Disruptive Innovation Inside the Bounds of Law?

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Charles M. Yablon, *The Lawyer As Accomplice: Cannabis, Uber, Airbnb, and the Ethics of Advising "Disruptive" Businesses*, 104 **Minn. L. Rev.** 309 (2019).

Charles Yablon writes mostly in fields adjacent to Professional Responsibility, such as civil procedure and jurisprudence. However, as a junior associate at a big law firm in the mid-1990s, I found his article on discovery abuse to be refreshingly clear-eyed and unsanctimonious about an ethical problem that was pervasive in my own practice. Ever since then, I have considered him as a kind of honorary legal ethics scholar. It was therefore with considerable interest that I noticed his new paper on providing legal assistance to clients in activities he refers to as "not quite legal."

Permissible legal assistance to businesses in the emerging cannabis industry is becoming a popular CLE topic (I am presenting a seminar this summer entitled "High above Cayuga's Waters?"). The discussion is usually framed around Model Rule 1.2(d), which states that a lawyer may not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." Even in a state in which medical or recreational use of cannabis products is permitted under state law, a dispensary or other business is still committing a serious federal felony of possession and distribution of a controlled substance. The on-again, off-again practice by the Justice Department of turning a blind eye to marijuana-related offenses in legal-use states raises an interesting jurisprudential issue. Yablon argues that the formal legal prohibition on the possession or sale or marijuana "should not be treated as the sole dispositive fact" regarding its legality. (P. 345.)

This jurisprudential approach sounds radical, but it is consistent with mainstream philosophy of law. As Joseph Raz contends, all legal positivists are committed to the Sources Thesis, which holds that the existence and content of a law can be determined solely with reference to its sources, excluding normative considerations such as morality. An official policy of non-enforcement or a clear trend in the direction of legalization could be sources of law, in Raz's sense. If they are, one might be justified in concluding that operating a cannabis dispensary in a legal-use state is not actually a crime, notwithstanding the federal statute, and a lawyer providing legal services to the dispensary would not be in violation of Rule 1.2(d). Similarly, Yablon argues that a lawyer may be justified in concluding, on the basis of objective evidence, that the conduct is likely to be permitted in the foreseeable future. (Pp. 379-80.) In that case, the lawyer might believe that Rule 1.2(d) does not prohibit providing legal assistance to a dispensary. (I should note that many states, either in ethics opinions or amendments to the rules of professional conduct, have sought to carve out an exception to Rule 1.2(d) for lawyers assisting state-legal cannabis businesses.)

Yablon usefully expands the scope of "not quite legal" conduct to include, not only cannabis distribution, but also self-styled disruptive companies like Uber and Airbnb. Love them or hate them, one characteristic of many of these newfangled businesses is their indifference to existing regulations. Uber famously charged into cities in which its business model was prohibited by taxicab licensing and regulation schemes, and defied regulators to come after it, knowing that its popularity with customers would insulate it from enforcement. Here's where things get extremely interesting from the point of view of jurisprudence and legal ethics. Many taxi licensing regulations, and also the byzantine hotel regulations that hobble—or at least complicate—Airbnb's expansion, are anticompetitive and are the

product of rent-seeking by well-connected local industry lobbyists.

Beyond that, there is much to *like* about these companies. I loathe Uber's ethical culture, but I must admit that it significantly outperforms legacy taxi companies on measures of customer service, convenience, and price. Suppose, for the sake of argument, that Uber and Airbnb have greatly increased the aggregate utility of society, albeit at the cost of significant harm to certain groups, such as taxi medallion owners. Of what relevance is this observation to the duties of lawyers representing these companies?

The great ethical risk presented by the valorization of disruptive business models is encouraging lawyers to see the law as nothing more than an inconvenient obstacle to be avoided, planned around, or engineered out of the system. In one of the news sources cited in Yablon's article, the Chief Legal Officer of Uber was quoted as saying:

> I tell my team, "We're not here to solve legal problems. We're here to solve business problems. Legal is our tool.…I am going to be supportive of innovation."

(P. 350.) Legal questions thus become risk-management problems, with the risk to be minimized by creative lawyering.

It is often observed that lawyers love the mantra "zealous advocacy within the bounds of the law," but tend to forget the "bounds of the law" part. Similarly, some corporate legal departments appear to promote the value of innovation or problem solving, while forgetting that they, too, must advise their clients within the bounds of the law. Here is where the interesting jurisprudential argument returns. Who says the bounds of the law are static? Isn't it the lawyer's job to push the bounds of the law? If the legal profession had been content to stay within the bounds of the law, we'd still be living with *Plessy v. Ferguson*.

There are several responses to this line of argument. One relatively straightforward response is that much of the legal change we applaud in our system occurs through litigation, in which a party seeking to extend, modify, or reverse existing law must argue openly and on the basis of persuasive legal authority for the change. Yablon agrees that Uber and Airbnb, as well as players in the emerging cannabis industry, are "genuinely engaging in a version of law reform." (P. 366.) Their conduct can be distinguished from that of truly antisocial actors who are simply evading the law in two ways. First, their conduct is aiming at some socially beneficial legal change, and second, their violations are transparent and thus could be subjected to challenge by regulators or those affected by the conduct. (Pp. 368-70.) In this way, Yablon seeks to connect the ethics of lawyers for these companies with the tradition of civil disobedience.

Civil disobedience proceeds from the assumption that the law in question is valid, though unjust. John Rawls refers to it as "disobedience to law within the limits of fidelity to law." A more subtle defense of the conduct of lawyers for Uber and Airbnb would, therefore, be to deny that the law on point actually prohibits the companies' conduct. The starting point for this argument would be a kind of anti-formalist approach to legal interpretation that should command broad agreement. Sources of the law, again following Raz, can conceivably include a range of interpretive conventions, including maxims of statutory interpretation, rhetorical techniques such as broad and narrow framing of rules, and specialized doctrines such as *desuetude* for outmoded statutes. Yablon notes that Airbnb has a plausible legal argument in support of its activities, while Uber more clearly (and repeatedly) violates many existing laws. (P. 357.) There is room for legal change within the bounds of the law, but the bounds cannot be stretched indefinitely. Beyond some point, lawyers advising a client are acting wrongfully,

either because their advice and assistance runs afoul of the prohibition in Rule 1.2(d) or, more controversially, because even in situations where the client conduct is not a crime or fraud, it is contrary to the principal-agent structure of the client-lawyer relationship to permit the lawyer to act on the basis of inadequate legal authorization for the client's conduct.

Where is the boundary? It is quite literally the entire job of lawyers to answer that question. There is no simple, algorithmic response that can substitute for the informed professional judgment of the professional community. Notice that slippage? I shifted from talking about the individual lawyers in question to community-based standards of judgment. Uber lawyers don't get to decide for themselves whether their company's disruptive technology is socially valuable enough to justify defiance of the law. Rather, there is an objective standard of reasonableness that can be used to analyze and critique the reasoning offered by lawyers (or, in a hypothetical vein, reasoning that could in principle be offered by lawyers). It would be possible, for example, to criticize Uber lawyers and give lawyers for Airbnb a pass. This ethical analysis is necessarily engaged *legal* analysis, however, and not a direct implication of the alleged social value of these businesses.

Even if Yablon may not be a card-carrying member of the community of professional responsibility scholars, we ought to welcome this contribution to "our" literature. His article reminds us that our ethical obligations do not depend only on the rules of professional conduct, but may turn on some subtle and contested issues in the philosophy of law.

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