

How (and How Not) to do Legal Ethics

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I. INTRODUCTION

How should scholars of legal ethics approach their subject? What questions should they ask and emphasize? What methods should they employ in answering them? What should they hope that their arguments will achieve?

Answers to these and cognate questions will determine the nature of the scholarly enterprise in legal ethics. In the introduction to *A Modern Legal Ethics*,¹ I began to set out my own views about what this enterprise should be. I gently suggested that legal ethicists—especially those who apply ideas from morality and politics to understanding and regulating the practice of law—adopt the wrong approach to their subject. I also proposed, in outline, an alternative method for philosophical legal ethics. The book aspired to apply this better method.

Conventional legal ethicists deploy moral theory in order to develop regulative principles that might govern lawyers' professional conduct. Indeed, being reform-minded, they typically seek even to cast these principles in forms that might be incorporated, as improvements, into the positive law governing lawyers. But the connection between philosophical theory and moral practice on which this casuist ambition depends is a fantasy. Living well necessarily involves more than mere technical excellence or skill and so cannot be achieved by applying moral theory (no matter how supple or sophisticated) to the facts of life. Instead, living well ineliminably requires judgment, and even creativity—capacities that cannot be reduced to the mechanical application of regulative principles to particular circumstances. No matter how good her theory, and no matter how assiduously she tries to apply it, the casuist will live *badly*.

The right ambition for the moral theorist who turns to applied ethics is not casuistry but rather interpretation and reconstruction. For the case of legal ethics, this involves identifying the moral and political ideals that are immanent in the practice of adversary advocacy as it is conceived through the law and made real in actual practice. A successful legal ethics must lay bare the structure of these

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1. See DANIEL MARKOVITS, *A MODERN LEGAL ETHICS* 1-21 (2008). This essay prescinds from and builds on the arguments of the book. Most of what I write here is new, but I occasionally borrow from the book in order to emphasize an idea developed in its pages.

ideals and, moreover, elaborate this structure in a fashion that connects the ideals to the broader moral and political forms of life—which include adjudication, democracy, and the rule of law—within which adversary advocacy appears. A *Modern Legal Ethics* takes up this task.

The book begins by reconstructing the positive law governing lawyers—including the professional ethics codes, the law of civil and criminal procedure, and tort law—in an effort to reveal the generic structure of adversary advocacy. The reconstruction proceeds through a systematic interpretive engagement with the law as it stands. But the book makes clear (as I shall explain in more detail in a moment) that it takes up the *particular species* of adversary advocacy practiced in the United States today only as an example of the *broader genus* to which this species belongs. Thus, the book repeatedly—indeed constantly and insistently—distinguishes between contingent and even accidental features of the current positive law governing lawyers and partisan lawyering’s generic structure.² The generic structure matters for the argument in a fundamental way; but the peculiar specification of the positive law is merely an epistemic pathway into the generic structure. The book argues that the generic core of adversary advocacy—the basic commitments that *every* form of adversary lawyering must accept—consists in a peculiar form of loyalty. This ideal requires lawyers not just to prefer their clients over others in the familiar ways, but also to repress their personal judgments concerning the truth and justice of their clients’ claims or causes. They must do so in order to communicate their clients’ positions to the authoritative institutions of the state in high *fidelity*.³ Lawyerly fidelity serves as an organizing ideal for the many more particular rules of the law governing lawyers and also elaborates a distinctive and captivating form of moral life. It requires lawyers to cultivate a highly unusual *negative capability*: to amplify the personalities of others even as they suppress their own.⁴ Once again, lawyerly fidelity, so understood, is a direct entailment of the basic structural form of adversary lawyering—it is required by the structural separation between advocate and tribunal that all adversary systems share, whatever more particular rules of professional conduct that they adopt.

Next, the book takes up morality, asking what it is like—not psychologically but ethically—to practice law subject to the self-effacement that lawyerly fidelity demands.⁵ Most importantly, fidelity to clients requires lawyers to promote claims and causes that they privately consider untrue and unjust—that is, to lie and to cheat on their clients’ behalves. The current state of positive law, and the particular species of adversary advocacy that this body of law instantiates, fixes

2. See, e.g., *id.* at 44, 47, 50, 53, 56-57, 60, 63-64, 66-67, 72-74, 77-78 (2008). This is just a sample of instances in which the text draws the distinction—there are many, many others besides.

3. See *id.* at 92-98.

4. See *id.* at 93-98.

5. See *id.* at 103-151.

the boundaries of lawyers' professional obligations to lie and to cheat in a particular, contingent way. But because these lawyerly vices are written into adversary advocacy's genetic code, they necessarily figure, subject to varying boundaries, in *every* species of adversary advocacy. The lawyerly vices, that is, arise immanently in every form of lawyering practiced in the shadow of the structural separation between advocate and tribunal. This renders adversary advocacy generically morally troubling. Moreover, the adversary system excuse, which dominates traditional legal ethics, can at most cast these lawyerly vices as necessary evils (necessary because they are essential to promoting the best available justice overall). But lawyers have good reason, connected to an ethically profound and philosophically precise interest in their *integrity*, to understand themselves as not evil at all. The dominant approach to legal ethics is therefore structurally inadequate to rendering the lawyer's professional life worthy of commitment.

The book's final part embeds the initial reconstruction of adversary advocacy not in moral but in *political* theory, in an effort to defend the legal profession's honor against the threat that lawyerly fidelity, and its associated vices, poses to lawyers' integrity.⁶ A reinterpretation of the ethics of role identifies the style of argument that this task demands,⁷ and a political reconstruction of lawyerly fidelity provides the moral substance that this style of argument invites.⁸ Negatively capable lawyers, who remain faithful to their clients, provide essential support for the authority of adjudication, which is an essential part of the broader project of legitimate government under the rule of law (as the retail analog to democracy's legitimation at wholesale). Lawyerly fidelity is thus an affirmative virtue in its own right, whose appeal promises to allow lawyers to re-integrate their professional obligations and their personal moral ambitions. However, in spite of the ideal's theoretical appeal, recent changes in the sociology of the legal profession and the institutional structure of the bar threaten to deprive lawyers of access to lawyerly virtue in their practical lives.⁹ The vindication that the book provides lawyers is therefore in the end only bittersweet. In this respect, legal ethics turns out to be interesting not just for lawyers but also as a diagnosis of modern moral life more generally. Lawyers live their professional lives at the hinge of modern morals and politics, so the complexities that trouble their professional ethics are not fundamentally special but instead capture—in an unusually pure and intense form—the moral and political conditions of all modernity.

Taken together, these three arguments propose a wholesale renovation of the ethical life of lawyers: a systematic reinterpretation of the positive law governing

6. See DANIEL MARKOVITS, *A MODERN LEGAL ETHICS* 155-246 (2008).

7. See *id.* at 155-170.

8. See *id.* at 171-211.

9. See *id.* at 212-246.

lawyers; a reconstruction of the ethical dilemmas immanent in this ethical regime that is adequate to the complexity of lawyers' lived moral experience; and a reintegration of legal ethics into political philosophy commensurate to the bar's central place in actual political life.

Although it does not trumpet this claim, *A Modern Legal Ethics* also proposes a wholesale renovation of legal ethics as a scholarly field. Casuistry produces not just bad living, but also bad scholarship. Indeed, in order for legal ethics to become intellectually and philosophically serious, it must abandon casuistry in favor of one or another version of the reconstructive method that the book proposes and pursues.

Seriousness is here itself a term of art. To be serious in this sense, a field of inquiry must have a structure that renders it in principle suited to understanding its subject. Even a serious inquiry might of course fail, for the familiar reason that it is carried out badly. But an inquiry that is not serious cannot possibly succeed.

Legal ethics as dominantly practiced nowadays is not serious, and hence cannot possibly succeed.

II. A CASE IN POINT OR HOW TO ENGAGE A LEGAL ORDER

William Simon's essay *Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives*, which in significant part responds to *A Modern Legal Ethics*, illustrates why a methodological revolution is so badly needed. Simon characterizes his own effort as an attack on "academic discussion"¹⁰ of legal ethics. But with respect to the central methodological distinction that I have drawn—between casuistry and reconstruction—Simon's essay falls squarely into the conventional, casuistic camp. He is principally concerned to improve the positive law governing lawyers by bringing that body of law into line with a moral theory that he finds independently appealing.

Indeed, Simon is so deeply steeped in the casuist method that he seems unable even to recognize reconstruction when it appears. He thus consistently misreads *A Modern Legal Ethics* as a failed piece of casuistry—failed because it does not seek sufficiently to reform bad law. The book may or may not succeed. But its successes and failures, such as they are, will be achieved on terms Simon seems unable even to imagine. Thus, while making clear just where and how Simon misreads the book is in the narrowest sense interesting principally to me, as its author, achieving this kind of clarity also serves a broader, and more generally interesting purpose: It reveals the difference between the reconstructive and casuist method and shows what might be gained by embracing reconstruction.

Simon's first substantial response to *A Modern Legal Ethics* asserts that the book exaggerates the divergence between adversary lawyers' professional

10. William H. Simon, *Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives*, 23 GEO. J. LEGAL ETHICS 987, 987 (2010).

obligations and ordinary morality. Although Simon concedes that the positive law governing lawyers likely does depart from what ordinary people think morally appealing or even acceptable, he insists that this reflects a contingent and shallow defect in the positive law rather than any necessary or appealing feature of the lawyer's structural role in our legal and political order. Once the positive law has been corrected along the lines that casuistry recommends, Simon believes, no substantial gap—and certainly no gap worth worrying about—between lawyers' professional ethics and ordinary morality will remain.

Accordingly, Simon suggests, the gap between lawyerly ethics and ordinary morality that *A Modern Legal Ethics* identifies, and the book's associated discussion of the lawyerly vices, must reflect a mistaken understanding of adversary advocacy. In particular, Simon claims that my reconstruction of the professional ethics of adversary advocacy gives inappropriate weight to the *Model Rules of Professional Conduct* and also to what Simon calls "some interpretive case law."¹¹ In doing so, Simon implies, I mistakenly conflate a self-serving and indeed more or less corrupt convention, established by "a trade association, struggling with internal division and external pressure,"¹² with the moral essence of the lawyer's professional role. Thus, Simon suggests that I believe that "the Owl of Minerva spreads her wings whenever the [American Bar Association's] House of Delegates votes."¹³

That charge is quite absurd. *Of course* the self-regulation of a self-interested profession will *inevitably* produce a professional ethics that expresses special pleading rather than the profession's highest ideals. This general lesson has, moreover, been exhaustively demonstrated for the special case of the legal profession, most notably and excellently (and over the course of many years' writings) by Richard Abel.¹⁴ That makes it quite implausible to think that *A Modern Legal Ethics* actually displays the attitude towards the positive law governing lawyers that Simon attributes to it, for the simple reason that such credulity concerning the law as it stands is and has been specifically demonstrated to be foolish. Accordingly, no modestly intelligent and minimally good-willed reader (or indeed non-reader) would read the book as Simon has done.

11. Simon, *supra* note 10, at 993. The "some" is misleading. Unlike the casuist approaches that Simon prefers, which typically rely on a small number of stylized cases designed to illustrate tensions that arise at the margins of professional ethics, *A Modern Legal Ethics* discusses literally hundreds of cases, and in some instances virtually all reported cases concerning the issues at hand. The cases, moreover, reflect ethical issues that arise at the very core of legal practice, in ordinary rather than extraordinary circumstances. This feature of the book is a direct consequence of its reconstructive rather than casuistic method. It is also one of the great advantages that reconstruction enjoys over casuistry.

12. Simon, *supra* note 10, at 994.

13. *Id.*

14. A particularly stinging example is Richard L. Abel, *Why Does the ABA Promulgate Ethics Rules?*, 59 TEX. L. REV. 639 (1981).

Simon is both intelligent and good-willed, so something else must be driving him to misunderstand the argument of *A Modern Legal Ethics* in such a basic way. The source of the confusion is, I believe, subtle but also very deep. It involves the methodological dispute between casuistry and reconstruction with which I began. Laying it bare will require some unpacking.

Every particular legal order invites three very different forms of assessment: concerning *what is*, or the contours of a particular species of positive law; concerning *what might be*, or the ideal law; and concerning *what must be*, or the generic structure of the law. The casuist and the reconstructive methods of engaging a legal order can be distinguished according to the patterns of attention and neglect with which they employ these three methods of assessment.

Casuistry judges what is by reference to what might be. Simon, who operates on this model, therefore begins from the positive law and instinctively seeks to improve it. Improvement, moreover, is most readily possible (easiest to achieve) with respect to features of the positive law that lie at or near its margins—that are not entrenched by either powerful interests or, especially, by the law’s generic structure. This explains Simon’s emphasis on the mistake-of-law problem. The details of this particular problem—which involves the general question whether lawyers may permit their clients to benefit from the legal errors of their opponents—are not important, for present purposes.¹⁵ What matters is that it is a casuist’s problem par-excellence. It presents an opportunity for arguing that a

15. Simon imagines that a lawyer knows her opposite number made a mistake of law, which benefits her client in a settlement negotiation (by causing him to offer a settlement whose terms are better, for the lawyer’s client, than the law as it actually stands could reasonably support). He asks whether the lawyer must, may, or may not disclose the mistake to her adversary. He argues that the positive law, as it stands, is open concerning this question—“that doctrine does not explicitly dictate either disclosure or nondisclosure,” Simon, *supra* note 10, at 989—although he never squarely addresses the question what the lawyer should do if the client expressly instructs her not to disclose.

Simon argues that the law should require disclosure in such a case. As he says, “as a matter of ordinary morality, the case for disclosure is simple and obvious.” Simon, *supra* note 10, at 990. The client is not entitled to get more than what the law supports, and he is certainly not entitled to his opponent’s lawyer’s mistake. On the other hand, the opposing party ought not to be harmed by her lawyer’s mistake; she ought not get less than the law, correctly understood, grants her. In this Simon is surely correct.

Moreover, Simon also argues that the correct account of the lawyer’s professional role conforms to ordinary morality on this point. He observes that no plausible conception of the adversary system requires non-disclosure. And he adds that, as a historical matter, the positive law doctrines tending against disclosure are new, were opposed by older ideals that recommend in favor of disclosure, and were adopted under circumstances that cast doubt on their soundness and absolutely refute any suggestion that adversary advocacy in itself requires non-disclosure. Simon, *supra* note 10, at 994-95.

Simon observes that I say in *A Modern Legal Ethics* (principally in a footnote illustrating another point) that the positive law, in its current state, mandates nondisclosure in a case that resembles his mistake-of-law problem. Simon, *supra* note 10, at 994. The relevant remarks in *A Modern Legal Ethics* appear at 56, and at 275 n.84. Simon is right concerning my interpretation of this other case, although I am not sure that this case is quite equivalent to his version of the problem. Moreover, I agree with him that the law may well remain open in the precise circumstances that he describes.

The more important point, however, is that nothing in the argument of *A Modern Legal Ethics*, or indeed in any serious legal ethics, turns on the positive law’s treatment of the mistake-of-law problem. I agree entirely that

legal order—whose generic structure allows it to decide the mistake-of-law question well or badly—should decide well. The problem therefore illustrates the way in which a legal ethicist's focus is determined by his method.

The connection between method and focus is, in Simon's case, stronger still. Simon is so wedded to casuistry that he cannot quite imagine that the law might be interesting as anything other than grist for the law-reformer's mill. Simon insists, in effect, that what is can be interesting only insofar as it may be improved in the direction of what might be. He implicitly rejects, therefore, that what is might be interesting because it reveals what must be.

This narrowness in Simon's approach becomes apparent even in his treatment of the mistake-of-law problem (and despite the fact, as I have admitted, that this is a natural problem for the casuist). Thus Simon simply assumes (without argument, and indeed without even accepting that the assumption *might* be rebutted by argument) that the positive law's treatment of the mistake-of-law problem is necessarily *purely* positive. He assumes, in other words, that the species of adversary advocacy practiced at a particular place and time can be linked to the generic idea of adversary advocacy *only* shallowly, and in this sense arbitrarily. As Simon says, "[T]here is no conventional definition of the adversary system that entails any answer to the Mistake-of-Law problem or indeed most of the disputed issues of the ethics of advocacy."¹⁶ Moreover, Simon insists, such understandings must be *shallowly* conventional, in the precise sense that the conventions cannot do any independent work in justifying the cases that come under them. Simon thus claims that "any definition of the adversary system [and note here that a definition *is* just a conventional understanding] that entailed responses to [particular doctrinal] problems would be just as controversial as those problems are in isolation."¹⁷

This is a natural thought for the casuist. It is entailed by the casuist idea that all the deep value work connected with a legal practice comes from some general moral theory, which is normatively prior to applications to particular practices. Finally, this is happy news for the law-reformer, who is left with maximal freedom to make piecemeal changes to positive law rules that he disapproves. By depriving legal practices of any deep normative structure, casuistry frees the law

the positive law might be changed on this point without in anyway undermining, or indeed damaging, the adversary character of legal practice.

The main argument about the lawyerly vices in *A Modern Legal Ethics* concerns not the contingent margins of any particular species of adversary advocacy but its generic core. The mistake-of-law problem is simply irrelevant to this argument. As I have said, the text of the book makes this basic point again and again. See *supra* note 2.

The interesting question is why Simon fails to see this. The main text of the essay answers this question in terms of the methodological divide between casuistry and reconstruction and argues that Simon, like almost all who apply moral and political ideals to lawyers professional ethics, works on the wrong side of that divide.

16. Simon, *supra* note 10, at 991 (emphasis added).

17. *Id.*

reformer from any requirement that her reforms must not just answer to external moral ideals but must also respect the immanent logics of the practices to which they might be applied.

The casuist's understanding of the positive law is false, however. Recall that every legal order invites *three* forms of assessment—concerning what is, what might be, and what must be—and observe that the casuist emphasizes the first two to the point of flatly ignoring the third. But legal orders are not all just shallowly conventional. Instead, at least some legal orders contain, immanently within them, a deeper normative structure. These legal orders embody, and in some cases even constitute, value-laden forms of life. And the legal orders in question therefore cannot simply be reformed, willy-nilly, to suit whatever extralegal values one or another casuist prefers. Indeed, often the deep normative structure of one legal order interacts, profoundly, with the deep normative structure of adjacent legal orders to form a mutually supportive complex of law. Thus it is a familiar thought, for example, that the private law regimes of contract, tort, and property interact with public law concerning distributive justice so that the public and private, taken together, establish an ideal of equal citizenship among persons (liberal public law and liberal private law operate together to institute a regime of egalitarian citizenship while simultaneously allowing citizens to retain an individual sphere of freedom and responsibility).¹⁸ One of the organizing themes of *A Modern Legal Ethics* (to which I shall return towards the end of this essay) is that adjudication, including the law governing lawyers, together with democracy forms a similar phalanx of associated legal orders. These orders jointly help open, cosmopolitan societies sustain legitimate resolutions of entrenched and intractable material and moral conflicts.

Moreover, what is—the doctrinal rules that constitute a particular species of positive law—might help to give epistemic access to what must be—the legal order's deep, or as I have sometimes said generic, normative structure. This is the core insight behind the reconstructive methodology that *A Modern Legal Ethics* proposes and applies. Of course, not every particular rule of positive law will be anything even approaching a necessary expression of the immanent structure of the legal order to which it belongs. In many cases, the generic structure of a legal order will permit a range (often, a broad range) of particular legal rules—in respect of these rules, the genus will admit many species. In some cases, a particular rule of positive law might even be at odds with the law's deep normativity, in which case there will exist an internal-to-law (rather than casuist)

18. I have pursued this line of thought in a series of articles, including *Contract and Collaboration*, 113 *YALE L.J.* 1417 (2004), *How Much Redistribution Should There Be?*, 112 *YALE L.J.* 2291 (2003), and *Luck Egalitarianism and Political Solidarity*, 9 *THEORETICAL INQUIRIES L.* 271 (2008) (symposium issue on Moral and Legal Luck). I am not alone in taking this view. See, e.g., Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *FORDHAM L. REV.* 1811 (2004); Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 *VA. L. REV.* 1391 (2006).

argument for law reform. The immanence relation is therefore not completely determinate at the level of individual doctrine. *A Modern Legal Ethics* accepts this thought, and in fact insists on it again, and again, and again, each time it distinguishes between contingent features of the particular species of the positive law governing adversary advocacy that exists in the United States today on the one hand and, on the other, adversary lawyering's generic core.¹⁹ This is why, quite apart from the absurdity of anyone's taking the *Model Rules* at face value, it is especially absurd for Simon to suggest that I do so in the book.

But even though many (and perhaps even all) individual doctrinal rules of any particular species of positive law—and thus also of course of the various species of positive law that we in the United States have today—might be changed while still respecting the generic structure of adversary advocacy, it remains possible to read this generic structure off of the body of positive law as a whole. (In this respect, interpreting the law is no different from interpreting any text, which, while rife with contingent and dispensable clauses, nevertheless possesses a certain integrity and hence a core meaning or meanings.)

A Modern Legal Ethics performs this reconstruction. It argues, in great detail, that the generic core of adversary advocacy—that is, of the practice of law as a partisan operating in the shadow of the structural division of labor between advocate and tribunal—requires that lawyers adopt two distinctive ways of proceeding in their work, which I call *professional detachment* and *lawyerly fidelity*.²⁰ The book further argues, again in great detail, that these lawyerly virtues carry with them ordinary vices, and in particular create professional obligations for lawyers to lie and to cheat. This is not the place to reprise that argument. It is exhaustively presented in *A Modern Legal Ethics*,²¹ and nothing that Simon writes casts doubt on, or indeed even addresses, any of the argument's particular steps.

Simon suggests, instead, that I can claim that lawyers must display ordinary vices only because I take too credulous a view of the positive law—because I am an apologist for the bar's self-servingness. He thus accuses that I “do[] not explain why [my] general account of . . . adversary advocacy requires any particular norm of the *Model Rules*.”²² The methodological argument just rehearsed shows why these suggestions miss the point of *A Modern Legal Ethics* and also why it is interesting that Simon should have made this particular mistake in his reading of the book.

Nothing in the argument of *A Modern Legal Ethics* turns on accepting any particular rule of the law as it stands. Indeed, the book repeatedly and clearly says that *no* particular metes and bounds of lawyerly partisanship are required by the

19. See *supra* note 2.

20. See DANIEL MARKOVITS, *A MODERN LEGAL ETHICS* 79-99 (2008).

21. See *id.* at 44-78.

22. Simon, *supra* note 10, at 994.

adversary advocacy's generic structure.²³ Rather, the point of the book's interpretive engagement with the positive law is to identify, out of this complex of individually contingent rules, something of the deeper normative structure of adversary advocacy to which these variously elaborated contingent rules all give expression. That structure will necessarily survive all reforms to the law governing lawyers that preserve the lawyer's distinctively adversary role²⁴—that retain the structural division of labor between advocate and tribunal in whose shadow lawyers, representing particular clients and their particular causes rather than justice directly, practice their profession.

Lawyers who practice in this way will retain, necessarily, professional obligations to act in ways that ordinary morality considers vicious. Accordingly, partisan lawyers—no matter what species of adversary advocacy they practice—will inevitably confront the difficulties concerning integrity that *A Modern Legal Ethics* documents. And they will become interested in the possibilities for sustaining their integrity in the face of their professional obligations that the book, with more hope than confidence, identifies.

Finally, although Simon, in a display of repressed moralism, claims that I approach lawyers as “moral freak[s],”²⁵ this characterization merely carries the casuist's lack of sympathy for the positive law governing lawyers over to the assessment of lawyers' moral rather than purely legal world view. Lawyers do find themselves at odds with ordinary morality, but their moral heterodoxy is neither gratuitous, nor capricious, nor self-serving. Instead, as I argue in detail in the book, lawyers adopt their professional vices “neither by inclination nor by choice,” but rather because they have been burdened with these vices “by historical forces beyond their control.”²⁶ If lawyers are villains, then this is neither a farce nor a disgrace, but a *tragedy*.

If there is a methodological mistake afoot, therefore, it is Simon's mistake (and a mistake of conventional legal ethics more broadly). This is to ignore that the law governing lawyers *has* a deep structure, and that this deep structure might constrain the casuist's enthusiasm for external-to-law value driven law reform and also her moralistic criticism of every deviation between ordinary and professional morality. Indeed, Simon is so entrenched in this mistake that, as I

23. Again, see *supra* note 2.

24. Here recall, further, that the term *adversary*, as used in *A Modern Legal Ethics*, encompasses both the systems of procedure that are commonly called “adversary” and those that are commonly called “inquisitorial.” The conventional distinction between adversary and inquisitorial systems, as the book explains, concerns the question whether the parties or the tribunal have control over the evidence in a trial. Both adversary and inquisitorial systems therefore can be (and indeed commonly are) adversary in my sense of the term, because both retain the basic commitment to assigning lawyers to particular clients rather than to justice writ large that this sense of the word picks out. For more on these matters, see DANIEL MARKOVITS, *A MODERN LEGAL ETHICS* 15, 125 n.*, 177 n.* (2008).

25. Simon, *supra* note 10, at 987.

26. DANIEL MARKOVITS, *A MODERN LEGAL ETHICS* 246 (2008).

have shown, he cannot even recognize when someone avoids it: He mistakes even an explicit effort at reconstruction for a nerveless, quietist casuistry.

III. LAW REFORM DONE RIGHT

A Modern Legal Ethics is therefore primarily concerned not with improving the law governing lawyers or indeed lawyers' ethical lives so much as with understanding adversary lawyering. The book aspires to generate what I called, in a postscript, a "reflective reorientation" to the practice of adversary advocacy and hence to legal ethics.²⁷

Of course, as I say towards the book's end, I hope that such a reorientation might establish the necessary backdrop against which every successful (and indeed even plausible) effort at structural reform must set sail. At the same time, proposals for law reform that set forth from such a reconstructive effort will necessarily depart—both in style and substance—from their casuist cousins. Drawing out the contrast between my reconstructive engagement with the positive law and casuist approaches (including Simon's) thus enables me now to say, a little more concretely than I did in the book, how the serious, reconstructive effort at law reform that I envision might go. At least, I can say how it might begin.

Simon and I agree on some basic points concerning law reform, to be sure. For example, we agree in opposing the narrowly instrumental version of casuistry that has come to dominate not just legal ethics but legal scholarship generally over the course of the last generation or so. (Indeed, Simon adopts, more or less wholesale, my concern that an instrumental approach to casuistry subjects lawyers to a particularly stark, alienating, assault on their integrity.²⁸) But we disagree on much else. In particular, Simon asserts, as he has in other work, that lawyers ought to modulate their adversary lawyering according to "a responsibility to take account of indications that injustice is likely to occur if the lawyer adheres to the presumption of partisanship."²⁹ Simon asserts, in other words, that

27. *Id.* at 253.

28. Simon, *supra* note 10, at 1006. Simon nevertheless asserts that I do not take this threat sufficiently seriously and in particular "seem[] insensitive to the difficulties posed for an ambitious conception of personal virtue by an ethic that requires the lawyer in some situations to actively subvert what she plausibly believes to be the most weighty moral stakes." *Id.* at 1007 n.37.

I cannot understand this assertion: The whole point of Part II of *A Modern Legal Ethics* was to elaborate this threat, and the conception of lawyerly negative capability that I develop in the book, and that underwrites the lawyerly virtues and thus also distinctively lawyerly first-personal morality, was designed specifically to counteract it.

29. Simon, *supra* note 10, at 1002. I take this to be a basic restatement of the "contextual view" of legal ethics that Simon has earlier developed. See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998). As he did in that book, Simon once again connects his preferred approach to legal ethics to jurisprudential ideas concerning legal realism and legal positivism. I have serious doubts about these connections, and indeed about Simon's characterizations of the various jurisprudential positions that they involve. But his contextual view of legal ethics remains available even apart from such jurisprudential

lawyers are fundamentally agents of justice, and that they must adjust what they will do for their clients with justice in mind.

This statement of principle identifies a stark contrast between Simon's substantive account of legal ethics—and virtually all other critical casuist accounts—and the account that I develop in *A Modern Legal Ethics*. This substantive disagreement, moreover, has clear roots in the methodological disagreement that I outlined above.

Thus casuistry makes it natural to assess legal ethics by reference to justice, since a theory of justice is precisely the tool that the casuist brings to her work. Put slightly more abstractly, the casuist is committed to the idea that moral, political, and indeed legal life might be successfully ordered according to regulative principles that have been identified and elaborated prior to any actual, affective engagement in the forms of life that these principles regulate. The casuist is committed to such principles for the simple reason that without them, her method has no starting point. In the case of casuistic legal ethics, the relevant principles come from moral theory or, in Simon's case, from a theory of justice.

But my reconstructive method shows that justice is not, as a matter of fact, what the legal system looks to in developing lawyers' professional obligations. As I argue in detail in *A Modern Legal Ethics*, a legal order that sought to produce justice—as measured by any plausible theory—in retail dispute resolution would look strikingly different from the system that we have, not just at its margins but in very basic ways.³⁰

Thus the laws that govern retail dispute resolution—including the rules of procedure, the rules of professional conduct, and even tort law—protect parties and lawyers who assert mistaken and even unreasonable legal claims (for example, claims that are dismissed or that lose on summary judgment) from liability for the harm that asserting the claims causes. The law of dispute resolution, in other words, refuses to hold disputants to account when they dispute in ways that produce injustice.

For example, the *Federal Rules of Civil Procedure* require only that filings are not made for an improper purpose, are nonfrivolous, and have or are likely to have evidentiary support.³¹ Indeed, the law governing lawyers even allows lawyers to assist those who seek to press unreasonable, and harmful, legal claims. Model Rule 3.1, for example, requires only that lawyers have a “basis in law and fact” for the claims they make on behalf of clients “that is not frivolous, which

speculations; indeed, its deepest foundations lie in moral and political rather than distinctively legal theory. The argument against Simon's approach that I pursue in the main text therefore sets aside jurisprudence and casts his views in this light.

30. I explain and defend this claim in MARKOVITS, *supra* note 1, at 44-78. The following paragraphs summarize and simplify the argument developed there.

31. See FED. R. CIV. P. 11(b); see also 28 U.S.C. § 1927 (2006) (making lawyers personally liable for costs and attorney's fees that result when they “multipl[y] the proceedings in any case unreasonably and vexatiously” in federal court); FED. R. CIV. P. 26(g) (extending Rule 11 to the discovery process).

includes a good faith argument for an extension, modification or reversal of existing law.”³² The law, in all these respects, allows people great leeway to assert their legal rights in adversary proceedings. Indeed, these rules do not require even that the exclusive motive for bringing a dubious claim is the (small) chance that the claim might succeed. Instead, a partially strategic motive for bringing a claim does not render the claim frivolous or unreasonable for purposes of either the law of procedure or the law governing lawyers, not even when the strategic advantages that the claim secures are inefficient and undeserved.³³

Similarly, and probably more importantly, tort law openly declines to apply ordinary standards of liability, that is, ordinary principles of corrective justice, to harms caused when one person asserts legal claims, including losing legal claims, against another. Thus, although there do exist torts of malicious prosecution and abuse of process, they are subject to narrow limits and certainly do not apply generally to impose liability in connection with unreasonable lawsuits or legal arguments that burden others, even when the lawsuits should have been predicted to fail.³⁴ Once again, the law clearly does not require clients or their lawyers to

32. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2007). Model Rule 1.2(d) similarly forbids lawyers from counseling clients to do something illegal but allows them to “counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

33. Courts have given this license to exploit procedure practical effect. In a typical case, a lawyer defending a lawsuit brought against his client by the Bank of Israel threatened to countersue, pointing out that the countersuit would embarrass the Bank politically and might slow foreign investment in Israel. Although the countersuit was clearly an effort to exploit a political vulnerability in order to extract a favorable settlement, the Second Circuit refused to sanction the lawyer. *See Sussman v. Bank of Isr.*, 56 F.3d 450 (2d Cir. 1995). The Second Circuit's reversal in *Sussman* indicated that, “it is both common and proper for lawyers to send demand letters to potential defendants, hoping that the threat will bring a desirable settlement but preparing for litigation if settlement is not possible. The purpose of [the lawyer's] threats and the suit he eventually filed was to put pressure—including the pressure of negative publicity—on his clients' opponents in litigation. There is nothing ‘improper’ about that, so long as the suit threatened or actually filed is not frivolous.” GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 3.1:202, at 550 n.1.01 (2d ed. Supp. 1996). Similarly, courts generally refuse to find that lawyers for unsuccessful tort plaintiffs have violated Model Rule 3.1 (or indeed to find lawyers liable for common law malicious prosecution), even when they bring lawsuits that aim principally at forcing a settlement rather than winning in court. Instead, sanctions are typically applied against lawyers in such cases only when lawyers bring tort claims that are not just unsuccessful but rather truly outrageous or vexatious. A typical example is *Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981), in which a lawyer argued that a hospital had broken his client's shoulder when it had in fact attempted to treat a pre-existing break.

In other words, the rules against bringing frivolous or unreasonable claims do not forbid a lawyer from benefiting her client by exploiting an opponent's undeserved strategic vulnerability to nonfrivolous, but ordinarily pointless, claims.

34. The traditional common law tort of malicious prosecution applies only to legal proceedings that, in addition to being wrongful, have a “quasi-criminal” character, substantially interfere with a person's liberty or damage her reputation, or interfere with property interests (such as in attachment or involuntary bankruptcy proceedings). *See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS* § 120, at 851-52 (4th ed. 1971). Although a growing majority of jurisdictions, and also the Restatement Second of Torts, recognize malicious prosecution without the requirement of special injury, *RESTATEMENT (SECOND) OF TORTS* § 674 (1977), a substantial minority of jurisdictions continue to follow the “English rule,” which denies actions for malicious-prosecution-based, groundless civil suits in the absence of special harms of the type just described. *See, e.g., Bickel v. Mackie*, 447 F. Supp. 1376, 1380 (N.D. Iowa 1978); *Garcia v. Wall & Ochs, Inc.*, 389 A.2d

proceed only with claims that are reasonable (for example, in the sense of joint cost minimizing).³⁵ Disputants, at least insofar as they conduct their disputing under the auspices of the state's dispute resolution mechanisms, are absolved of the ordinary requirement to take care of the interests of others.

These are only brief summaries of complicated legal regimes, to be sure. Moreover, the precise limits on the adversary assertiveness that these and other related legal rules allow remain a subject of substantial dispute, and the rules themselves remain open to continual readjustment. Disputants, and especially their lawyers, might always be deprived of any particular protection for aggressive partisanship that they currently enjoy. But however the metes and bounds of disputants' partisan privileges are set, it is unquestioned that these rules impose a much lower standard of care in pressing legal claims than the standards that govern ordinary conduct that is potentially harmful to others, for example, hunting, lighting fires, or even driving.

Certainly, the law does not impose strict liability or even negligence standards on disputants and the lawyers whom they employ. Strict liability would hold disputants liable whenever they asserted claims or defenses that eventually lost. And even negligence would (following a prominent interpretation of reasonableness) hold disputants liable whenever their arguments failed to minimize the total costs—including both error costs of inaccurate dispute resolution and transactions costs of litigation—that they, their opponents, and third parties had jointly to bear. Although the rules prohibiting frivolous litigation sometimes use the word “reasonable,” they have never been—and could not be—seriously thought to require disputants and their lawyers to bring only claims that are reasonable in the tort-law-like sense that their expected social benefits exceed their expected social costs. Clearly, the prohibition that they establish is not—and again could not be—violated every time a party brings a claim that loses on summary

607, 608, 610 (Pa. 1978); PROSSER, *supra*, at 850-53. Most American jurisdictions also recognize the tort of abuse of process. See RESTATEMENT (SECOND) OF TORTS § 682 (1977); PROSSER, *supra*, § 121, at 856-58.

Note that no jurisdiction recognizes the tort of malicious defense. See Jonathan K. Van Patten & Robert E. Willard, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation*, 35 HASTINGS L.J. 891, 893 (1984).

35. Fee-shifting, which requires losing parties to pay winning parties' fees and costs, imposes some liability on those who assert losing but nonfrivolous legal positions. Fee-shifting has been widely adopted in Great Britain and selectively in the United States. In Britain, see CPR 44.3(2)(a) (Eng.); see also Michael Zander, *Will the Revolution in the Funding of Civil Litigation in England Eventually Lead to Contingency Fees?*, 52 DEPAUL L. REV. 259, 292 n.192 (2002) (“The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party.”). In the United States, see 42 U.S.C. § 1988 (2006) (which entitles certain successful civil rights plaintiffs to recover their fees and costs) and also Rules 11 and 37 of the Federal Rules of Civil Procedure, which (among other things) require payment of costs (in the narrow sense of court costs) associated with suits that are unreasonable or without substantial justification).

Although fee-shifting arrangements bring the standard of liability for pressing legal claims more nearly into line with the standards applied elsewhere in the law, the liability that they impose is limited to the direct costs of adjudication and does not include the often much larger (and potentially enormous) indirect costs—for example involving lost opportunities or lost reputations—imposed by the mistaken claims.

judgment.

These observations just apply—to the particular case at hand—the basic distinction between species and genus that, I have said, lies at the core of the reconstructive method. However the metes and bounds of partisanship are fixed in a particular species of adversary advocacy, it is part of the generic structure of the practice (indeed, a direct expression of the structural division of labor between advocate and disputant, on the one hand, and tribunal, on the other) that disputants and their lawyers enjoy substantially greater leeway to harm others than ordinary standards of liability would allow elsewhere in the legal and political order.

In all these ways, our legal order insulates people from liability for the harms that they impose simply by asserting losing (including predictably losing) legal claims. This is a subtle but enormously important point. The legal system entitles people, with the help of lawyers, aggressively to pursue their legal claims by denying legal recognition to many of the harms that such assertions of legal rights cause others. The legal system, in other words, entitles people to dispute in ways that commit injustice, and it entitles lawyers to aid disputants in ways that commit further injustice. This is, in the end, just a restatement of the basic structural division between advocate and tribunal from which my reconstructive engagement with adversary advocacy began—of the thought that, unlike tribunals, lawyers are charged to represent particular clients and causes, rather than justice writ large. But now the enormous methodological implications of this conclusion may be laid bare: The reconstruction of our system of retail dispute resolution thus demonstrates that casuistry cannot possibly be in sympathy with this system, because it begins from a class of ideals that the system rejects.

Now in addition to pursuing this negative claim—that the generic structure of adversary advocacy is not and could not possibly be elaborated casuistically, including therefore in terms of justice—*A Modern Legal Ethics* also pursues a positive claim—concerning the terms in which adversary advocacy *can* be explained.³⁶ The centerpiece of this positive characterization is an argument that the legal orders that arise in and around adversary adjudication elaborate a practice not of justice but of *legitimacy*. That is, adversary adjudication is best understood as a practice that produces agreement about which resolutions of disputes to *obey* in the face of entrenched and intractable disagreement about which resolutions to *adopt*. Adjudication, the book argues, is thus the retail analog of democracy, which is similarly, and also by its nature, best understood in terms not of justice but rather of legitimacy. (As with the practice of adjudication, our democratic practice includes, in its generic core, features that ensure that it will not reliably produce justice.) I develop the structural analogy between adjudication and democracy in detail in the book. I also develop the idea that

36. See DANIEL MARKOVITS, *A MODERN LEGAL ETHICS* 171-211 (2008).

partisan lawyers are essential to the legitimacy of adjudication, roughly because they form a bridge between disputants and the state's dispute-resolution procedures. The bridge enables these procedures to reshape disputants' aims and beliefs in such a fashion that they become willing to accept the resolutions that the state is willing to provide.

There is no point in reprising that argument here. It is, however, worth emphasizing one basic contrast between justice and legitimacy—between the kinds of things these are. Unlike principles of justice, which present ideals according to which legal and political arrangements might be judged (on the model of casuistry),³⁷ an account of legitimacy does not announce a regulative principle *at all*. Instead, legitimacy arises from actual, affective engagements with a legal order, and in the particular case at issue in legal ethics, with the practices (concerning adjudication and its associated forms) through which our legal order manages dispute resolution at retail. Principles of justice represent the conclusions of a theoretical argument that may then be applied (casuistically) to criticize and improve practice. But legitimacy avoids this priority for theory and is, instead, practical all the way down.

Simon seems simply not to notice this part of *A Modern Legal Ethics* (even though it develops one of the book's three central claims, whose elaboration accounts for roughly a third of the book's pages). The reason, I suspect, once

37. This is true of conceptions of justice quite generally, regardless of the intramural disputes that exist among them. It is certainly true of substantive principles of justice, for example, of the utilitarian ideal that each person should count as one and no one as more than one. See JOHN STUART MILL, UTILITARIANISM 60 (George Sher ed., 1979). Mill attributed this formulation to Bentham. Nevertheless, I know of no place at which Bentham actually committed the words to print, and Mill provides no citation. Bentham would no doubt have approved of the view, and he did say, in a passage that Mill's immediately prior remarks suggest Mill had in mind in making the reference to Bentham, that "[t]he happiness and unhappiness of anyone member of the community—high or low, rich or poor—what a greater or lesser part is it of the universal happiness and unhappiness, than that of any other?" Jeremy Bentham, *Plan of Parliamentary Reform, in the Form of a Catechism, with Reasons for Each Article: With an Introduction Showing the Necessity of Radical, and the Inadequacy of Moderate, Reform*, in THE WORKS OF JEREMY BENTHAM 433, 459 (1843).

The regulative character of justice also survives, although perhaps less obviously, in theories that recognize a procedural component to justice.

Sometimes, procedures figure in these theories as epistemic tools for revealing what is substantively just, as in what Rawls calls *perfect* procedural justice. See JOHN RAWLS, A THEORY OF JUSTICE 85 (1971). (A simple case is the common "I cut, you choose" rule for two persons dividing a pie. A more complex case involves economic markets, which, according to the fundamental theorems of welfare economics, can be constructed so as to produce efficient and just allocations of many goods among many persons.) In these cases, justice obviously presents a regulative ideal—indeed, the ideal according to which the procedures are considered perfect.

In other cases, including most notably in the case that Rawls calls *pure* procedural justice, see *id.* at 86, procedures do not just serve to identify allocations that are just on independent substantive grounds but are themselves constitutive of justice. Even in these cases, however, justice remains a regulative ideal, in the sense that the justice of the outcomes generated by the procedures may be appreciated even without any actual, affective participation in the procedures. Thus, pure procedural justice may be elaborated, as it actually is in Rawls, counterfactually, as a way of enabling persons to identify regulative ideals for (casuist) use in criticizing and improving societies that have not and could not possibly actually employ the procedures through which these principles are revealed.

again concerns methodology. As a committed casuist, Simon simply cannot *imagine* that a dispute-resolution mechanism might aim at anything other than satisfying *some* regulative principle; and since Simon (correctly, to my mind) rejects instrumental principles such as efficiency, he settles naturally, and indeed almost inevitably, on the idea that our system of adjudication pursues justice. Simon therefore cannot even engage the argument that I make on the terms, or using the methods, that he prefers. His argument—and, as I have been saying, almost all conventional legal ethics—simply fails to join issue with mine.

The structural difference between my views and Simon's, in this respect, is brought most clearly to a head in Simon's discussion of the principle, enshrined in the preamble to the *Model Rules*, that lawyers are "officers of the *legal system*."³⁸ Simon translates this idea into the common suggestion that lawyers are "officers of the *court*."³⁹ Indeed, calling this a *translation* probably overstates the distance between the two formulations in Simon's mind. Simon, who here follows conventional usage and wisdom, probably regards the two forms of words as directly *equivalent*. But the reconstructive account of lawyering that I developed in *A Modern Legal Ethics* and have reprised here demonstrates that these two formulations are very different and importantly different and also that the difference between them can be made precise.

Being an "officer of the legal system" is not at all the same thing as being an "officer of the court." The court, after all, is only a *part* of the broader legal system, that is, of the complex of practices and institutions that together constitute adversary adjudication. This broader legal system, I have been saying, aims at *legitimacy*. The court, by contrast, is the part of the legal system that aims at *justice*, as the advocate is the part of the legal system that aims at the disputant's (her client's) partisan advantage. This is merely a more specific and precise way of saying that the court and the advocate stand on opposite sides of the division of labor in terms of which the broader legal system is organized.

Now, just as the legal system's legitimacy depends, I have argued, on the advocate's partisan fidelity to her client's claims, so the system's legitimacy likely also depends on the court's directly pursuing justice.⁴⁰ I therefore agree

38. Simon, *supra* note 10, at 1001, quoting MODEL RULES pmb. para. 1 (2007) (emphasis added). Later on, when the preamble discusses conflicts between a lawyer's duties to her client and other professional obligations, the text again refers, quite precisely, to talk of the duties to the "legal system" rather than duties to a tribunal or court. MODEL RULES pmb. para. 9 (2007). Admittedly the Preamble also says that lawyers have "special responsibility for the quality of justice." MODEL RULES pmb. para. 1 (2007). And the Model Rules, in other places, do refer to lawyers as "officers of the court." See, e.g., MODEL RULES R. 3.3 cmt. 5. The Model Rules are simply not consistent on this linguistic point.

39. Simon, *supra* note 10, at 1001 (emphasis added).

40. The law sometimes recognizes this explicitly and rejects efforts by *courts* narrowly (rather than by the legal system writ large), to pursue legitimacy directly, at the expense of justice.

A case on point is *United States v. Nelson*, 277 F.3d 164 (2d. Cir. 2002), which concerned an effort by a trial judge to secure the legitimacy of a jury verdict in a politically, racially, and religiously charged case. To begin with, the judge employed racial and religious tests during jury selection with the aim of seating a racially and

with Simon that justice has a place in the broader practice of adjudication.

But explaining the point in this way reveals, almost at once, that when Simon (following many others, to be sure) equates being an “officer of the legal system” with being an “officer of the court,” he indulges in a synecdoche that commits a confusion. The court’s perspective is no more the perspective of the entire legal system than the advocate’s. And hence the court’s pursuit of justice is no less incomplete, from the perspective of the legal system’s legitimacy, than the advocate’s pursuit of partisan advantage.

Casuistry, because it understands all applied ethics in terms of the pursuit of a regulative ideal, and because justice naturally presents itself to the casuist as the ideal most appropriately pursued in this way, disguises this structural point. Casuistry thus invites the confusion of court and legal system into which Simon (and almost all conventional legal ethics) falls. But although that confusion is rendered natural by casuistry, it remains fundamentally a confusion. The reconstructive method reveals the confusion, and the important connection between the legal system and legitimacy that this method displays reveals why the confusion is profound and thus also dangerous. To be clear: If the advocate’s role is recast so that she must pursue justice, then the legal system will lose legitimacy.

These reflections point, finally, to a distinctively reconstructive approach not just to understanding law but also to law *reform*. This approach emphasizes that the law governing lawyers must serve the legal system’s legitimacy, and it takes aim at the places in our current legal order at which lawyers and the rules that govern their practice do not serve legitimacy. Three seem to me especially important. These concern, respectively, the distribution of access to legal services, the conduct of lawyers outside of litigation, and the special character of lawyers who represent not private parties but the government.

First, the unequal access that different persons (and different classes of persons) enjoy to the assistance of a loyal, partisan lawyer threatens the legitimacy of a system of adjudication that purports to be capable of authorita-

religiously balanced jury. Pursuant to this goal, the judge further seated a particular juror, perceived as essential to securing racial balance, in spite of his admission that he could not guarantee his impartiality.

An appellate court regarded both actions skeptically, even as it acknowledged the trial judge’s good motives and even in spite of the parties’ acquiescence in the questionable procedures at trial. As the higher court observed, impartiality plays a “fundamental, indeed foundational, role . . . in our system of courts.” *Id.* at 206. To be sure, parties might freely submit to partial dispute resolution procedures under the supervision of a body other than a court—for example, to partial forms of arbitration. *See id.* at 208-09; *see also*, Daniel Markovits, *Arbitration’s Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431 (2010) (arguing that arbitration in some circumstances achieves social solidarity on the model not of adjudication but of contractual bargaining). But courts cannot, by their nature, adopt partial approaches for themselves, not even when they do so in the service of legitimacy.

The appellate court insisted, in other words, on the point about the division of labor that I elaborate in the main text: Even as the *legal system* pursues legitimacy, *courts* must for themselves aim directly and exclusively at justice.

tively resolving disputes among all persons. *A Modern Legal Ethics* argues at great length that lawyers are required to bind disputants to the processes by which their claims are resolved and to transform their claims into terms that the legal system can address. If this is right, then disputants who do not have adequate access to lawyers (who are never properly *anyone's* clients) will not be so bound, and any outcomes that the legal system imposes on them will be *unmediatedly* imposed, and they will, commensurately, lack legitimacy. This threat to the legitimacy of adjudication arises even in criminal cases, where, in spite of the state's formal guarantee of defense counsel, actual representation (because of constraints on imagination, skill, motivation, and even time) often falls far short of the ideal of lawyerly fidelity on which adversary lawyering's legitimating powers depend. The threat to the legitimacy of adjudication arises more dramatically still in civil cases, where many disputants (plaintiffs primarily, but also, as for example in SLAPPs,⁴¹ sometimes defendants) have literally no access to counsel at all, and hence encounter the legal system purely as alien imposition.

This much is, in one sense, familiar, as casuists have long lamented the unequal distribution of lawyering and the threat to justice that this distribution poses. But the reconstructive method, by placing legitimacy rather than justice at adjudication's generic core, importantly recasts the concern. In doing so, the unconventional approach insists that law reform in this area must take surprising directions. Two are particularly worth mentioning.

On the one hand, the reconstructive analysis in *A Modern Legal Ethics* provides new insights concerning the reform of adjudication proper. Thus casuists, being concerned for justice, are naturally inclined to respond to inequalities in disputants' access to lawyers by rewriting the law governing lawyers to reduce the partisanship that lawyers may display: As lawyers' partisanship becomes constrained, casuists observe, they become less potent tools for promoting their clients' advantage; and disparities in disputants' access to lawyers' services therefore create smaller distortions in the balance of advantage, which is to say less injustice. The natural ending point of this movement of thought proposes segregating large classes of disputes from partisan lawyering altogether, by removing these disputes from the grip of adjudication and instead submitting them to rational, technocratic methods of dispute resolution, associated with regulation by expert bodies or bureaucracies.

But this conventional wisdom, while likely sound, neglects the concern for legitimacy that animates our system of adjudication. In particular, the conventional view neglects the need for recognizably partisan lawyers—that is, lawyers whose practice displays fidelity to their clients—to *legitimate* outcomes even to powerful, wealthy clients. Achieving justice, as the argument above reveals, comes at a cost to legitimacy. To be sure, the balance between these two values

41. Strategic Lawsuits Against Public Participation.

might of course be struck differently from where the legal system of the United States strikes it today. (Recall that it is no part of the argument of *A Modern Legal Ethics* to defend the precise limits on lawyerly partisanship fixed by the *Model Rules* and the rest of the current law governing lawyers, and indeed that the reconstructive method could not possibly deliver any such conclusion.) But at some point, sustaining legitimacy requires sacrificing justice; at the very least, sustaining legitimacy through *adjudication* admits of no substitute for guaranteeing truly partisan adversary advocates to all disputants. Indeed, the justice-based proposals of casuist law reformers contain an implicit admission of this point: Insofar as these reformers' concerns for rationality and justice draw them inexorably towards legislative or bureaucratic mechanisms for handling claims, they propose in effect to substitute one or another mechanism of wholesale political legitimation for the retail forms of legitimacy in which adjudication, by its nature, traffics.

On the other hand, reconstructing adversary adjudication as an exercise in retail political legitimation reveals connections between adjudication and other legitimating practices established by our legal and political order. These connections may be exploited in the service of law reform. For example, the reconstructive approach reveals that adjudication establishes a kind of *solidarity* among disputants (rather than simply enabling tribunals to identify true and just resolutions of disputes). Applying reconstructive methods to another legal order, contract, reveals that this order similarly establishes solidarity among contracting parties, and indeed that bargaining and contract are themselves mechanisms of dispute resolution, and hence much more similar to adjudication than is commonly understood.⁴² Critically, both adjudication and contract engender forms of social solidarity that operate horizontally—that is, directly and reciprocally between persons—rather than vertically—as when persons are bound together through their separate allegiances to some institution that stands above them both. Once this is understood, it becomes clear that the bureaucratic, and hence vertically integrative, alternatives to adjudicatory dispute resolution favored by casuist law reformers are not the only possible alternatives. Contract might also serve in adjudication's stead to resolve disputes and sustain social solidarity. Moreover, contract actually does so serve—specifically through certain instances of the practice of arbitration. I take up this possibility in detail elsewhere, using the reconstructive method to propose a law reform agenda concerning arbitration, including its interaction with adjudication.⁴³ The details of that argument are less important, for present purposes, than the fact that the reconstructive approach makes the argument possible, whereas casuistry disguises the associations on which the argument depends and thus impedes law

42. See Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004).

43. See Markovits, *supra* note 40.

reform.

A second basic connection between the reconstructive method's focus on legitimacy and law reform concerns the conduct of lawyers outside of the precincts of adjudication. Much of what lawyers do nowadays is of course far removed from the direct supervision of any tribunal or indeed even from any retail legal or political dispute. Most importantly, lawyers spend a substantial proportion of the time and energy engaged in disputing not at retail at all but rather at *wholesale*. Lawyers lobby in favor of legislation or administrative rule-making that benefits their clients or even in favor of one or another competing conception of the general interest. The reconstructive account of adversary adjudication, because it justifies lawyers' partisanship in terms of the specific dynamics of legitimation at play in this form of retail dispute resolution, makes unusually plain that this justification does not extend beyond the precincts of adjudication. Certainly it does not extend to lawyers' participation in wholesale dispute resolution. Rather, lawyers who engage in wholesale politics must comport themselves according to the principles that govern legitimation in that arena. Indeed, insofar as lawyer-lobbyists flout these principles, they de-legitimate wholesale politics and the settlements that it generates, and hence in the end de-legitimate adjudication also (because the legitimacy of adjudication's resolution of retail disputes depends, at least in some measure, on the legitimacy of the wholesale settlements from which the disputes that adjudication engages prescind).

I have not, to be sure, developed any detailed account of the principles that govern the legitimacy of wholesale dispute resolution. But the legitimate resolution of disputes at wholesale seems clearly to require forms of creative self-assertion, charismatic personality, and prudential compromise—in short, forms of leadership—that stand fundamentally at odds with the lawyer's negatively capable support role. The reconstructive approach thus promises to underwrite an argument explaining why conventionally partisan lawyering and the privileges and protections associated with it must be abandoned when lawyers enter wholesale politics. Indeed, my approach suggests that lawyers (operating in their traditional, negatively capable role) are not well suited to political leadership, *tout court*.⁴⁴

Third, the reconstruction of adversary legal ethics pursued in *A Modern Legal Ethics* suggests a striking and profound, but nevertheless almost uniformly overlooked, difference between lawyers who act on behalf of private clients and government lawyers. This difference, moreover, has enormous consequences both for the professional ethics of government lawyers and for the institutional structures into which such lawyers should be organized. Insofar as *A Modern*

44. I have earlier drawn out some of these conflicts between lawyering and leadership. See Daniel Markovits, *In Praise of the Supporting Cast*, 116 *YALE L.J. POCKET PART* 272 (2007).

Legal Ethics correctly grounds lawyerly partisanship in the project of establishing adversary adjudication's legitimacy, the case for such partisanship simply does not extend to government lawyers. While the authority of adjudication must constantly be legitimated to private disputants, it need not be legitimated to the government. The tribunal whose legitimacy is at issue, after all, is an arm of the government, which is, therefore, *in authority*. Indeed, as happened in the case of lawyer-lobbying, importing the partisanship associated with private lawyering to the practice of law on behalf of the government is just not required by legitimacy. Rather, it affirmatively undermines legitimacy. This has profound consequences for government lawyers of all stripes.

To begin with, government lawyers should generally adhere to a far less partisan code of professional ethics than their privately employed counterparts. Limits on the partisanship of government lawyers are commonly acknowledged with respect to prosecutors, although this is generally treated as a special case, best explained in terms of the special protections afforded criminal defendants.⁴⁵ But in fact, government lawyers' partisanship should be dampened quite generally, and in respect not of the substantive legal areas in which they intervene but rather of their structural role in the legal order. If private lawyers are officers of the legal system but not necessarily of the court, government lawyers are agents, if not of the court directly, then of the same principal of which the court is also an agent. And as agents of a principal for whom the problem of the government's legitimacy simply does not arise, government lawyers should enjoy none of the entitlements to partisanship that grow out of the project of legitimation.

Government lawyers should display some form of deference, and indeed even loyalty, to their political masters, to be sure. But this should be the deference and loyalty of the professional civil servant, explained and limited in terms of the proper balance between democratic political authority and the forms of authority associated with technical expertise. And although it remains an open question just what the contours of this form of civil-servant loyalty should be, it is a safe bet that it will be more narrowly cabined, and hence justify less partisanship, than lawyerly fidelity.

Moreover, reconstructing the structural role of the government lawyer along these lines has implications not just for government lawyers' professional ethics but also for the institutional structures through which government lawyers' professional energies are marshaled. In particular, government lawyers should be organized into legal departments that display whatever degree of independence from the overtly political officers of government the best understanding of lawyerly expertise requires. Because lawyerly fidelity is justified by reference to

45. See, e.g., STANDARDS FOR CRIMINAL JUSTICE 3-1.2 (c) ("the duty of the prosecutor is to seek justice, not merely to convict"); *id.* at 3-3.9; MODEL RULES R. 3.8(a) (2007).

a problem of legitimation that simply does not arise in their circumstances, political officials are simply not entitled to negatively capable partisan lawyers, just as they are not entitled to negatively capable partisan economists or scientists. This insight has profound consequences for the organizational structure of lawyering in the government of the United States today. It suggests, for example, that the United States Department of Justice—at least, the parts of this department that provide lawyering rather than law-enforcement services for the government of the United States, and in particular the Office of Legal Counsel—should be more profoundly separated from the political branches of government (and especially from the executive branch) than it is today. The analysis suggests, *a fortiori*, that the White House Counsel's importance, and its intimate connection to the President, should both be diminished.⁴⁶

IV. CONCLUSION

The profound methodological differences between the casuistry implicit in Simon's essay and my own reconstructive approach therefore have profound consequences for both academic legal ethics and the practice of law. Casuistry traps academic legal ethics in a series of confusions and misunderstandings about adversary advocacy, which mislead conventional scholarship into directing its attentions towards tangential matters and ignoring core questions. And, being so misled, casuists propose reforms to the practice of law that would introduce new threats to the legitimacy of adjudication even as they ignore central existing threats.

The root of the casuist's difficulties lies in her confidence in her own conception of justice—both concerning its truth and concerning its capacity to improve life by providing a regulative guide to human conduct. To be sure, some improvements to a professional ethics largely drafted by the self-interested profession that it purports to regulate can always easily be made. But these will generally be so obvious—so plainly corrective of lawyers' self-seeking—that they can be identified without reference to any sophisticated casuistry, simply by common sense. And as soon as common sense runs out, casuistry, too, will be inadequate to guiding reform.

A Modern Legal Ethics proceeds less confidently and more cautiously, aiming not so much to decide particular questions of doctrine or to solve particular problems as to produce a reflective reorientation to the practice of law, including to the relation between this practice and adjacent forms of legal and political legitimation. It should therefore be unsurprising that the book's efforts, on virtually every front, do more to pose questions than to answer them. *A Modern Legal Ethics* is therefore perhaps best understood as attempting to set a new

46. Here I am pursuing a suggestion introduced by Bruce Ackerman. See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* Chapter 4 (forthcoming 2010).

agenda for academic legal ethics and, although now only at one remove, perhaps also for law reform.

The academic agenda is quite different from the one picked out in Simon's essay. Thus, whereas Simon emphasizes my characterizations of the outer limits of lawyerly partisanship under the law as it happens to stand here and now, the central academic question to ask of the book concerns its characterization of the generic core of the law governing lawyers. Does this body of law cast lawyers as a central pillar in retail political legitimation? What is the relationship between the form of legitimation associated with adjudication and other legitimating practices that exist, alongside adjudication, in our legal and political order? Can procedure legitimately resolve disputes in the manner that I describe, or indeed in any manner other than by directly tracking truth and justice? And, if the answers to both these questions are "yes," how broadly does my conception of lawyers' ethics apply? That is, which among the many types of conduct by lawyers fall properly within the scope of retail dispute resolution, understood in terms of the theory?

The agenda that *A Modern Legal Ethics* poses for law reform is perhaps broader still, and surely more provisional. What are the greatest threats to legitimacy that face our legal order, and in particular our practices of adjudication, today? Can these threats be addressed purely from within the practice of adjudication, or do they jointly concern multiple legitimating legal regimes (including not just adjudication but also contract, for example, or democratic legislation), so that they must be addressed in terms of these several regimes? And finally, how might justice be pursued after all, without sacrificing legitimacy?

The last question of course returns the argument to casuistry's proper ground. But the casuist's concern for justice will have been quite literally chastened by the journey, as the appeal of her conception of justice is tempered by the recognition that others do not share it, and that law and lawyers are centrally concerned to sustain stable and solidaristic social relations even in the face of the ongoing disagreement.