

The Radical Conservatism of *The Practice of Justice*

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The Practice of Justice is a fundamental but in some ways also remarkably conservative—in the best sense of the word—critique of the prevailing system of lawyers' ethics and practices. It is fundamental, in the sense that William Simon razes to the ground the current structure of ethical rules and their presuppositions. It is conservative, in that he then shows how a system of lawyers' ethics can be rebuilt on its existing foundations, using existing construction materials—the ordinary working conceptions of law and justice that lawyers bring to bear in other aspects of their practices.

My aim in this brief comment will be first, simply to highlight those arguments of the book that seem most distinctive, novel and powerful; second, to point out some of the problems I see and qualifications I might suggest to Simon's major thesis, and to advance a couple of modest additions to his reform project; and finally to speculate about the challenge that Simon's thesis and reforms pose to the current legal profession.

I.

Simon's book consists, of course, chiefly of a critique of the "Dominant View" of legal ethics, and a proposal to substitute for it a "Contextual View." The Dominant View is that the "lawyer must—or at least may—pursue any goal of the client through any arguably legal course of action and assert any nonfrivolous legal claim."¹ This position, he says, that the lawyer must be a zealous advocate within the "bounds of the law," relies on a partial and constricted idea of what "law" is: chiefly a formal-positivist idea that law consists of rules, along with a libertarian proviso that construes such rules strictly against the state. Yet outside the legal context, Simon argues, lawyers and legal decision-makers habitually adopt a much larger and more flexible conception of what the law is, as only in some contexts and on some occasions requiring strict and formal interpretation. In other occasions and

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1. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 7 (1998). Hereinafter, all references to *The Practice of Justice* will be made by citation to page numbers without additional identification.

contexts lawyers treat legal enactments as broad statements of principles or charters of purposes, to be generously extended by analogy to like situations, or to adapt to changing circumstances, and to incorporate standards from a larger background of social norms and customs. In still other situations lawyers selectively “nullify” formal legal enactments, treating them as dead letters that have lost any normative force or enforcement backing that they may once have had. Simon argues that lawyers should bring to bear the same kind of discretionary, contextual judgment they would use in interpreting any other kind of law to construe the “law” that governs and limits their representation of clients. Once they have done so, “[l]awyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice,”² meaning, resolution on the “legal merits,” with law being understood in the broad sense.

What Simon’s book isn’t. Perhaps I can best begin to explain what Simon’s argument is about by first describing several more familiar kinds of critique that it is not:

1. Simon’s critique of legal ethics is not the cynic’s, nor the skeptical Chicago-economist’s, nor the neo-Marxist sociologist’s, which ironically often turn out to be identical.³ Their view is that professional ethics are simply thin rationalizations of self-interest—the self-interest of professionals in maximizing their incomes, and of their guilds for controlling their markets by restricting entry and competition, and that it is naive to expect them to be anything else or to take them seriously as moral aspirations. Such critiques are obviously external, uttered from the standpoint of the skeptical outside observer. Simon could not deny—no sensible person could—that many so-called ethical rules have this self-serving and protectionist character. His subject however is not the ethical codes’ discrete body of sub-rules, but the basic ethical principles and commitments of the profession. And toward these, Simon’s stance is one of internal critique. He takes at face value lawyers’ own best and most idealistic constructions of the purposes and effects of their principles. He assumes that lawyers, or the best of them anyway, are genuinely committed to the “moral aspirations” of their social role, and genuinely hope to find a connection between what they do every day and the overall animating ideal of serving justice, just as doctors want to feel a connection between their daily practices and the general social goals of keeping people healthy, curing disease and relieving pain. The problems, as he sees them, are that lawyers are constantly put into situations in which their actions seem to cause immediate or short-term injustices, and that the ethical princi-

2. P. 138.

3. See generally RICHARD L. ABEL, *AMERICAN LAWYERS* (1989) (a skeptical sociologist); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962) (a skeptical economist); MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977) (another skeptical sociologist).

ples that they habitually use to rationalize these practices of injustice are terribly inadequate to the job of connecting them with the larger justice-serving goals of the legal system. The task of reforming legal ethics is to help reestablish that connection.

2. In keeping with his project of internal critique, Simon's focus is primarily ethical rather than institutional, that is, on critique and reform of lawyers' ethical responses to dilemmas that the legal system as it currently operates routinely puts them in, rather than to the systems and structures that create the dilemmas. This distinguishes his enterprise from general critiques of legal institutions and procedures, such as critiques of the adversary system of trials as a fair and efficient mechanism for finding facts; of perverse incentives set up by "American rule," contingent-fee, or fee-shifting arrangements for lawyers to abuse clients or the legal system; of the ways "unauthorized practice" rules and similar protectionist policies inhibit competition from lower-cost providers; or more generally still of the distribution of legal services in favor of wealthy clients and the restricted access that high prices impose on nearly everyone else. It is clear that Simon shares many of these critiques—and indeed makes them central to his argument that the legal system cannot and does not operate automatically to produce just outcomes, but his main attention is on something else. Any set of legal institutions or processes will be subject to malfunctions that will cause major shortfalls from the ideals of equal and effective justice. His question is: How should a responsible lawyer adapt his practice to such failures?

3. Simon frames his approach as an alternative to two other critical stances most often recommended by other ethics reformers. One (most notably associated with David Luban) is the critique of the Dominant View from the standpoint of, and the effort to bring professional ethics into harmony with, the claims of ordinary morality (or the lawyer's personal morality).⁴ The other (chiefly associated with Gary Bellow and to some extent with Geoffrey Hazard)⁵ is what Simon calls the Public Interest View, that "law should be applied in accordance with its purposes, and litigation should be conducted so as to promote informed resolution on the substantive merits."⁶

Simon's position is closer to the current Dominant View than either of these alternatives. He prefers that his proposed ethical system be based, like the current one, on "law" rather than ordinary or personal morality. But his

4. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* xxii (1988) (Luban suggests replacing the Dominant View of legal ethics with a Morally Activist View in which "[t]he morally activist lawyer shares and aims to share with her client responsibility for the ends she is promoting in her representation; she also cares more about the means used than the bare fact that they are legal.").

5. See GARY S. BELLOW & BEA MOULTON, *THE LAWYERING PROCESS* (1978); GEOFFREY HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* (1978).

6. P. 8.

view of “law” is one of judgments that often, though not invariably, incorporate moral norms, including norms that sometimes justify ad hoc nullification or even conscientious resistance to laws whose operation is conspicuously unjust. Simon’s lawyers, seeking to ascertain what standards should guide their representation of clients, should consult legal sources and engage in legal analysis, not their own views or those of moralists; to this extent legal ethics remains in Simon’s hands a role-morality. As for the Public Interest standard: In many cases (and as I’ll suggest later on probably most cases), Simon’s ethical standard will be much the same as a Public Interest standard. But Simon wants to reserve to his lawyers the option to be vigorous, one-sided, hardball partisan advocates *in appropriate contexts*, those in which the lawyers can rely on equally resourceful adversaries or negotiating partners to represent conflicting interests, or on other more authoritative institutional actors (such as judges or arbitrators or administrative agencies) to reach informed decisions on the merits. As he says, although lawyers should think like judges in determining what the relevant law is, they need not behave like judges if there are real judges, or their equivalents, available and capable of making informed decisions.

One of Simon’s boldest—but when one thinks about it completely consistent—moves is to apply his proposal unflinchingly to the one type of practice where even the most public-interest-minded legal-ethics reformers endorse the Dominant View of hardball-libertarian-positivist-partisan-advocacy. That is criminal defense. Simon thinks that even in this role the lawyer needs to make contextual judgments about whether a particular defense tactic—e.g. destructive cross-examination of a prosecution witness the lawyer knows to be truthful—will be so uncorrected-for as to result in an unjust outcome. Here as elsewhere, however, he is also willing to consider arguments that in a legal system such as ours, which imposes crazily savage penalties even for minor offenses, that defense lawyers may be justified in using almost any tactic to bargain such sentences down.

What Simon’s book is. Having said a bit to describe this book negatively, by what it is not, let me add a bit more about what it affirmatively is.

The most powerful parts of this book are the critical ones demolishing, piece by piece, the components of the Dominant View. Not since Luban’s *Lawyers and Justice*⁷ has the conventional set of ideas about the lawyer’s ethical role been so well explicated, and so thoroughly critiqued. Simon’s picture of the Dominant View is different from Luban’s in key respects.⁸ The key critiques are of (1) libertarian premises of conventional ethics; (2)

7. LUBAN, *supra* note 4.

8. Luban identifies as the key components of dominant legal-ethics thinking the principles of Partisanship (zealous advocacy) and of Non-Accountability (lawyers not responsible for ends sought by clients or means used to seek them so long as within bounds of the law). See LUBAN, *supra* note 4, at 7.

positivist and formalist premises; and (3) consequentialist accounts of how lawyers following the Dominant View will feed into an overall process whose workings will approximate justice in the long run. A few words about each of these:

1. *Libertarianism.* Simon's critique of the libertarian element in standard legal-ethics reasoning is brief and devastating.⁹ In their libertarian mode, lawyers argue that the primary social role of lawyers is to protect clients from an overbearing state, which means they are entitled to construe all legal ambiguities and exploit all procedural opportunities in favor of clients. But the liberal state is itself instituted to protect individuals from predation, and its ability to do so can be thwarted by lawyers for predators. Moreover, most clients are private parties asserting claims against other parties, that, if unjustified, will invade their liberty and autonomy; here too, the lawyer heedless of justice is likely to wreak injustice as libertarians themselves define it.

2. *Positivism.* The Dominant View says that lawyers are to fight for clients' ends by any means necessary "within the bounds of the law." What the "law" means is therefore central; and Simon argues that dominant legal-ethics adopts a positivistic theory of law, that it consists of formal rules that are sharply differentiated from non-legal customs and values.¹⁰ This constricted view of what law is allows lawyers to disclaim any responsibility for third parties and the public interest: The law as-it-is may be presumed to take those interests into account to the extent they need to be; and if it does not, that is a problem to be solved by changing the rules, not by lawyers. But, Simon argues, the positivist view cannot be reconciled with the ways law is actually interpreted in our legal system, which regularly uses substantive criteria of interpretation and application, appeals to broad standards and purposes, and refers to general social background customs and values.¹¹ Legal-ethics reasoning turns out to be an island of highly formal analysis about law-as-rules in a legal system that is actually pervaded by substantive and purposive reasoning.¹² Even on the island of professional-responsibility law,

9. See pp. 30-37 (describing and critiquing various articulations of the libertarian premise).

10. See p. 37 ("Legal ethics is the only area in which [lawyers] continue to cling to [the positivist premise].").

11. See pp. 37-40 ("While a few legal philosophers still defend the positivist premise, nearly all practicing lawyers reject it implicitly in the way they argue cases, advise clients, and draft documents.").

12. To be sure, formalist modes of reasoning are staging an impressive come-back in our legal system, as in field after field judges reemphasize literalist or "plain meaning" interpretations of statutes and contracts, and try to replace open-ended standards by bright-line rules. See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (describing and critiquing the plain meaning approach to statutory interpretation advocated by Justice Scalia). But these formalist revivals are highly selective; and the judges who promote them are just as busy promoting deformalization of rules in other legal fields. See Kathleen Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 69-123 (1992) (describing how Justices divide on the

there are big thickets of contextual and purposive standards as well as rules, notably the tort-based duty not to commit malpractice.

Moreover—one of Simon's most powerful points—lawyers are not by any means consistent positivists in thinking about their own obligations to "the law."¹³ They too, like official decision-makers, are always and inevitably making discretionary substantive distinctions—between serious laws and non-serious laws, active laws and obsolete laws, prohibitions and mere taxes on conduct—and giving themselves some freedom to nullify the effects of positive rules. In contexts where their economic self-interest is not at stake because they are not earning fees, such as deciding whom they will represent pro bono, and how they will conduct the representation, lawyers are likely to take into account how their actions will further the cause of justice as well as complying with any arguable construction of formal law. Thus even lawyers who assert a positivist view of law do not behave in accordance with it.

3. *Consequentialist accounts.* Simon's critique concludes with a brilliant chapter hacking away at the third basic proposition of the Dominant View,¹⁴ what one might call its structural or consequentialist premises: that lawyers' actions that seem to result in immediate injustices are actually okay because they all fit into a system or process that—like the classical economic market aggregating selfish preferences into an equilibrium that benefits everyone—does tend to work toward justice in the long run. One of Simon's most interesting claims is that conventional legal-ethics reasoning tries to make this connection between ordinary practice decisions and ultimately fair outcomes by advancing a host of instrumental armchair-empirical arguments about the aggregate effects of the practices;¹⁵ and that a great many of these arguments are surprisingly lame and implausible, or at least no more plausible than the obvious counterarguments.

II.

Simon himself takes as his main thesis that lawyers' ethical judgments should be contextual rather than categorical, based on open-ended standards requiring particularized discretionary applications rather than on bright-line rules. I suspect that for a great many readers, the most arresting claim of the book will be that lawyers must take personal responsibility for the quality of

question of rules versus standards, and why the division may vary depending on the issue confronting the Court).

13. See pp. 37-43, 79-108 (describing inconsistencies in the Dominant View in mainstream legal culture and using the theme of implicit nullification to exemplify substantive, rather than positivist, themes).

14. See pp. 53-76.

15. Such as the argument that confidentiality rules forbidding lawyers to disclose clients' plans to commit frauds and crimes will lead clients to be candid with their counsel, who can then advise them to desist, and thus will deter much bad conduct.

justice, and—to some extent—for the production of just outcomes, in every representation, even when doing so may work against the client's interest, or at any rate the client's short-term interest as the client perceives and presents it. I predict that it is this view of lawyers' obligations, and the effective examples Simon uses to explain how to apply it in practice, that are most likely to arouse the indignation and resistance of ordinary lawyers.

Why is that? After all, limits on partisanship are already built into the Dominant View, which says that the lawyer must/may push client interests up to the bounds of the law, but no further.¹⁶ The function of the positivist and libertarian theories of law which Simon critiques is to allow the lawyer to push back the boundaries, to widen the zone in which he can advance client interests. (The function of the instrumentalist arguments that aggressive representation will roughly add up to justice in the long run is to enable him to feel good about it.) The lawyer thus feels himself up against the hard wall of limits on partisanship only at the point where the client is about to violate some unmistakably unambiguous plain command of positive rules. Even then, as Simon says, if the rule is little enforced, or taken to be merely a tax on conduct (a rule that the client may violate now and pay for later), the lawyer may feel entitled to advise the client that he may safely disregard it. Anyway, lawyers tend to take utterly for granted that ambiguities or loopholes, adversaries' or regulators' or judges' lack of resources or information, and gaps in enforcement schemes, present strategic opportunities that may be exploited on behalf of clients. Simon is, I believe, completely right to point out that lawyers do not *invariably* engage in such strategic behavior, that in actual practice they make discretionary contextual decisions and refrain from exploiting every advantage presented by textual ambiguity or the weakness of monitors or opponents. But the principle of partisanship is so strong that lawyers generally hesitate to articulate or explicitly limit it.

To be sure, Simon argues that in some settings the lawyer may indeed legitimately act as an unabashed partisan, leaving the justice of outcomes to the workings of some process, or to the discretion of a decision-maker who is better positioned or more authoritative than the lawyer to determine the merits. Quite often Simon's standard of justice-seeking contextual judgment would not require the lawyer to forego any strategic opportunity or inventive interpretation of existing law that would benefit her client. Sometimes all it would demand is somewhat greater openness or candor on the lawyer's part about her tactics, i.e. that she flag an adventurous reading of law that would widen loopholes or frustrate purposes of a legal regime, so that authoritative decision-makers will notice what the client is trying to do and get a chance to approve or disapprove. Simon also makes clear, however, what is undenia-

16. See p. 46 ("The lawyer is portrayed as a kind of surveyor/scout whose job is to advance the will of the client up to the edge of 'boundaries' that are constituted independently of his efforts.").

bly true, that there is no process anywhere in the legal system that remotely approaches the capacity for self-executing justice that will automatically correct for any aggressive deviations. Even the most formal process our system offers, under ideal conditions for its functioning, such as the full-scale adversary trial between two parties with equally matched resources, can—because of weaknesses inherent in the nature of adversary proof and the weakness of the umpire-judge—horribly malfunction. And where the process will not self-correct, he wants lawyers to help correct it in the direction of doing justice.

Simon's justice-serving ethic is not some unprecedented radical innovation in our legal culture. As he says, it was the traditional ethical position of the American bar, expressed in virtually all its ethics texts and public pronouncements, until sometime this century. But the implications of his position for current practice standards can be very radical indeed.

Suppose (this example is adapted from Simon's own wonderfully rich description of the savings-and-loan debacle)¹⁷ that a regulatory regime is proposed to constrain certain business practices. The business sends in lawyers and lobbyists to try to kill the legislation. They are unable to kill or even weaken the substantive legislation, but they are able to weaken the agency created to carry it out by getting the legislature to lower agency appropriations and build in clumsy expensive enforcement procedures (mandatory cost-benefit analysis, trial-type enforcement hearings, etc.) that will eat up agency resources and deliver strategic opportunities to enforcement targets to delay and resist. They are also able to influence appointments to the agency and to bring political pressure to bear on agency staff. The result is that in any confrontation with industry, any attempt to monitor compliance or bring enforcement proceedings, the agency will always be weak, understaffed, easily outmaneuvered.

Here is a case in which lawyers themselves have helped to undermine the manifest purposes of a law by sabotaging its capacity for implementation. I am not quite sure how Simon would advise industry lawyers to handle client matters coming before this agency. Under the Dominant View, or at least one version of it, the lawyers are not required to compensate for any weaknesses in the regulatory process: If the agency staff is inept, over-extended, and under-informed, that's tough for them but fair game for the industry lawyers. Under Simon's ethic, as I understand it, the industry lawyers have to ask themselves if the substantive purposes of the regulatory scheme will be substantively undermined by their tactics, and if they will, whether other

17. See William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 L. & SOC. INQUIRY 243, 246-51 (1998) (describing Kaye Scholer's notorious representations of Lincoln Savings & Loan and the charges brought against Kaye Scholer by the Office of Thrift Supervision).

actors in the legal system better positioned than they can correct for that. If not, the industry lawyers must avoid tactics that will subvert the regime.

To answer this, the industry lawyers will have to develop a theory of the substantive purposes of the legal regime. They might reason that the statute was meant to further policies based on some widely held norms, such as protecting worker safety or the environment or preventing racial discrimination, and that if the agency is too weak to implement those policies, their job is to help it along, to compensate for its frailties even if they helped create them in the first place! One might say that if this is Simon's view he seems to be arguing that at some point the industry lawyers must cease viewing the law as a political terrain in which they may fight their client's battles to gain as much ground as they can, and view it instead as a repository of norms they must respect. Even viewing the law-as-norm, however, the industry lawyers might also suppose that the legislative decision to deprive the agency of effective enforcement powers was designed to qualify or undercut its nominal mission; that the law is thus only a kind of "symbolic" law like the sodomy laws, which pacify an interest group's demands by encoding them in the statute book even though they are not enforced; that the agency was set up from the very start to do as little as possible; and that by resisting enforcement the lawyers are therefore behaving as honest and faithful agents of the law's real purposes. They might perhaps also have some reason to believe that major support for the statute came from special interests, let us say economic rivals trying to realize a competitive advantage by raising their client's costs, and suppose that they are entitled to counter this Machiavellian stratagem by counter-stratagems of their own, which will help to nullify their rivals' illegitimate advantage. Or, less cynically, the lawyers might argue (and in all sincerity believe) that the restrictions on the agency's enforcement abilities also express important and widely shared values, that businesses should not be unnecessarily burdened with regulations, that administrative risk-assessment should be based on rational analysis, that the industry is entitled to the protections of procedural due process, and that their job is to defend those values.

Simon is, of course, perfectly aware that the kind of substantive legal analysis he wants lawyers to engage in is indeterminate in the sense that it is likely—as in the example I just gave and other examples of his own—to generate several plausible and conflicting conclusions about the purposes of a legal regime and its applications to particular cases or transactions. His response is that the legal system confronts legal and factual indeterminacy all the time without throwing up its hands and concluding that all answers are equally good or equally arbitrary; that officials like judges and administrators and prosecutors are constantly having to come to a judgment that one solution out of many plausible solutions is the best solution; and if they can do it,

so can lawyers.¹⁸ Simon wants lawyers to reason like judges, even if most of the time they won't have to act like judges (because there are real judges or judge-equivalents in the background).

This response is powerful and, so far as it goes, convincing. I wish, however, I could be more sanguine than I am about the capacity of practicing lawyers to engage in relatively disinterested contextual reasoning. True, as Simon says, even lawyers who claim to be Positivists (we just neutrally lay out for our clients the way the law is and predict how it will treat them) actually make a lot of substantive and contextual arguments. They say things like: We are entitled to fight unreasonable regulations or overreaching discovery requests or unscrupulous opponents with obstructive tactics; we would be foolish to insist to our clients that they strictly comply with under-enforced laws that everyone else routinely ignores; juries are likely to misvalue certain kinds of evidence so every tactic designed to keep them from hearing it is justified; totally scorched-earth criminal defense is justified because prosecutors have an overwhelming advantage, juries don't understand burden-of-proof instructions, sentences are hideously excessive and prisons are a nightmare that almost nobody should have to endure. But when lawyers do make such substantive/contextual judgments, I'll bet that they almost invariably ratchet them one way, in favor of their clients' interests, or their own.¹⁹ If contextual ethical reasoning is already for many lawyers largely a means of rationalizing prior dispositions and commitments, is there room to be uneasy about Simon's broad view of what ethics entails? Lawyers for powerful clients already help them engage in so much implicit ad hoc nullification of regulatory and tax regimes. Would the effect of handing them Simon's ample casuistic tool-kit license even more? If lawyers must adopt a substantive view of their role as concerned to promote justice, will they be inclined to overcome dissonance between justice ideals and client goals by becoming true believers rather than alienated Positivists—thinking like judges, perhaps, but like very biased judges?

People who share such concerns with me will argue: "See, that's why we need hard categorical rules to constrain lawyers' conduct—anything softer the lawyers will simply capture and turn to their own purposes." Like Simon, however, I think this position overestimates the utility and determinacy of rules as guides to complex legal decision-making; rules can be and

18. Simon may underestimate the postmodern agnosticism of judges in current conditions. See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

19. But consider Stewart Macaulay's classic study of consumer protection lawyers. See Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 L. & SOC'Y REV. 115, 136-40 (1979). He found that small town lawyers for consumer debtors rarely deployed (if they knew about them at all) the full range of legally available defenses on behalf of their clients, in part because they sincerely believed that they should not help debtors escape from paying their debts, but also in part because most of their business was likely to come from town merchants who would be annoyed at overly aggressive representation of debtors.

regularly are gamed, manipulated, or applied so literally that they defeat their evident purposes.²⁰

The real problem then, is not just to encourage lawyers to reason contextually and substantively, but to do so in ways that favor the furtherance of values and purposes of the legal system as they would be constructed by a relatively impartial spectator. This project will appeal most strongly to government lawyers and public-interest lawyers, who are more accustomed to the idea that the ends they help their clients pursue must ultimately have some relation to the ideals of the legal system. It is likely to scandalize lawyers in practices where the dominant ethic of client loyalty is reinforced by self-interest, who have grown used to thinking of themselves as the butlers to their more powerful clientele, sworn to follow faithfully in their service without much regard for the damage such service may do to the legal framework that created and ultimately must justify their roles.²¹ It will take a lot more than a readjustment of reasoning modes to dislodge this ethic and replace it with one in which lawyers would assume affirmative responsibilities, which might be minor or major according to context, for contributing to just outcomes. It would in fact require a major restructuring of the regimes that regulate and discipline the legal profession, and more importantly—because no system of regulation or discipline can work entirely against the grain of the prevailing norms of a professional community—a reorientation of professional culture itself.

In his final chapter Simon advances some interesting suggestions for institutionalizing something like his justice-serving ethic. Wisely, I think, he tries to redirect ethics reforms away from simply rewriting the disciplinary rules, which already far too often take the form of quasi-criminal imposition of liability for violations of rules, instead of prescribing affirmative general obligations to assist the legal system achieve its best purposes. He emphasizes the need for reforms that use market incentives to inspire competitive “races to the top” in markets where such races may actually attract clients with an interest in hiring lawyers with reputations for honest and cooperative behavior, and for building associations that will help to reorient “intra-professional” norms. I expect that institutionalizing this ethical regime would also require some pretty big sticks as well as carrots, such as more gatekeeper standards imposing obligations on lawyers to investigate and certify clients’ compliance with legal requirements, to withdraw from repre-

20. See Simon’s discussion of the practice of “working to rule”—obstructionism via strict rule-following. Pp. 90-91 (“In some areas, scrupulous compliance with the law is so burdensome and even disruptive that it occurs only as a form of protest.”).

21. The metaphor is, of course, suggested by Kazuo Ishiguro’s 1989 novel, *The Remains of the Day*. See Rob Atkinson, *How the Butler Was Made to Do It: The Perverted Professionalism of The Remains of the Day*, 105 YALE L.J. 177, 179-80 (1995) (“In its depiction of the tragic life of an aging English butler . . . Ishiguro’s novel invites us to take seriously the title of the ABA’s encyclical on professionalism, *In the Spirit of Public Service* . . .”).

senting clients who will not cooperate, and in extreme cases to blow the whistle on non-complying clients; or to produce information that will lead to resolution on the merits. It would be far better, however, if lawyers were given more positive reasons to take the interests of justice into account in routine representations. One reason among many they do not at present is because they fear disciplinary sanctions or malpractice actions if they act against a client's interest. Thus any reform would have to give lawyers who conscientiously try to act justly some immunities and safe harbors. They also need reinforcement and support from professional communities in the form of guidelines developed collaboratively by reputable lawyers in different legal specialties, setting standards for ethical conduct well above the floor of the disciplinary rules. And they need regular recourse to authoritative opinions advising them of the ethical implications of proposed conduct in advance, instead of having to fear what may be imposed post hoc.²²

I would also put a bit more emphasis than Simon does on the constructive role that lawyers can play—and have certainly played in the past—as legal statesmen, that is, as architects of policy changes in substantive law and procedure that will help to compromise ongoing legal conflicts that tend to waste parties' resources or lead to unjust outcomes, or that will help equalize the playing field of conflict. Flaws in lawyering are often traceable to flaws in system design, and system reform would make it less necessary for lawyers concerned with just outcomes to engage in ad hoc compensation or nullification in discrete situations.

III.

Let me close this essay with a word about the context in which this book appears. The American legal profession is evidently going through one of its periodic spasms of agonizing self-appraisal.²³ The levels of public distrust and dislike of lawyers, and the morale of lawyers themselves, as (no doubt crudely) measured by surveys, have never been lower. Lawyers are awash in books and speeches about, commissions on, codes promoting, laments over the decline of—and exhortations urging the renewal of—professionalism. The A.B.A. and all the state bar associations have active committees worrying about the erosion of professional values—from public service to “civility”—and offering proposals for their restoration. Books like Anthony

22. See Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665 (1994), for a particularly useful and thorough treatment.

23. See generally COMMISSION ON PROFESSIONALISM, AMERICAN BAR ASSOCIATION, “. . . IN THE SPIRIT OF PUBLIC SERVICE”: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986); AMERICAN BAR ASSOCIATION, TEACHING AND LEARNING PROFESSIONALISM (1997).

Kronman's *Lost Lawyer*,²⁴ or Mary Ann Glendon's *A Nation Under Lawyers*,²⁵ or Sol Linowitz's *Betrayed Profession*,²⁶ to name only the best known among many jeremiads, lament the decline of lawyers from a past greatness (which all these books interestingly enough locate around the 1950s). Some critics diagnose the worst features of current law practice as hyper-commercialism, business values crowding out values of craft and service; and hyper-adversariness, too much nasty, expensive, wasteful, zero-sum warfare. Others are subjecting the adversary system of litigation and jury trial to the most severe critiques that have been heard since the Progressive period. Some complain that the system unduly burdens business with frivolous suits brought for the self-enrichment of the tort plaintiffs' bar; others worry that the system fails to compensate the large majority of small plaintiffs' claims in any way; and others still point out that our haphazard party-controlled methods of developing facts and expert interpretations of them in litigation are guaranteed to obscure truth and prevent rational decision-making. To be sure, many of these practices have strong defenders: those who are skeptical of nostalgia for the old regime, which they see as one of hypocrisy and social exclusion; those who attribute the morale crisis to the whining of lawyers feeling the pressure of a generally healthy process of increased competition; or those who have done or know of research showing that jury trial is a mostly rational process that usually works pretty well and that the "litigation crisis" of increased filings, frivolous suits, and huge meritless windfall jury awards is a myth. But among such defenders are the strongest critics of other features of the current system, especially its gross failures to deliver competent and affordable services to the vast majority of people who are not rich, and yet whose needs for legal assistance are among the most pressing and severe (examples include criminal defendants in capital cases, spouses facing custody disputes, employees fired from their jobs, evicted renters or foreclosed-upon debtors, and victims of toxic torts).

You might suppose that in such a firestorm of criticism, in which the most basic features of the legal system and law practice such as the ancient and sacred right of jury trial are seen as contestable, and many of them have become the objects of active legislative revision (like the "tort reform" proposals), that the climate would be right for such a fundamental reappraisal of lawyers' ethics as *The Practice of Justice*. And ideally it should be. But in fact Simon's book poses a more radical challenge than most of the other critiques of the legal system. He challenges a set of values and attitudes that

24. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

25. MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994).

26. SOL M. LINOWITZ WITH MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994).

are deeply entrenched and taken for granted in the mentalities and workday practices of American lawyers. His book is directed to lawyers in a concededly highly imperfect world, but instead of allowing them to blame shortfalls in justice on those imperfections, it asks them to adjust their practices to help compensate for them. American lawyers are often quite receptive to jeremiads lamenting their decline and fall from a profession to a business, because the jeremiads, like country-and-western songs about disappointed love, make them feel better about feeling bad and don't ask them to do anything.²⁷ Simon's book is a more pointed challenge because he argues that the defects in the legal system are a reason for lawyers—individually and as a collective—to act to correct them, and that in every representation there are small occasions for such corrections.

Among another group of readers the response to Simon will not be that the book is too critical. It will be that Simon vastly overestimates the “moral anxiety” of the current legal profession and both its desire and capacity to engage with the project of connecting its daily practices to the larger enterprise of doing justice.²⁸ Such a skeptic would argue that the battle Simon is waging for the soul of the profession was lost long ago; that lawyers have given up on any project save that of making as much money as they can; and that their “ethical” projects, insofar as they are not pure economic protectionism (e.g. the policing against unauthorized practice) have very little purpose besides the collectively self-interested one of making credible commitments to clients that lawyers will preserve their confidences, aggressively promote their interests, and construe every possible ambiguity of fact or law in their favor, even when to do so will work obvious and gross injustices upon others. For such skeptics, the kinds of “instrumental” arguments that lawyers make to defend such practices have never been more than window-dressing anyway.

Pessimistic Weberian sociologists of the profession would confirm this skeptical view from another perspective, by arguing that lawyers like other professions have already surrendered the autonomy they would need to take control of their ethical situation. Bureaucratization, heteronomy, and specialization within the division of labor have entirely divorced them from control over their work and its product, or the ability to connect what they do

27. On the ritualistic functions of bar rhetoric, see Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274, 275 (1986) (noting the great volume of commentary on professional reform, but concluding that there has been “little change in either the rhetoric or dimensions of reform”).

28. See, for example, Jonathan Macey's reaction to Simon's criticism of the bar associations for their refusal to criticize Kaye Scholer's representation of Lincoln Savings & Loan, in Jonathon R. Macey, *Professor Simon on the Kaye Scholer Affair: Shock at the Gambling at Rick's Place in Casablanca*, 23 L. & SOC. INQUIRY 323, 323-24 (1998) (writing that Professor Simon's surprise at the Kaye Scholer affair stems from his “excessive idealism” of the legal profession).

to its likely social effects.²⁹ Such skeptics might cite Robert Nelson's well-known survey of corporate lawyers, most of whom, when asked what ethical dilemmas or conflicts they had met with in their work, astonishingly responded that they had faced almost none.³⁰

But if our work as lawyers has no perceptible connection with the valued purposes of law, or only a random and mostly negative connection (that it helps clients evade or circumvent those purposes) why would anyone attach social value to our work? Lawyers for the relatively poor or powerless can always, of course, take some satisfaction in simply evening the playing-field. But what of lawyers for the relatively well-off? The only lawyers who could validate their work under a skeptical view of ethics would have to be true believers of another sort, subscribers to a peculiar code of Babbitry, willing to adopt the position that *whatever* businesses and wealthy individuals, the main users of legal services, want to do is necessarily valuable even when it conflicts with the system of legal restraints that legislatures and other parties want to put on their conduct, just because such restraints are per se unreasonable interferences with wealth-creation. Doubtless some lawyers do believe in some such form of vulgar-libertarian anarchism. But most surely recognize that capitalist market systems depend essentially on the integrity of the legal framework of constraints that support them, and that lawyers cannot therefore find justification for their role in being haphazard saboteurs of those frameworks.

Simon, understandably, thinks the profession can find a better pathway back to pride in its work if prompted to reorient its practices to accord better with its ideals. Whatever problems critics may find with his diagnosis and proposed remedies, it's hard to imagine a sharper instrument than this book for prodding the profession into a fundamental rethinking of its ethics. *The Practice of Justice* is a great antidote to shallow complacency and shallow despair.

29. For various versions of this critique, see generally ABEL, *supra* note 3; ELLIOTT A. KRAUSE, *DEATH OF THE GUILDS: PROFESSIONS, STATES, AND THE ADVANCE OF CAPITALISM, 1930 TO THE PRESENT* (1996) (discussing the consequences of declining guild power); EVE SPANGLER, *LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK* (1986) (describing how lawyers do their work in many different contexts, including large law firms, civil service, corporate counsel, and legal services for the poor); Eve Spangler & Peter M. Lehman, *Lawyering as Work, in PROFESSIONALS AS WORKERS: MENTAL LABOR IN ADVANCED CAPITALISM* 63 (Charles Derber ed., 1982) (exploring the impact of the loss of individual autonomy and the rise of bureaucratic control upon lawyers).

30. See ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 252-59 (1988).