undertake an immoral action is hard to justify as a morally neutral choice. Happily, the legal system provides a way around this problem. Rather than simply blaming the client for morally questionable activities, the lawyer can cast the blame directly upon the context of the legal system. The argument is based on a deeper understanding of the *purpose* of the lawyer's agency-role. Instead of merely standing in the client's shoes as a neutral agent, the lawyer acts as a remedy for the complexity of the law. Because lawyers are required to respect the limits of the law, any morally questionable activities that the lawyer undertakes on the client's behalf will, at the very least, be arguably legal. As legal actions, these activities could (in theory) have been carried out directly by the client. Due to the law's complexity, however, the client is unable to proceed without assistance: although a particular course of action may be open to the client, *recognizing* the availability of that course of action, or knowing the steps required to undertake a particular act, may require the lawyer's special expertise. The law is confusing and complex. The complexity of the law ensures that no one but a legally trained professional can successfully navigate the legal system. According to Charles Fried:

> ... the web of perhaps entirely just institutions ... has become so complex that without the assistance of an expert adviser an ordinary layman cannot exercise that autonomy which the system must allow him. Without such an adviser, the law would impose constraints on the lay citizen (unequally at that) which it is not entitled to impose explicitly.[17]

By helping the client cross the "barrier of complexity" erected by the legal system, the lawyer acts as a morally neutral conduit through which an untrained client can gain access to the law. The lawyer is a necessary and neutral component of the legal system, existing only to eradicate the barrier presented by the complexity of the law.

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[17] C. Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation" (1976) 85 Yale Law Journal 1060 at 1073.

As the lawyer is simply an antidote for the complexity of the system, the lawyer has no business evaluating the moral value of the client's proposed activities. Provided that the client's goals (and the methods used to achieve them) are not illegal, the lawyer must guide the client through the morass of the modern legal system, allowing the client to take advantage of whatever benefits the law provides.

The "neutral conduit" argument seems intuitively appealing. According to this model, the lawyer is merely a remedy for a dysfunctional feature of the legal system. The problem of complexity creates an unintentional barrier that must be overcome. The lawyer's only role is to eradicate that barrier. When discharging that function, the lawyer must be careful not to impose additional hurdles that impede the client's access to the benefits of the law.[18] The lawyer cannot impair the client's access to the system by inquiring into the moral value of the client's project. Indeed, as long as the client's goals are authorized by law (or, at least, not explicitly prohibited), the lawyer lacks the moral authority to police the ethical worth of the client's goals. The lawyer must merely apprise the client of the boundaries of the law and assist the client in taking whatever legally authorized steps the client chooses. If lawyers sat in moral judgment over all potential clients, lawyers could refuse to act for those who held unpopular ideas. Rather than being ruled by law, society would be governed by a parliament of lawyers. Rather than eradicating the barrier of complexity, a lawyer who judged the moral value of a potential client's goals would erect a barrier of morality, forcing the client to adhere to the lawyer's personal code of ethics.

Whether the lawyer is depicted as a morally neutral agent or as a remedy for the complexity of the law, the lawyer is thought to bear no moral responsibility for actions undertaken in pursuit of the client's goals. Whatever ostensibly unethical actions the lawyer may commit, the legal system grants the lawyer absolution and takes on all of the moral responsibility. All of the troubling moral issues are said to be resolved at the institutional level, leaving the lawyer free to proceed in a value-neutral manner. As Postema notes:

> ... once he has accepted the client's case, the lawyer must represent the client, or pursue the client's objectives, regardless of the lawyer's opinion of the client's character and reputation, and the moral merits of the client's objectives. On this conception, the lawyer need not consider, nor may he be held responsible for, the consequences of his professional activities as long as he stays within the law and

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[18] See S. L. Pepper, "Lawyers Amoral Ethical Role: A Defense, A Problem and Some Possibilities" (1986) American Bar Foundation Research Journal 613.

> acts in pursuit of the client's legitimate aims. Thus, the proper range of the lawyer's concern – the boundaries of the lawyer's "moral universe" – is defined by two parameters: the law and the client's interests and objectives. These factors are the exclusive points of reference for professional deliberation and practical judgment.[19]

The "moral universe" of the lawyer is extremely circumscribed. As long as the lawyer's actions are for the benefit of the client and not prohibited by the law, the lawyer makes no moral judgments. Instead, the lawyer enjoys a total lack of moral accountability: every lawful act that serves the client's interest, no matter how unscrupulous or morally repugnant it might seem, is given the imprimatur of morality by the institution of the legal system. Despite any harm that the lawyer's action might inflict upon another, the lawyer bears no moral culpability. In the words of Lord Brougham:

> An advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world, that client and none other. To save that client by all expedient means, to protect that client at all hazards and costs, to all others, and among others to himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other ... he must go on reckless of the consequences.[20]

While inhabiting the context of "the legal system" the lawyer treads upon a special moral plane. In this region of institutional amorality, standard notions of ethics, good behaviour and propriety have no place. The lawyer disengages his or her "moral sensors", pursuing the client's goals with no regard for the suffering that the lawyer's actions may inflict upon another. By taking shelter within this ethically sterile role, the lawyer "places the responsibility for all of his acts at the door of the institutional author of the role." The lawyer's own behaviour is systemically amoral, beyond the reach of "ordinary" ethical concerns.[21]

The traditional conception of the lawyer's role is attractive for many lawyers. Because all moral and ethical issues are resolved at the institutional level, the lawyer has no need to pay attention to potentially troubling moral problems. As Richard Wasserstrom notes, "the moral world of the lawyer is a simpler, less complicated,

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[19] *Supra* note 7 at 73-74.

[20] See W. Forsyth, *The History of Lawyers: Ancient and Modern* (Union, NJ: The Lawbook Exchange, 1996) at 380, as cited in A. C. Hutchinson, *supra* note 1 at 91.

[21] *Supra* note 7 at 74.

and less ambiguous world than the moral world of ordinary life."[22] While ordinary people might be troubled by the ethical implications of their actions, the lawyer has no need for such concerns. Safe in the arms of "the lawyer's context", the lawyer dons moral blinders, aware of only two inherently flexible guidelines, namely (1) the interests of the client, and (2) the limits of the law. However immoral or unethical an action might appear, however terrible the suffering it might cause, the context of "the legal system" takes the place of the lawyer's conscience, allowing the lawyer to proceed without regard for moral concerns. As long as an action is legal and in the client's interests, the lawyer may take that action without considering its moral implications.

The context provided by the legal system (or "the lawyer's context") is a justificatory framework - a context by reference to which the moral worth of a lawyer's actions can be justified or measured. Like all actions, the actions of lawyers must be measured by reference to the contexts they inhabit. The foregoing vision of "the lawyer's context", as we have seen, is thought to provide a measure of contextual justification for a wide array of behaviour which, extracted from this context, might appear to be immoral or unethical. In my view, this account of "the lawyer's context" should be troubling. Upon close examination, "the lawyer's context" is revealed as an indeterminate notion that lacks the power to truly justify a lawyer's immoral deeds. Indeed, *any* appeal to context is inherently problematic, plagued by problems of indeterminacy, subjectivity and confusion. The many problems that flow from any appeal to context are discussed in the following section of this paper.

4. The Trouble with Context

(a) The Textuality of Morals

Previous sections of this paper have underscored the importance of contextual information in the assessment of an action's moral value. Whenever we judge an action as "moral" or "immoral", we first turn to the context in which the act took place. Whether this context is comprised of the intentions of the actor, the actor's religion or cultural background or the environment in which the act occurred, that context forms the basis for our assessment of the action's moral worth. Without an

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[22] R. Wasserstrom, "Lawyers as Professionals: Some Moral Issues" in G.C. Hazard Jr. and D.L. Rhode eds., *The Legal Profession: Responsibility and Regulation*, 2nd ed. (Westbury, New York: The Foundation Press, 1988) 162 at 166.

inquiry into these contextual factors, a thorough assessment of the morality of the action is impossible. The same is allegedly true of lawyers' actions: only when a lawyer's behaviour is situated within the context of "the legal system" can we fully appreciate the moral value of the lawyer's actions. As noted above, the contextual nature of morality carries important implications.

The "contextual dependence" of morality demonstrates its textual nature. When assessing the morality of an action, our contextual inquiry has the effect of ascribing meaning to the relevant activity. The action is a "text" that carries a meaning.[23] We discern an action's meaning by situating the action within a contextual framework, allowing us to appreciate and understand the action. Our attempt to understand the ethical merit of a morally suspect action (or "text-act") is essentially an interpretive inquiry. We situate the text-act within a context, determine the impact of that context on the meaning of the act, and ultimately develop an understanding of the significance of the underlying action. This process closely parallels the construction of written texts.[24] Whether our texts are morally suspect actions or traditional written documents, these texts are inevitably interpreted by reference to the contexts they inhabit.

When conducting an interpretive inquiry, we often assume that "the context" will serve as a convenient and valuable tool in the creation and discovery of meaning. Indeed, many commentators presume that contextual information is a necessary precondition to the generation of meaning. According to Reed Dickerson, for example, "In the communication of meaning there are two main elements: (1) the vehicle of communication specially created and controlled by its author, and (2) the context within which that vehicle operates. No communication is complete without both."[25] Whether the "vehicle of communication" is a physical

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[23] On the meaning of "meaning" in this context, see D. Cornell, "From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation" in G. Leyh ed., *Legal Hermeneutics: History, Theory and Practice* (Berkeley: University of California Press, 1992) 147. At page 155 of that work, Cornell writes "when I use the word *meaning*, I am referring not to institutionalized linguistic meaning in the sense of the intelligibility of sentences but to ethical meaning. As we have seen, Hegel understood that the dilemma of legal interpretation does not turn on whether we can cement linguistic meaning. Legal rules are justified in Hegel through the appeal to the realized relations of reciprocal symmetry that give them ethical justification."

[24] On the problem of textuality and interpretability generally, see R. A. Posner, *Law and Literature* (Cambridge: Harvard University Press, 1998) 209-246.

[25] R. Dickerson, *The Interpretation and Application of Statutes* (Toronto: Little, Brown and Company, 1975) at 103.

gesture, a spoken word or a written text, that vehicle is incapable of generating a clear meaning until it is situated within a broader context. Without context no communication is possible. As Pierre-André Coté suggests, any "interpretation that divorces ... expression from the context ... may produce absurd results."[26] This view of the pivotal role played by context raises an obvious problem. If "the context" is the key to unlocking the meaning of words or actions, how are we to determine precisely what "the context" is? The definition of "context" raises important interpretive problems which are discussed in the following section of this paper.

(b) Defining "Context"

If our interpretation of texts (including actions, documents and other vehicles of communication) is invariably dependent upon context, it seems sensible to insist upon a rigorous notion of context that is capable of guiding interpretation.[27] Simply put, we must identify the context before we can use it as a method of assessing or interpreting the texts or text-acts that it enfolds. As the Court noted in *Bentley v. Rotherham and Kimberworth Local Board of Health*: " ... there is no doubt a rule ... that you may control the plainest words by a reference to the context. But then, as has been said very often, you must have the context even more plain, or at least as plain – it comes to the same thing – as the words to be controlled."[28] An indeterminate context seems unhelpful in the quest to uncover the meaning of equivocal words or actions. As a result, any inquiry that relies on contextual factors presupposes our ability to define "the context" with some degree of confidence and precision. But what *is* a context? Is it possible to define the notion of "context" with any degree of specificity? Derrida claims that these questions lack definitive answers:

> But are the prerequisites of a context ever absolutely determinable? Fundamentally, this is the most general question I would like to attempt to elaborate. Is there a rigorous and scientific concept of the context? Does not the notion of context harbor, behind a certain confusion, very determined philosophical pre-suppositions? To state it now in the most summary fashion ... a context is never absolutely

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[26] P-A. Coté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville: Les Editions Yvon Blais, Inc., 1991) at 242. At page 236 of the same work, Coté argues that "Without going so far as to say that words have no intrinsic meaning, their dependence on context for real meaning must be recognized."

[27] The impact of context upon meaning, together with the general "instability" of contextual frames of reference and linguistic symbols is explored in chapter 3 of R. N. Graham, *Statutory Interpretation: Theory and Practice* (Toronto: Emond Montgomery Publications Ltd., 2001).

[28] (1876), 4 Ch. D. 588 at 592 (per Jessel, M.R.).

> determinable ... its determination is never certain or saturated.[29]

Contexts are never self-defining. They are mutable, ephemeral creatures that are inherently indeterminate and incapable of leading to precise interpretations of the texts or text-acts that they envelope. There is no precise notion of "the context"; no incontestable method of determining the boundaries of contextual frames of reference. What factors are considered part of a context? What information lies within a context's boundaries and what is found beyond its outer limits? Every attempt to answer these questions raises problems. According to Dickerson, a context includes the entire "conceptual matrix of established ideas and values that identifies the culture" in which a particular text is found.[30] This "conceptual matrix" is extremely open textured, seemingly capable of encompassing the sum of human experience. As Dickerson explains:

> The underlying cultural elements that provide the materials of context include (1) the pervasive network or grid of concepts presupposed by the language of that culture, and (2) the coordinate fund of habits, knowledge, values, and purposes that are shared by the great bulk of the speech community of which both author and audience are members and at least some of which are taken account of in each communication. Together, the factors make up the aggregate of relevant human expectations.[31]

Such a context is too broad to be particularly helpful. Although Dickerson notes that only "some" of the elements of this open textured context must be taken into account in any act of interpretation, it seems impossible to determine which elements of this vast, amorphous context count as "relevant" to a particular inquiry. How do we determine which elements of a context are important? According to Elmer Driedger, the relevant aspects of a context include "anything that contributes to a text's meaning, other than the text itself".[32] This raises additional questions, namely (1) if "the text itself" is not a part of the context, how does one separate the context from the text that it enfolds?, and (2) how does one define the outer limits of the context, determining which information lies within a context's boundaries and which information is too remote from the text or text-act to contribute to its meaning?

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[29] J. Derrida, "Signature Event Context" in P. Kamuf, ed., *A Derrida Reader* (New York: Columbia University Press, 1991) at 84.

[30] *Supra* note 25 at 105.

[31] *Ibid.* at 106.

[32] E. Driedger, in R. Sullivan ed., *Driedger on the Construction of Statutes* 3rd ed. (Toronto: Butterworths, 1994) at 193.

There is no controlled margin of any communicative vehicle that clearly marks the boundary between a context and the text that it enfolds.[33] This problem is particularly evident where the text being interpreted takes the form of a morally suspect action. Consider a simple example. Two human beings come into physical contact. The contact is sexual in nature, but short of intercourse. One human is male, the other is female - in fact, they are brother and sister. The brother and sister belong to a community in which there is an important cultural rule forbidding incest. The brother and sister, while "blood relatives", were raised apart from one another and have no idea that they are genetically related. Reflecting upon the elements of this text-act, we encounter a problem of contextual boundaries. Which elements of the narrative are components of the action (or text-act), and which elements are components of the context? Can the action be defined as "brother and sister unwittingly breaching an incest taboo", or does this definition of the act include contextual information? Perhaps the incest taboo is part of the social context in which the act takes place, and not part of the act at all. Perhaps the action can be defined as "brother and sister engaging in sexual contact without knowing that they are genetically related". This too is problematic. Is the familial relationship between the actors an element of the context or a component of the action? If the action is defined as "incest", it must (by definition) include a reference to the relationship of the actors. If the action is defined as "sexual contact", the relationship that exists between the actors may be regarded as contextual information. The knowledge and intentions of the actors raise additional problems: should *intention* be considered part of the action or an element of its context? This problem also arises when one considers a written text: is "the author's intention" an element of the written text or an element of the context that surrounds it? These questions have no clear-cut answers. The boundary between the text and its context is constantly shifting, defying our ability to define it with precision.

While the elusive border between text and context may seem to be a purely "academic" problem, it has potentially important implications: when engaging in an act of interpretation, the interpreter (constrained by time and limited resources) must restrict the interpretive inquiry to those contextual factors that have an undeniable bearing on the meaning of the text. While the entirety of the text must be considered, certain elements of the context must (of necessity) be ignored. Given the unbounded nature of contexts, no interpreter can hope to deal with every element of a context when engaging in an act of interpretation. As a result, the interpreter

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[33] The problem of margins or boundaries between context and text is admirably explored by J. Derrida in "Tympan", *supra* note 29 at 146.

chooses between various elements of the context, deciding which elements are relevant to the meaning of the text and which elements can be safely disregarded. Once a particular piece of information has been severed from the text and relegated to "the context", that piece of information runs the risk of being ignored. Once extracted from the text and set adrift in the ethereal realm of context, a piece of information that may seem relevant to one interpreter may be cast off and declared to be "too remote" by another. As a result, our decision on the issue of what is "text" and what is "context" is the first step in determining which elements of a communicative vehicle are relevant in determining its meaning. The "internal boundary" of the context coincides with the outer margin of the text. As a result, whether our text takes the form of a written document or a morally suspect action, our definition of context inevitably controls our understanding of what the text *is*.

Assuming that it is possible to draw a principled boundary between the text and the context that surrounds it, we must now determine where the context ends. Where is the outer limit of the context? What information is too remote from a communicative vehicle to contribute to that vehicle's "true meaning"? This is yet another question without an answer. Consider a statute. When interpreting that statute, we may decide that everything that is not internal to the act itself is part of the context. But what does this context include? Which elements of this context have a role in casting light upon the meaning of the relevant legislation? Does the context include the intentions of the enacting legislature?[34] Does the context include the common law before the act's creation? The political motives of those who proposed the relevant legislation? What about previous versions of the statute, or amendments that have been drafted but not yet implemented? Each of these factors (together with countless others) seems to count as contextual information that could guide us in our understanding of the relevant text.[35] Based on Dickerson's far-reaching definition of "the context", every one of the foregoing factors *can* be regarded as an element of the context, depending upon the interpreter's point of view. Unfortunately, few interpreters have the time or the inclination to consider all potentially relevant pieces of information. While countless sources of information *can* be regarded as "contextual", the interpreter must set a practical limit on the contextual inquiry. This leads to the primary problem arising from references to

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[34] See J. Willis, "Statute Interpretation in a Nutshell" (1938) 16 Canadian Bar Review 1, as well as R.N. Graham, "Good Intentions" (2000) 12 Supreme Court Law Review (2d) 147.

[35] Other possibilities include (1) unrelated legislation passed during the same Parliamentary session, (2) government papers discussing the relevant legislation, (3) previous judicial interpretations of the relevant legislation, (4) previous voting behaviour of those who supported a bill's passage, (5) legislative debates, etc. The list of possible factors seems to be limited only by the imagination of the interpreter.

"the context": if there is no pre-ordained notion of "the context", any interpreter who relies on contextual information has the duty (or the luxury) of determining precisely what the context is. The interpreter has the power to determine where the outer-boundaries of the context should be set, effectively determining which information is relevant in generating a text's meaning and which information can be cast aside. The interpreter draws a circle around the text, defining the "region of context" that will have a role in constructing the text's meaning. Information within this region may be given a prominent role in illuminating the text or text-act that it encircles. Information beyond this region will be summarily disregarded, regardless of any impact that it could have on the text's meaning. Unfortunately, there is no principled method of determining whether a given piece of "arguably contextual" information falls within or beyond a text's contextual bounds. The definition of "the context" is a matter of the interpreter's discretion.

Because contexts are inherently indeterminate, the manner in which an individual defines a context will be coloured by that individual's view of what that context *ought* to be. A person charged with any interpretive task (including the task of "moral assessment") will inevitably design a context that suits his or her own personal preferences. This is not a result of insidious political motives or a desire to render skewed interpretations, but a basic element of the human condition. As Searle notes:

> ... we have no access to, we have no way of representing, and no means of coping with the real world except from a certain point of view, from a certain set of presuppositions, under a certain aspect, from a certain stance. If there is no unmediated access to reality, then, so the argument goes ... there is no reality independent of the stances, aspects, or points of view.[36]

Our own biases, experiences and ideological affiliations inform our perceptions of reality. We see the world through the lens of our own preferences, making sense of the world by reconstructing it through our own subjectively held points of view. If an interpreter of a poem has strong religious views, he or she may interpret the poem by reference to the poet's religion - other interpreters may ignore the poet's religion and arrive at different conclusions regarding the poem's "true" meaning. If an interpreter of a statute feels that voting patterns in Parliament are an important component of a statute's context, he or she will interpret the relevant statute by

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[36] *Supra* note 14 at 20. It should be noted that Searle generally disagrees with the idea of "perspectivism", and advocates the Enlightenment vision that humans actually *do* have access to the truth of the "real world". In Searle's view, reality is neither indeterminate nor inaccessible, just extremely complicated and difficult to understand given the current state of knowledge and technology.

reference to voting patterns. More importantly, an interpreter (whether consciously or unconsciously) may emphasize those elements of the context which tend to lead to whatever interpretation the interpreter prefers. If an interpreter *wants* to decide that a novel is a metaphor for the author's latent homosexuality, the interpreter can construct a context that leads to this result. Perhaps the interpreter will consider some (but not all) of the other books written by the author. Perhaps the interpreter will consider some (but not all) of the events in the author's personal life that, from a certain perspective, parallel selected passages of the novel. Perhaps the interpreter will consider the author's political beliefs while conveniently ignoring the author's religious views. Provided that the interpreter is both creative and sufficiently interested in generating a particular result, it will be possible for the interpreter to construct an interpretive context that leads toward the interpretation that he or she hopes to render.[37] Even if the interpreter hopes to proceed in an objective, neutral manner, the interpreter may be powerless to do so. We *are* our own biases. We cannot divorce ourselves from our subjective points of view when we struggle to understand the world around us. When constructing a context for the purposes of an interpretive inquiry, including a moral assessment, we inevitably construct a context that appears to "make sense" from our own ideologically-distorted points of view. The context that is ultimately constructed by the interpreter says as much about the interpreter as it does about the text. While the context is the key to the "true meaning" of the text, the interpreter (guided by personal preferences, politics or ideological leanings) is the master of the context.

Whether the text to be interpreted is a novel, a legislative provision or a morally suspect act, the interpretation that is ultimately rendered will inevitably depend upon the interpreter's definition of "the context". The definition of the context will depend, to a large degree, upon the identity and biases of the interpreter. This is not to say that every interpretation (or every definition of context) is equally plausible: an interpreter is constrained in several ways. The language of a text often provides important constraints, as certain interpretations (in almost any context) are absurd. It seems unlikely that an interpreter could construct a tenable context that could lead us to interpret the national anthem as a recipe for lasagna. Similarly, there are limits on the contexts that an interpreter can create. When interpreting this paper, one *cannot* decide to situate it in the context of my early writings on intellectual property. I have never written about intellectual property. Despite these limits, the

[37] There are, of course, some limitations on the ability of an interpreter to manipulate the meaning of a text (or a text-act), although these limitations are less restrictive than many would like to believe. Some of the restrictions on ideological interpretation are discussed below.

power of the interpreter to construct the interpretive context is an important consideration. When interpreting this paper, one *could* interpret it by reference to my earlier writings on interpretation, by reference to my parents' religious beliefs, by reference to my conduct as a commercial lawyer or by reference to my leisurely pursuits.[38] Depending upon the context that an interpreter constructs, one could decide that this paper is (a) an indictment of the morality of lawyers, (b) a nihilistic view of interpretation, (c) thinly veiled sarcasm, or (d) an attempt to satisfy a publication quota in the hope of eventual tenure or promotion. With enough contextual stage-setting, the meaning of a text can be destabilized to a sufficient degree to give rise to a large number of competing interpretations. By deciding which elements of a particular contextual matrix count as relevant information, an interpreter can create room to manoeuver between an array of competing interpretive possibilities. The beliefs, values, assumptions and biases of the interpreter play an inescapable role in the construction of "the context", and the context is the key to the text's meaning. In this sense, all interpretation is inherently value-laden. There is something of the interpreter in every act of interpretation. The interpreter re-constructs the text (or text-act) by situating the text within a context that reflects the world that the interpreter perceives. There is no neutral context that defines itself without our intervention. The unmediated, value-free context is a myth, and value-neutral forays into context are impossible.

The indeterminate, value-laden nature of "the context" has important implications in the assessment of morally suspect actions. Every moral assessment is an act of interpretation. As acts of interpretation, moral assessments are dependant upon context - one can never assess the moral or ethical merit of an action without first situating that act within a context. The context, as we have seen, is an indeterminate concept that reflects the conscious or unconscious ideological biases of the interpreter. When assessing the morality of a text-act, the interpreter will inevitably construct a "moral context" that reflects the interpreter's own perceptions and opinions - the interpreter constructs the moral world that informs the interpreter's judgment of the moral or ethical merit of an action. All moral assessments are contextual inquiries, and all contextual inquiries are vulnerable to ideological appropriation by the person charged with the duty of undertaking the inquiry. The value laden nature of contextual inquiries, particularly in the arena of morality, raises important concerns when one considers "the lawyer's context"

[38] Countless other contextual frames of reference are, of course, possible, limited only by the interpreter's knowledge of the author, the text and the general cultural framework in which the text was written.

described in section 3, above. The problems that arise from appeals to that particular context are highlighted in the following section of this paper.

5. Redefining "The Lawyer's Context"

(a) Introduction

Section 3 of this paper described "the lawyer's context", the framework by which lawyers traditionally justify the morally dubious actions that they take in a client's name. As noted above, lawyers frequently claim that any ostensibly immoral actions taken in a client's name are given the imprimatur of morality by virtue of the context in which those acts occur.[39] Provided only that the act in question advances a client's interests and is not expressly forbidden by the law, the relevant act is said to be justified by the peculiar moral context that enfolds the lawyer's institutional role. By situating their actions within "the lawyer's context", lawyers justify their actions and disclaim responsibility for any adverse consequences that their actions bring about. The moral burden of the lawyer's behaviour is borne by "the lawyer's context", leaving the lawyer free to act without regard for the moral value of his or her professional acts. Indeed, the lawyer need not even turn his or her attention to the morality of decisions made within the lawyer's institutional role: all moral quandaries are resolved at the institutional level, leaving the lawyer free to operate within the bounds of an ethically sterile professional framework.

The justificatory power of the lawyer's context is more illusory than real. As we have seen, contexts are inherently amorphous, reflecting the ideological views of whatever individual makes an appeal to the relevant context. Like any contextual frame of reference, "the lawyer's context" is a nebulous and indeterminate concept that is always subject to ideological construction. There is no determinate notion of "the lawyer's context" that exists apart from the ideological values of those who purport to act within that context. Like any individual charged with the moral assessment of an action, a lawyer engaged in an appeal to "the lawyer's context" has the luxury of designing the boundaries of that contextual frame of reference. There is no rigorous notion of "the lawyer's context" that is capable of guiding our assessment of a lawyer's professional actions. While professional regulations (such as the Rules of Professional Conduct) purport to establish guidelines that restrict a lawyer's behaviour, these guidelines fail to address the lion's share of morally

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[39] See generally C. P. Curtis, "The Ethics of Advocacy" (1951) 4 Stanford Law Review 3.

questionable activities that lawyers undertake in a client's name. No professional regulation tells a lawyer whether or not it is appropriate to act for an organization devoted to racial segregation. No professional rule provides a meaningful limit on the ability of a lawyer to humiliate a truthful, adverse witness. Indeed, most of the moral quandaries faced by lawyers fall between the cracks of professional codes of conduct. "The lawyer's context" is neither hemmed-in by professional regulations nor defined by the oaths we take upon admission to the bar. Instead, "the lawyer's context" is continually re-constructed by those who use it as a method of assessing the morality of the acts that it allegedly enfolds.

(b) Defining the Context

When individuals turn to "the lawyer's context" for moral absolution, they inevitably define that context by reference to their own subjective preferences and values. Like all people, lawyers have no unmediated access to the truth; no ability to see the world without peering through the lens of their own biases. Wherever a lawyer is required to construct an interpretive framework, he or she will inevitably undertake this task by reference to his or her own ideologically-informed perceptions of the world. The same is true of the lawyer's involvement in the construction of "the lawyer's context". Like any context, the institutional matrix that surrounds and penetrates a lawyer's actions is subject to continual re-definition, reflecting the ideological preferences of whatever individual relies on the context as a source of moral comfort. "The lawyer's context", like every interpretive framework, is inevitably shaped "by the people who [have] the power to make the choices in accord with their views on morality and justice and their own self interest".[40] Viewed from this perspective, "the lawyer's context" is a mirror that simply reflects the ideology of the viewer. Relying upon this indeterminate context, a lawyer can construct justifications for a wide array of morally suspect actions. Provided that a particular course of action is neither proscribed by law nor prohibited by professional regulations, a creative lawyer will have very little trouble constructing a context in which the relevant course of action is condoned or even required. Lawyers are trained to manipulate rules, alter perceptions and inject a great deal of uncertainty into texts and concepts that might otherwise appear to be straightforward. For the creative lawyer, the construction of a justificatory context is a simple matter, leaving the lawyer free to act in whatever *legal* manner the lawyer chooses while constructing a "lawyer's context" that accepts the moral blame. The

[40] D. Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology" (1986) 36 Journal of Legal Education 518 at 521.

lawyer simply chooses the relevant course of action and constructs a "lawyer's context" that provides the necessary moral approval.

The indeterminate nature of "the lawyer's context" can be demonstrated through a simple example: Carl Crough is a lawyer engaged in private practice, widely known for his ability as a thorough research lawyer. Carl is contacted by his friend, Ashleigh Bower, who is a lawyer acting for a manufacturing concern. Ashleigh's client, XYZ Manufacturing Co., is the defendant in a multi-million dollar class action launched by elderly plaintiffs who have contracted a degenerative disease. Ashleigh asks Carl to conduct research into two specific areas, namely (1) the manner in which lawyers can stretch out pre-trial proceedings in the hope that sick and elderly plaintiffs will die before the matter goes to trial, and (2) the nature of the restrictions that the Rules of Professional Conduct impose on lawyers who seek to engage in "stall tactics".

Carl believes that Ashleigh is an ethical person. He also knows that, given his own impressive research skills, he can probably discover a litigation strategy that will stretch-out the class proceedings while avoiding any charge of impropriety under the Rules of Professional Conduct. Several of the plaintiffs in the class proceeding will likely die in the intervening period, accomplishing one of the goals of Ashleigh's client. How should Carl proceed?

Perhaps Carl wishes to accept Ashleigh's retainer and assist her in stretching out the relevant proceedings. Carl can justify this action by reference to "the lawyer's context". Carl constitutes this context by (1) emphasizing his role as a remedy for the complexity of the law, (2) noting that he needs the business and has a right to earn a living, (3) emphasizing the fact that Ashleigh is his client, rather than the manufacturing company that wishes to benefit from the death of elderly plaintiffs, (4) noting that Carl has no "decision-making role" in this project: Ashleigh will decide what advice the manufacturing company receives, and the manufacturing company will decide how to proceed, and (5) relying upon the fact that the litigation strategy which Carl will ultimately design is authorized by "the letter of the law", constructed with a view to avoiding penalties for improper conduct. Carl accordingly decides that his preferred course of action is justified by "the lawyer's context".

Note that Carl could have quite easily constructed a radically different context, justifying the opposite course of action. If Carl wished to refuse to help his colleague, Carl could have constructed a "lawyer's context" that emphasized the following factors: (1) Carl's personal autonomy in selecting clients, (2) Carl's role

as a guardian of the administration of justice or an officer of the court, (3) Carl's view that the "spirit" of the Rules of Professional Conduct prohibits the use of "stall tactics", even where those tactics are not prohibited by the literal language of the relevant rules, and (4) Carl's view that procedural technicalities are available for a specific purpose and that using them to defeat a valid claim in this instance would do violence to the purpose of the relevant rules of civil procedure. Carl could also emphasize these factors to create a lawyer's context in which he *can* accept this project, but must simply advise his client that the use of "stall tactics" is prohibited. Whichever course of action Carl adopts, he can construct a "lawyer's context" that justifies the relevant course of action. Carl's decision to choose a particular course of action will be based (in part) on Carl's moral reasoning - reasoning that will ultimately be attributed to "the lawyer's context". Carl's action (whatever it is) will be justified on the grounds that the relevant course of conduct is condoned or even required by virtue of Carl's institutional role within the legal system. Carl may ultimately deny ever having made a moral decision: whether he accepts or rejects this retainer, Carl can (perhaps subconsciously) construct a "lawyer's context" that appears to make the relevant moral call and to direct the course of action that Carl ultimately adopts.[41]

The lawyer's ability to manipulate "the lawyer's context" flows (in part) from the many conflicting allegiances of the lawyer: lawyers are (among other things) agents of their clients, officers of the court, servants of the constitution, guardians of the administration of justice and remedies for the complexity of the law. By emphasizing one or more of these conflicting duties at the expense of other roles, lawyers can construct a wide array of "lawyer's contexts" that serve to justify or condemn a broad assortment of morally suspect actions. The lawyer's preferred course of action will direct the manner in which the lawyer constructs "the lawyer's context". Perhaps the lawyer will emphasize his or her role as a guardian of the administration of justice. Perhaps the lawyer will emphasize his or her role as a zealous advocate of the client or a remedy for the complexity of the law. Depending upon the course of action that the lawyer wishes to take, the lawyer may emphasize different aspects of the lawyer's role when constructing a moral context that justifies the relevant course of conduct. Whatever action the lawyer takes, he or she can

[41] Note that "contextual manipulation" will also help Carl in the definition of the proposed course of conduct. Perhaps Carl will define his action as "assisting a fellow lawyer in a research project" (a perfectly moral act). Perhaps he will define the action as "helping a wealthy company defeat a valid claim by ensuring that sick and elderly plaintiffs will die before the trial". Carl's decision to undertake a particular action may depend (in part) on Carl's ability to define the specific act in a morally palatable way.

justify that action by constructing a "lawyer's context" that accepts the moral blame. The lawyer makes the initial choice to adopt the lawyer's preferred course of action. Having made this personal choice, the lawyer goes on to create a "lawyer's context" to which the lawyer's moral decision can be attributed. This context will inevitably support the lawyer's choice. The lawyer attributes his or her own ideological views to the institution of "the legal system", which in turn takes the blame for the lawyer's morally suspect acts. Whatever consequences flow from the lawyer's conduct, the lawyer has the power to cast the blame for negative consequences on the context that allegedly enfolds the lawyer's acts. Although the lawyer may have caused or contributed to harm through his or her actions, the harm is said to be caused by the legal system that directed the hapless lawyer to act within the bounds of an institutional role. The fact that the context of "the legal system" was shaped by the lawyer's personal bias is conveniently ignored, as is the fact that the lawyer could have re-defined this context in a way that led to an alternate course of action – perhaps a course of action that could have avoided the harm that was caused by the lawyer's morally suspect acts.

Reliance upon "the lawyer's context" as a substitute for the lawyer's moral judgment is intellectually dishonest. By situating his or her actions within "the lawyer's context", the lawyer denies his or her role in making moral decisions and claims that moral and ethical choices were directed by the institution of the legal system. The lawyer effectively claims that he or she had no role in defining the moral limits of his or her behaviour. This claim is misleading. While "the lawyer's context" may stand ready to take the blame for the lawyer's morally suspect acts, it is the lawyer who defines the boundaries of "the lawyer's context". By imprinting "the lawyer's context" with his or her own values, the lawyer ensures that "the lawyer's context" will ratify the lawyer's personal choices. The lawyer designs the context in a manner that conforms to his or her personal ideology, shifting the lawyer's moral decisions into the institutional context that the lawyer has effectively created. A determinable or static "lawyer's context" that truly takes the place of the lawyer's judgment is an illusion, designed by those who wish to conceal or disclaim their own involvement in the resolution of contentious moral issues.

What harm could possibly flow from "intellectually dishonest" reliance upon "the lawyer's context"? Perhaps a little dishonesty is harmless. After all, whether the lawyer makes a decision openly or attributes that decision to a context of the lawyer's own design, the lawyer's behaviour will ultimately be governed by the lawyer's personal view of what it means to be a "moral lawyer". Theoretically, reliance upon "the lawyer's context" should have no measurable effect on a lawyer's conduct: either the lawyer will undertake an action and accept the moral blame, or

the lawyer will undertake the same action and cast the moral blame upon an illusory context. In either case, the lawyer takes the same course of action; the net "moral effect" of the lawyer's action is the same. If the lawyer's role in defining "the lawyer's context" has no practical effects, why worry about the practice of shifting decisions to the institutional level? In my view, there are compelling reasons for lawyers to take responsibility for their moral decisions and to admit their role in shaping the context that traditionally exempts the lawyer from the need to confront difficult moral issues. The perils of repeated reliance upon "the lawyer's context" are discussed in the following section of this paper.

(c) The Perils of "The Lawyer's Context"

Repeated reliance upon "the lawyer's context" leads to the gradual erosion of lawyers' ethical standards.[42] While (on a theoretical level) "the lawyer's context" simply mirrors each lawyer's personal beliefs and therefore ratifies the lawyer's moral decisions, the illusion of justification is convincing. Outside observers (such as clients, friends and colleagues) may embrace the myth that "the lawyer's context" requires the lawyer to act in morally discreditable ways. Outside observers may believe that the lawyer's actions do not reflect the lawyer's personal choices, but are instead directed by the institutional task of lawyering. Because the lawyer realizes that his or her behaviour is insulated from moral attack as a result of the illusion of a justificatory context, the lawyer may take actions that he or she would steadfastly avoid if he or she was forced to bear the ultimate moral blame. The lawyer knows that clients, friends and colleagues will buy into the illusion of a justificatory context, allowing the lawyer to act without fear of moral disapproval. As long as the lawyer's questionable deeds are neither proscribed by law nor prohibited by professional regulations, the moral-insulation provided by "the lawyer's context" ensures that the lawyer will not be blamed for those misdeeds. Free of the burden of moral blame, the lawyer is unlikely to exercise the same degree of prudence that he or she might exercise if forced to bear responsibility for the consequences that flow from morally questionable activities.

Outside observers are not the only individuals who fall victim to the illusion of the justificatory power of "the lawyer's context". Indeed, lawyers who appeal to "the lawyer's context" may themselves buy into the illusion of a determinate legal context that stands in the place of the lawyer's moral judgment. If the lawyer can

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[42] *Supra* note 22 at 162 where Wasserstrom notes that "the lawyer-client relationship renders the lawyer ... more than occasionally immoral in his or her dealings with the rest of mankind."

convincingly lay the blame for his or her actions on an institutional framework, the lawyer can assuage the feelings of guilt that might arise if the lawyer was forced to acknowledge the fact that he or she made a conscious decision to undertake an action that caused avoidable harm. The illusion of "the lawyer's context" allows the lawyer to take actions for which the lawyer would never claim responsibility.[43] While the lawyer *is* responsible for the action (due to his or her role in constructing "the lawyer's context") the illusion of a context that condones or even requires the relevant action spares the lawyer from the burden of moral guilt. To put it bluntly, the context makes it easier for the lawyer to embark upon an immoral course of action. The availability of an indeterminate context that will bear responsibility for the lawyer's decisions can only lead to a dilution of the moral and ethical standards that are ostensibly demanded of lawyers upon admission to the bar.

Reliance upon "the lawyer's context" has an additional side-effect that may be more insidious than the erosion of the lawyer's ethical standards. Rather than simply leading lawyers to adopt morally suspect courses of action, repeated reliance upon "the lawyer's context" may actually leave lawyers unable to recognize moral issues. The theoretical model of "the lawyer's context" suggests that lawyers evaluate proposed courses of action, assess their moral implications, decide upon the appropriate course of action and then attribute that decision to the justificatory framework that is provided by "the lawyer's context". In practice, this pattern may not hold. Repeated reliance upon "the lawyer's context" engenders a level of "moral comfort" among lawyers, assuring them that, whatever legal course of action they pursue, "the lawyer's context" will pick up the moral pieces. Reliance on "the lawyer's context" is comfortable and easy. The lawyer need not be troubled by the morality of his or her actions, as a mutable "lawyer's context" stands ready to take the blame. Secure in the availability of a justificatory context, the lawyer may stop reflecting upon the moral and ethical issues that inevitably arise in legal practice, not even aware of the need to "construct a context" that is capable of justifying morally suspect actions. Instead, the lawyer will simply accept the existence of an amorphous, undefinable context that allows the lawyer to act in a systemically amoral fashion. The lawyer knows that "the lawyer's context", whatever that might be, can be moulded in such a way as to ensure that it will take responsibility for the lawyer's morally questionable activities. Whatever course of action the lawyer may

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[43] *Supra* note 39. Curtis gives several controversial examples of behaviour that is said (by some) to be justified within "the lawyer's context" but immoral if committed in "private life". Some of the more interesting examples include lying to police officers and giving false evidence before administrative tribunals. The argument is that lawyers who take these actions in the course of their professional duties would not do so if they were forced to bear direct moral responsibility for such acts.

pursue; whatever harm the lawyer's action might cause, "the lawyer's context" stands ready to accept the moral blame while leaving the lawyer free of any responsibility. Secure in their ability to construct a "lawyer's context" that accepts all moral blame, lawyers are free to choose their actions without first turning their minds to moral implications. In effect, the lawyer buys into the availability of a justificatory context that accepts the moral blame for *any* legal acts the lawyer might commit in a client's name. The lawyer accepts the argument that "the lawyer's context" permits a lawyer to act without regard for moral issues. As a result, the lawyer need not even bother undertaking the moral assessment of a proposed course of action – whatever action the lawyer takes, "the lawyer's context" will step in to bear the moral responsibility.

When a lawyer relies on "the lawyer's context" as a substitute for his or her own moral judgment, the lawyer's moral sensibilities degenerate. The withering of the "moral sensors" of the legal community is a distressing problem, a problem that is caused by unwarranted reliance on institutional contexts as a proxy for sound moral reasoning. According to Rhode, "lawyers' sensitivities can atrophy, or narrow to fit the constricted universe" defined by the lawyer's institutional role.[44] In other words, reliance on "the lawyer's context" causes lawyers to lose the ability to recognize and deal with moral problems. As Hutchinson notes, "there is ... a depressing indifference among lawyers to issues of legal ethics and a lamentable ignorance about how to identify and deal with situations that raise ethical queries and challenges."[45] Frequently relying on a justificatory context, lawyers eventually lose the ability to recognize the moral implications of their actions. Because the lawyer is protected by a shifting, nebulous context that will take the moral blame for the lawyer's actions, the lawyer has no need to reflect upon the morality of professional decisions. The lawyer relies on "the lawyer's context" out of reflex, rather than out of reflection, ignoring moral issues that inevitably arise. The lawyer's underused, underdeveloped moral faculties may simply cease to function, allowing the lawyer to forge ahead in pursuit of his or her vocation scarcely aware of the most obvious moral issues. Bereft of moral sensitivity, lawyers fail to recognize the ethical dilemmas that permeate every aspect of the law. Cast adrift in a sea of shifting moral contexts, lawyers may accept the institutional myth that the universe of the lawyer is a morally sterile realm.

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[44] D. L. Rhode, "Ethical Perspectives on Legal Practice" in G. C. Hazard, Jr. and D. L. Rhode eds., *The Legal Profession: Responsibility and Regulation*, 2nd *ed.* (Westbury, New York: The Foundation Press, 1988) 170 at 177.

[45] *Supra* note 1 at 3.

While the foregoing problems are distressing, the solution is quite obvious. Simply put, lawyers must stop relying on the moral justification that is thought to reside within "the lawyer's context". Rather than laying their moral choices at the feet of an elusive non-entity, lawyers must take personal responsibility for the choices that they make while acting in pursuit of their professional duties. According to Hutchinson, "In a world of shifting contexts, there is an even greater need to develop a sense of moral judgment that can respond flexibly and firmly to the different challenges that lawyers face in their professional lives."[46] The fact that lawyers have the power to construct a justificatory moral context underscores the importance of a lawyer's moral judgment. A lawyer must recognize the moral issues that arise in the profession and develop a principled method of dealing with those issues. A failure to do so reinforces the myth that lawyers operate in a zone of amorality and leaves lawyers ill-equipped to recognize or respond to the countless moral issues that permeate the legal system. The decision to act for a particular client is always a moral choice, implicating the lawyer's personal view of whether or not a "moral lawyer" can assist a particular client in pursuit of a given goal. Decisions regarding the manner in which a lawyer conducts a trial, negotiates a transaction, drafts documents and bills clients have inescapable moral implications. By accepting moral responsibility for these actions and decisions, lawyers will ensure that they inform themselves of the costs and benefits of morally questionable courses of action. Taking "moral care" when making such decisions, lawyers exercise their moral sensibilities and reinforce their ability to recognize and contend with moral quandaries.

The acceptance of moral responsibility does not, of course, guarantee that lawyers' moral choices will change. A lawyer who genuinely wishes to act for a racist organization will probably do so whether or not he or she is permitted to cast the blame upon "the lawyer's context". The acceptance of personal responsibility may not change the manner in which lawyers respond to moral dilemmas. What it will do, however, is lead to a better understanding of the moral issues faced by lawyers. Rather than simply choosing actions without first weighing the moral implications, lawyers will reflect upon important moral questions: does my role as an advocate justify the harm that I am causing? In this particular instance, does my role as a remedy for the complexity of the law outweigh the importance of my role as a servant of the courts? Can I live with the moral implications of furthering this client's dubious projects? These will always be difficult questions, capable of generating a wide array of responses. The ultimate action taken by the lawyer is less

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[46] *Supra* note 1 at 47.

important than the fact that the lawyer acknowledges and makes a moral choice. Whatever course of action the lawyer chooses, the lawyer must acknowledge the moral issues and arrive at a decision. Rather than simply claiming that an invisible omnipresence makes the relevant moral calls, "ethical lawyers will develop a mode of practice on which they have critically reflected and for which they are willing to take personal responsibility."[47] While the ultimate decisions of lawyers may be no better than they presently are, they will (at the very least) *be decisions*. Lawyers will acknowledge and confront the moral issues that arise in legal practice rather than buying into the myth that the practice of law is a moral wasteland bounded only by the client's interests and the indefinable limits of the law.

Beyond its ability to avoid the harms inherent in thoughtless reliance upon "the lawyer's context", the acceptance of personal responsibility for moral decisions has beneficial effects. First, it makes the task of lawyering a much more personally satisfying venture. When a lawyer's professional behaviour deviates too strongly from his or her personal code of conduct, the lawyer inevitably feels the tremendous psychological tension that is associated with role-differentiated morality. This can have a profound impact on the lawyer.[48] Lawyers who defend positions that they (upon reflection) personally regard as immoral have trouble reconciling their personal codes of ethics with the choices that they make in pursuit of their professional roles. This leads to guilt, depression and a general distaste for legal practice.[49] By openly confronting the moral issues that arise in legal practice, the lawyer has the opportunity to chart his or her own ethical course, constructing a mode of practice that fits comfortably within the lawyer's personal ethics.[50] In this way, the lawyer can construct a mode of practice that is both professionally and morally satisfying, allowing the lawyer to take ownership of his or her moral choices rather than feeling the need to apologize for the systemic amorality of the lawyer's

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[47] *Supra* note 1 at 147.

[48] In "Protecting Lawyers from their Profession: Redefining the Lawyer's Role" (1980) 5 Journal of the Legal Profession 31, Erwin Chemerinsky discusses the perils of "counter attitudinal advocacy". Generally speaking, Chemerinsky describes a theory which holds that, where a lawyer (in the course of his or her professional duties) attempts to persuade others of a position that the lawyer does not (in his or her personal life) hold, the lawyer's personal views will tend to alter in response to the psychological conflict created by counter attitudinal advocacy. In a similar vein, see Curtis, *supra* note 39 at 13, "by the time he has even sketched out his brief, however skeptically he started, he finds himself believing more and more in what it says, until he has to hark back to his original opinion in order to orient himself".

[49] See generally Chemerinsky, *ibid.*

[50] See Simon, *supra* note 16.

chosen profession. More importantly, lawyers will learn to recognize the moral implications of their actions. In the course of taking responsibility for the morality of their decisions, lawyers will (of necessity) learn to recognize and evaluate the difficult moral choices that routinely arise within the practice of law. By exercising their moral faculties, lawyers will improve their own ability to recognize and cope with moral problems. The inevitable result will be a "morally aware" bar that acknowledges the moral issues penetrating the law rather than propagating the myth of an ethically sterile legal profession.

6. Conclusion

The practice of law is not the "moral wasteland" that lawyers often make it out to be. The moral-world of the lawyer is not a constricted universe bounded only by the client's interests and the limits of the law. On the contrary, the law is permeated by moral and ethical choices. When we accept retainers, select files, pursue litigation or decide upon our personal styles of practice, we make moral decisions that effect our collective perception of the institutional task of lawyering. Unfortunately, lawyers often fail to recognize these choices. Rather than acknowledging these moral and ethical choices, lawyers instead turn to a mutable "lawyer's context" that is thought to stand in the place of the lawyer's moral judgment. Non-reflective reliance upon this context can lead lawyers to believe that all potentially troubling issues are decided by the authors of the lawyer's institutional role, leaving the lawyer with no need for moral faculties. To be sure, the "role agent" model of lawyering may justify certain departures from standard notions of morality. What it does not justify, however, is the general failure among lawyers to weigh the moral and ethical costs associated with specific actions taken in a client's name. "The lawyer's context" cannot stand in the place of the lawyer's moral judgment. On the contrary, the content of "the lawyer's context" is continually redefined by the personal moral decisions made by lawyers. "The lawyer's context" does not replace our morality: it is controlled by our own choices and reflects the moral biases of individuals acting within the legal system. Through our professional decisions we *invent* "the lawyer's context", imprinting it with our personal ideologies.

Lawyers must acknowledge their role in creating "the lawyer's context" and defining what it means to be a moral lawyer. When lawyers recognize that individual decisions control the moral and ethical boundaries of our calling, we will stop relying upon an indeterminate context for moral direction and absolution. Instead of leaving moral decisions in the hands of a fictional entity, lawyers will make moral decisions for themselves. By reclaiming personal responsibility for the morality of our calling, lawyers will inevitably increase the esteem in which we are

held by the general public and improve our own view of our profession. More importantly, lawyers will come to recognize the importance of careful moral reasoning in pursuit of the practice of law. Exercising their moral judgment, lawyers will create a style of practice for which they are willing to take personal responsibility. Rather than being seen as an endless supply of systemically amoral mercenaries, the legal profession may once again be viewed as a noble calling.