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APPARENTLY SUBSTANTIAL, ODDLY HOLLOW: THE ENIGMATIC PRACTICE OF JUSTICE

Heidi Li Feldman*

THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS. By William H. Simon. Cambridge: Harvard University Press. 1998. Pp. 253. \$35.

INTRODUCTION

The Practice of Justice: A Theory of Lawyers' Ethics, by William H. Simon,¹ is one of the most thoughtful and important books in legal theory — not just legal ethics — published in the past ten years. Like David Luban's seminal contribution to legal ethics, *Lawyers and Justice: An Ethical Study*,² published a decade ago, Simon's book is a deliberate rival to accounts of lawyers' professional responsibility that begin with a command to zealous advocacy, end with a prohibition on outright illegal conduct, and offer nothing in between. Authors and commentators have grown increasingly dissatisfied with this as the basic structure of legal ethics,³ but to date, no alternative model has gained widespread endorsement. Other than Anthony Kronman's *The Lost Lawyer* and Luban's *Lawyers and Justice*, I know of no other full-scale attempt to develop a profession-wide alternative to the all-zeal/no-unlawfulness model. We need as many serious attempts as possible if those of us interested in legal ethics are to fashion an enduring, plausible theory of how lawyers should act and who they should be.

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1. Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School.

2. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988).

3. See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF A LEGAL PROFESSION* (1993); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Geoffrey C. Hazard Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991); David Luban, *Stevens's Professionalism and Ours*, 38 WM. & MARY L. REV. 297 (1996); Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990); Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169 (1997). Although they are motivated by different concerns, each of these authors discusses the shortcomings of the zealous advocacy model and argues that it cannot serve as a complete or compelling theory of legal ethics.

Each worthy effort teaches us what we should or should not include in such a theory, even if we do not wholly adopt the author's proposal. *Lawyers and Justice* taught that we should be suspicious of a legal ethics founded on role morality. *The Lost Lawyer* focused attention on the centrality of high quality practical reasoning in good lawyering. William H. Simon's *The Practice of Justice* reminds us to mine the rich resources of jurisprudence when building a solid theory of legal ethics, and to watch out if we ignore the jurisprudential foundations upon which our theory rests.

Simon skillfully and persuasively criticizes what he calls the "Dominant View" of legal ethics, by revealing the inadequacies of its jurisprudence.⁴ According to the Dominant View, which is a variety of the all-zeal/no-unlawfulness model, "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" (p. 7). Simon demonstrates the Dominant View's dependence upon formalist commitments to libertarianism and legal positivism. Then, he undermines these commitments, clearing the way for Simon's preferred theory of legal ethics, the Contextual View, which holds that "the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice" (p. 9). Unfortunately, the Contextual View suffers from some serious problems, difficulties that become particularly apparent when we imagine putting the Contextual View into practice. An oddity of *The Practice of Justice* is that the flaws in Simon's positive account of legal ethics seem to be ones he should have easily spotted. As I will argue below, Simon overlooks a normative vacuum in his theory. Since his critique of the Dominant View reveals its inadequacy if we do not accept its normative engine, libertarianism, one might have expected Simon to make sure his own account possessed a plausible, workable source of normativity. Simon presents the Contextual View as if justice will fill this role. But as Simon construes justice, it cannot play the part.

The shortcomings in Simon's approach to justice relate to a more general flaw in Simon's approach to ethics. Simon seems insensitive to the idea that ethical requirements should be instructive, compelling, and authoritative. Immanuel Kant's ethics highlight this sort of categoricity, which insists that ethical requirements are nonoptional and do not vary according to personal interpreta-

4. Simon also rejects the "Public Interest View," which he claims urges 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." P. 8. But his main target is the Dominant View, and I restrict my discussion to Simon's critique of it and his advancement of the Contextual View.

tion.⁵ Simon objects strenuously to a different sort of categoricity — a tendency to conceive ethical demands unduly broadly, without nuance (p. 9). But in his zeal to condemn this sort of categoricity, he overlooks Kantian categoricity entirely. Simon's conception of justice strips that value of much of its normative power. Simon's blindness to Kantian categoricity makes it seem that he envisions a lawyers' ethics without normative authority of any kind.

THE FAILINGS OF THE DOMINANT VIEW

Perceptively and adroitly, Simon demonstrates that in its blend of libertarianism and legal positivism, the Dominant View is a throwback to an earlier school of legal thought, sometimes called formalism and, sometimes, Classical Legal Thought.⁶ Epitomized in *Lochner v. New York*,⁷ classical formalism imported the libertarian conception of freedom as protection from unwarranted encroachments by the state or by other individuals. According to libertarianism, the state or other people are only justified in interfering with an individual's pursuit of her own ends if she consents to the interference, or if in her pursuit she interferes with others' like pursuit without their consent. In addition to its libertarianism, classical formalism included a form of legal positivism, conceiving of law as both conceptually and substantively independent of other social, political, and intellectual realms. Formalist judges wrote as if the content and application of precedent cases were transparent and self-evident. These jurists did not overtly consult or invoke moral, political, economic, and historical facts or theories to justify their interpretations of the law. For classical formalists, interpretation, like the law itself, was obvious.

5. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 76 (H.J. Paton trans., 1948) (1785) ("Unless we wish to deny to the concept of morality all truth and all relation to a possible object, we cannot dispute that its law is of such widespread significance as to hold, not merely for men, but for all *rational beings as such* — not merely subject to contingent conditions and exceptions, but *with absolute necessity*."). Ludwig Wittgenstein assumed ethics possessed this sort of absolute quality, and he argued that this implies that ethics must be independent of matters of fact. See Ludwig Wittgenstein, "Lecture on Ethics," in STEPHEN DARWALL ET AL., *MORAL DISCOURSE AND PRACTICE* 65, 66-68 (1997). Philippa Foot has famously argued against the need for or presence of Kantian categoricity in ethics. See generally Philippa Foot, *Morality as a System of Hypothetical Imperatives*, in *VIRTUES AND VICES* 157 (1978). John McDowell argues against Foot's conclusion that moral imperatives are hypothetical, while at the same time offering an alternative categoricity to that of Kantian ethics. John McDowell, *I. Are Moral Requirements Hypothetical Imperatives?*, 52 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, SUPPLEMENTARY VOLUME* 13, 13 (1978).

6. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 10 (1992); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 2 n.6 (1983); Andrew M. Jacobs, *God Save This Postmodern Court: The Death of Necessity and the Transformation of the Supreme Court's Overruling Rhetoric*, 63 U. CIN. L. REV. 1119, 1122-24 (1995); Duncan Kennedy, *Towards an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3 (1980).

7. 198 U.S. 45 (1905).

Although American classical formalism did not include an account of legal ethics, Simon is dead right when he claims that the Dominant View of legal ethics is the account that follows from classical formalism (p. 28). The Dominant View instructs the lawyer that she may or must pursue the client's interests via any arguably legal course of action. The law by itself sets the only limit on what the lawyer may do. David Wilkins, another current and important legal ethicist, presents this as "the boundary claim."⁸ Like Simon, Wilkins observes that this image of the law as boundary-setting relies on a sense of the law as an external force, exerting influence on the lawyer independent of her own or anybody else's moral, political, economic, or historical views.⁹ This is the formalist vision of law's separateness. Under the Dominant View, the lawyer barricades the client's rightful sphere of autonomy by pressing the client's lawful claims. Since the law itself is not moral, political, or economic, the lawyer is not aiding the client in any illegitimate imposition on anybody else's freedom; but anything short of pressing to the boundaries of the law would mean that the lawyer is illegitimately imposing her own views on the client. The lawyer facilitates the client's freedom as per the libertarianism of classical formalism.

Simon rejects both the libertarianism and the legal positivism of classical formalism. He faults libertarianism for its cramped conception of freedom and its elevation of this form of freedom over all other moral goods (p. 36). Simon rejects legal positivism because it cannot sustain the strong law/nonlaw distinction it draws (p. 37). Simon's attack draws heavily on jurisprudential ideas advanced by Ronald Dworkin and by Critical Legal Studies scholars, debts Simon acknowledges heartily (p. 247). The key premise of his argument is that it is impossible to interpret the law, and therefore to identify it, without incorporating moral, political, and economic values into one's assessment. These values, however, do not stem from a sovereign's enactment, one feature positivism relies upon to distinguish law from nonlaw (pp. 38-39). Simon advances other arguments against legal positivism, but this is the main one, and it is convincing.¹⁰

THE NORMATIVITY AND PRACTICAL GUIDANCE OF ROBUST ETHICAL THEORY

As the subtitle of *The Practice of Justice* tells us, Simon offers a theory of lawyers' ethics. Simon insightfully draws our attention to

8. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 471 (1990).

9. See *id.* at 472.

10. For a fuller and quite helpful discussion of Simon's Dworkinian arguments against legal positivism, see Robin West, *The Zealous Advocacy of Justice in a Less Than Ideal Legal World*, 61 Stan L. Rev. 973, 977-79 (1999).

the fact that such a theory can rely upon jurisprudence — philosophy of law — as well as moral and political philosophy. He does this by showing how the Dominant View generates its normative ethics — its basic tenet of how a lawyer ought, morally, to behave — from its jurisprudence (libertarianism plus legal positivism). And his own strategy for generating an alternative normative ethics for lawyers depends primarily on substituting a different jurisprudence for the one implicit in the Dominant View. The key difficulty here, however, is that a jurisprudence without a robust moral philosophy cannot effectively guide ethical conduct. A robust moral philosophy is not necessarily a correct moral theory, but it has at least two features: (at least minimally) plausible accounts of (i) the source of moral normativity and (ii) what counts as an appropriate response to this normative source.

The Dominant View relies on libertarianism as its robust moral philosophy, a point Simon himself makes. In libertarianism, the source of moral normativity is the individual. Responding to the normativity of the individual calls for leaving her free to choose and act as she pleases. Other major moral theories offer alternative sources of moral normativity. In Kantianism, the source is the moral law itself; we respond properly to this normative source by exercising pure practical reason to figure out exactly what it calls for us to do in any particular situation.¹¹ According to utilitarianism, the good — in the form of human happiness — is the source of normativity, and it bids us to act so as to maximize its existence.¹² In classic virtue theory, human telos or purpose supplies normativity, and we acknowledge this source appropriately by shaping our characters so as to fulfill our telos.¹³

People's reactions to the plausibility of each theory's source of normativity vary; even among those who endorse the same source, debate arises over exactly what strategies and tactics constitute correct responses. But Kantianism, utilitarianism, and virtue theory — and, to a lesser degree, libertarianism — have identified sufficiently believable sources of normativity and made adequate recommendations about the right response to these sources to gain adherents and expositors. If Simon's Contextual View is to qualify as an eth-

11. See IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* 35-36, 87 (H.W. Cassirer trans., Marquette Univ. Press 1998) (1788); IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 12-14 (James W. Ellington trans., Hackett Publ. Co. 1981) (1785); see also LEWIS WHITE BECK, *A COMMENTARY ON KANT'S CRITIQUE OF PRACTICAL REASON* 219 (1960); CHRISTINE M. KORSGAARD, *CREATING THE KINGDOM OF ENDS* 77 (1996).

12. See JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 11-16 (J.H. Burns & H.L.A. Hart eds., Univ. of London Athlone Press 1970) (1789); JOHN STUART MILL, *Utilitarianism*, in *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 1, 8 (E.P. Dutton & Co. 1951) (1861).

13. See ARISTOTLE, *Nichomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE* 935, 942-43 (Richard McKeon ed., W.D. Ross trans., Random House 1941).

ics, even if only an ethics for lawyers, it has to identify a source of normativity and indicate what counts as the right sort of response to that source. If the Contextual View is to hold any promise, both source and response have to be at least minimally plausible.

According to the Contextual View of lawyers' ethics, "lawyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice" (p. 138). The Contextual View defines justice as the "basic values of the legal system," and it "subsumes many layers of more concrete norms" (p. 138). In short, justice is equivalent to legal merit (p. 138). Before analyzing the ethical aspects of this view, let us examine its jurisprudence.

Instead of a formalist theory of interpretation, according to which the meaning of legal rules and standards is transparently available from an examination of precedent, Simon adopts a substantive, purposivist theory, according to which the meaning of legal rules and standards is not evident simply from textual examination but must be ascertained in light of the basic values and goals of the legal system (p. 82). Because these goals and values include moral components, law cannot be walled off from morality (p. 85). Without reference to the morality incorporated into the law's basic values, we cannot even identify what the law is. Simon calls this a substantive conception of the law (p. 82). Substantive conceptions come in many stripes, depending upon what one takes the law's basic values to be. Simon mentions natural law, libertarianism, utilitarianism, wealth-maximization, Rawlsianism, virtue theories, and Dworkinian coherentism as substantive conceptions of American law (p. 82).

Simon's purposivist jurisprudence includes a metaphysics — a theory of what the law is — and an epistemology — a theory of how we should identify what the law is. Metaphysically, the law is infused with moral, political, and economic values. Epistemologically, we should consider these values in our efforts to decide what the law is, means, and requires of us. Simon's metaphysics and epistemology of law are mutually supporting. The reason we cannot readily know the law without making reference to its basic values is because the law does not exist apart from its basic values. Correlatively, because the law has built into it basic values, we cannot easily identify the law unless we appreciate its basic values. The relationship between what the law is and how we know the law is not one of logical connection or conceptual constitutiveness. In principle, we could have an interpretive method that would enable us to identify the law without ever considering, acknowledging, or noticing the law's basic values, or even postulating that it has any, even if the law itself consists of moral and political values in part.

Likewise, we could use a method that supposes and considers basic values to identify the law even if, as it turned out, the law itself does not include any basic values. But, pragmatically speaking, if our best theory of legal interpretation instructs us to consider basic values that seem to be part of the law and if our best understanding of what law is includes basic values, then each of these recommends the other. In other words, if the substantivist's metaphysics of the law holds, his interpretive method promises to be helpful; and if his interpretive method proves helpful, this bolsters his metaphysical claims.

Simon's account of substantive conceptions of law makes the Dominant View's jurisprudence into a closet substantive view. Since the Dominant View relies on a libertarian morality to explicate and justify both zealous advocacy and its legal limits, the Dominant View deviates from its own commitment to legal positivism (p. 43). Simon's argument allows us to extend to legal ethics the observation that, appearances notwithstanding, law is morally and politically value-laden — an observation made by legal realists and their intellectual descendants.

It follows from Simon's own critique of formalism that any theory that ties lawyers' ethics to the law is ultimately going to have to put something in the placeholder occupied by libertarianism in the Dominant View. If substantivism about law is right, then any ethical theory that requires lawyers to interpret or identify the law will have to take a position on the fundamental values that are part of the law on a substantivist view, or it will have to delegate responsibility for ascertaining those values to some other theory or authority and justify this assignment. Simon seems to choose the second path. Simon does not offer an extended account of the moral and political content of the law. Instead, he claims that the law's fundamental purpose is justice and he equates justice with legal merit. This allows him to argue that anybody able to reason accurately about justice or legal merit is an appropriate delegate for the task of filling in the law's substantive moral and political content (p. 51). Since lawyers are trained to reason about legal merit — if not justice — they are especially suited for the job.

By equating justice with legal merit, Simon could mean that whatever legal positions hold water under our actual legal rules and standards are consistent with justice. Or he could mean that whenever our legal rules and standards appear to permit positions inconsistent with the requirements of justice (as understood independent of the apparent legal merits), we have misunderstood the law and must correct our identification of legal merit. This descriptive equation of legal merit and justice is blatantly false. It cannot be that whatever our current law permits always coincides

with or constitutes justice. At any given moment in history, the law permits activities that run counter to our best and most deeply held ideas about justice. Examples of divergence abound. A tort regime that made it virtually impossible for injured, relatively poor workers to recover any damages from their negligent, relatively wealthy employers did not even comport with contemporary views about justice.¹⁴ A constitutional law that allowed, *under the Fourteenth Amendment*, race-based segregation struck even contemporary participants as unjust.¹⁵

It isn't that on occasion our ideas about justice could turn out to be wrong and the law's permissions just; it's that it seems utterly absurd to suppose that this could be the case on every occasion where law and justice seem to conflict. Most of the time, Simon himself appreciates the absurdity of the strong descriptive equation. Hence, he devotes a large portion of the book to justifying nullification, which he argues is not really nullification but, when done rightly, is correction of a misunderstanding of what the law is (pp. 86-98). If legal merit equals justice, and seemingly legal conduct is actually unjust, then nullification serves to realign law and justice, thereby replacing inauthentic law with the genuine article. Setting aside the worry that this conception of nullification makes it impossible to ever say that there is unjust law — because it seems that on this approach if putative law is unjust it is not really law — this conception of nullification presents a particular problem for Simon's Contextual View.

Remember: Simon maintains that lawyers are especially suitable delegates for the task of ascertaining the moral content of the law, because they are trained to identify positions with legal merit. But if genuine legal merit depends on an accurate understanding of justice, then lawyers are only especially good delegates if they are especially good at judging justice. Legal training could only make one especially good at this if the legal system in which one was trained did in fact overlap extensively with the requirements of justice, or if the style of legal thinking one learned was a style that was either the same as, or a useful contributor to, good reasoning about justice. I have already explained why we should seriously doubt that our current legal system overlaps justice thoroughly enough to assume that those well acquainted with the law are thereby well

14. See THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 286-302 (1992) (describing the common law doctrines preventing recovery: judicial and legislative efforts to modify these doctrines, which were only moderately successful; and the tepid administrative schemes meant to remedy the problem of workplace injury).

15. See *Plessy v. Ferguson*, 163 U.S. 537, 554-64 (1896), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (Justice Harlan arguing, in dissent, that Louisiana's race-based segregation laws were inconsistent with both guarantees of liberty and equality).

acquainted with justice. As for whether those skilled in legal analysis are thereby skilled in judging justice, at minimum, this is an open question. First, there is the issue of whether a method of thought learned with regard to a domain (law) that most probably deviates from justice at least sometimes is likely to be useful for reaching accurate conclusions about justice. Second, there is the problem that motivates Simon's book in the first place. Many lawyers seem to feel that what their jobs require of them is, at worst, inconsistent with justice and, at best, irrelevant to it (p. 1). They do not qualify this observation with the caveat that when they are engaged in pure legal deliberation — as opposed to, say, rainmaking or document handling — *then* they sense a convergence between lawyering and deliberating well about justice. This suggests that those most engaged in the practice of legal reasoning do not perceive themselves as especially well suited to the task of identifying the requirements of justice — the task the Contextual View assigns them.

Simon does not actually bluntly tell lawyers to figure out the just outcome in each matter in which they participate and then act accordingly. He recommends procedural guidelines to assist lawyers in deciding what justice requires of them in any given situation. Simon suggests these guidelines as antidotes to three tensions he claims recur in legal ethics problems (p. 139). One is the tension between substance and procedure, which "arises from the lawyer's sense, on the one hand, of the limitations of her judgment regarding the substantive merit of a matter and, on the other hand, of the limitations of the established procedures for determining the matter" (p. 139). Another is the tension between purpose and form, which arises because a lawyer deciding how she ought to act under the law can concentrate on the purely formal features of a legal rule or principle, or she can consider the purposes that underlie these features (pp. 144-45). Because formal and purposive interpretations of the same law do not always dictate the same conduct, the lawyer must mediate between the two when deciding what to do. The third tension is between broad framing and narrow framing. As Simon uses the term, framing is the description of the issue at hand (p. 149). Often, an issue and its resolution will look different depending upon whether we frame the issue with a few characteristics of the situation or with many (p. 149).

For each tension, Simon suggests a guideline for resolving it in particular situations:

- (I) To mediate between substance and procedure, the lawyer should ask herself whether she can count on the relevant procedures to achieve the correct substantive outcome. "[T]he more reliable the relevant procedures and institutions, the less direct responsibility the lawyer need assume for the substantive justice of the resolution . . ." (p. 140).

- (II) To reconcile form and purpose, the attorney should weigh the clarity and significance of the purpose against the formulaic requirements of the law. "[T]he clearer and more fundamental the relevant purposes, the more the lawyer should consider herself bound by them; the less clear and more problematic the relevant purposes, the more justified the lawyer is in treating the relevant norms formally" (pp. 145-46).
- (III) To decide which characteristics to include in her framing of an issue, the lawyer should respect three standards of relevance: (i) A consideration should be included in the frame if it fits the most plausible interpretation of a law's scope. If a law regulates narrowly, a lawyer should frame the issues that arise under it narrowly; if the law regulates broadly, the lawyer should frame it broadly (pp. 150-51); (ii) If a consideration is likely to have substantive practical influence on the resolution of a matter, then it should be included in the frame of the issue (p. 151); (iii) If a lawyer cannot competently handle an issue framed broadly — due, perhaps to limitations on her knowledge, skill, or resources — she should frame the issue more narrowly (p. 151).

These guidelines and the interrelationships between them raise myriad issues. Whatever else we may say about them, one thing is certain: they do not provide a lawyer with a substantive account of justice. Yet the first guideline — counseling a lawyer to deviate from unreliable procedures to achieve substantive justice — clearly presupposes that the lawyer can locate a substantive account. She needs contentful principles of justice to assess the overall reliability of the relevant procedures and institutions (do they usually achieve just results?) and to decide whether to trust these procedures and institutions in the instant matter (how likely is it that they will achieve the just result this time?).

The other two guidelines also presuppose that the lawyer possesses at least some features of a substantive account of justice. According to the second guideline, a lawyer should treat the law formulaically only to the degree that its substantive purposes are unclear. If we accept Simon's central jurisprudential assertion — that the law's fundamental substantive purpose is justice — then we have to accept that lawyers need to know something about the content of justice to judge when to interpret law more purposively, less formally. Simon never claims that every law's only purpose is justice, so it would not be right to say that the second guideline only has impact if a lawyer has a complete account of substantive justice in hand. The balance between purposive and formalistic interpretation could be struck according to the clarity and significance of a law's purposes other than justice. Nevertheless, because justice is

the most fundamental purpose of all law, according to Simon, uncertainty about substantive justice will always tilt the balance toward formalistic treatment — an odd result for a theory motivated by a rejection of formalism in legal interpretation.

The third guideline also implicates substantive justice. This guideline specifies three criteria of relevance to which a lawyer should refer when framing an ethical problem. The first standard of relevance says that the broadness or narrowness of frames should vary with the broadness or narrowness of the scope of the law involved in the problem. Ascertaining the scope of a law, however, generally requires understanding its purpose or animating values (again, a lesson of American Legal Realism, reiterated by contemporary scholarly descendants of that movement). If justice is always one of the purposes or basic values informing a law, an attorney cannot settle the scope of the law without some substantive conception of justice, and the way the law in question relates to achieving substantive justice. The second standard of relevance looks to the empirical difference a variation in frame would make to the resolution of the issue. Shifting the frame might prompt a lawyer to consider different laws possibly applicable to the situation. This potentiality could quickly push the lawyer into having to analyze the purpose, meaning, or reach of different laws in order to decide which ones apply under which frames. Once a lawyer must engage in this analysis she needs — again, according to Simon's view of the law — a substantive conception of justice. The third standard of relevance does not presuppose that a lawyer referring to it has a substantive conception of justice in mind. But it does seem to presuppose some substantive ideas about justice that Simon apparently holds but does not defend. This third standard directs a lawyer to narrow the frame of an ethical problem according to shortfalls in her knowledge or competence that would make it difficult to resolve the problem if it was framed more broadly. I do not find this advice intuitively compelling. It seems to tell a lawyer that it is always better to stick to her knitting in the face of uncertainty and scarce resources, rather than risk acknowledging a more serious ethical problem and bungling it. But this advice is only appealing if we think that lawyers should be consistently risk averse about attempting to achieve justice when their own knowledge and competence is limited. At first glance, this proposition does not seem obviously correct. It seems to depend upon a further claim about the relative merits of ambitious but botched ethical problem-solving versus a potential sacrifice of justice. Perhaps it also relies on a claim about the likelihood of bungling in the face of uncertainty and scarce resources. The first of these two claims is clearly a substantive moral claim that may belong within a substantive theory of justice, yet it is not a claim that Simon defends.

I do not fault Simon for propounding a theory of lawyers' ethics that a lawyer cannot use unless she possesses a substantive conception of justice. But a lawyer acting under the Contextual View will have to arrive at a substantive conception of justice somehow. Simon seems untroubled by this. Yet he ought to be concerned. It is hard to develop an acceptable — let alone a correct — conception of justice. Even if an attorney does not start from scratch, but instead decides to adopt a conception of justice from an established philosophical or religious tradition, it will be hard for her to select wisely and with full appreciation of an established conception's content.

Of course, this picture of an individual attorney surveying established conceptions of justice or carefully developing her own is rather fanciful, in any event. An attorney who approaches ethical problems according to the Contextual View is unlikely to have the time or training to select or work out a substantive conception of justice. She is much more likely to consult her intuitions about justice on a case by case basis. This scenario raises concerns about the soundness of the Contextual View when put into practice.

There are several potential pitfalls for an ethical regime that depends on decisionmakers unsystematically consulting their intuitions for its success. The decisions of such actors will only be as sound as their ethical intuitions. But one key motivation for developing any theory of ethics, including a theory of lawyers' ethics, is doubt about the soundness of decisionmakers' pre-philosophical intuitions. Such doubt becomes especially acute in contexts where a decisionmaker's instincts about justice might be distorted by self-interest or other morally irrelevant factors. Practicing attorneys operate in such a context. Both their livelihoods and their professional relationships can depend upon decisions they make about ethical problems. When one's position, income, or friendships can turn on one's ethical choices, it is hard to trust, and perhaps even to know, one's intuitions about justice.

CATEGORICAL PRECEPTS AND THE PROBLEM OF SPECIAL PLEADING

The Contextual View does not necessarily restrict an attorney to her own intuitions about justice as she decides what to do about an ethical problem. But Simon's absolute resistance to what he calls the "categorical" seems to inhibit him from advocating any more systematic conception of justice. Equally, it seems to lead him to oppose any ethical theory that concentrates on developing the outlook of lawyers so that we might have more confidence in the soundness of their untutored intuitions about justice.

Simon describes categorical decisionmaking and categorical norms as follows:

[B]oth the Dominant and the Public Interest views, for all the differences in their priorities, adopt a common style of decisionmaking that I call categorical. Such decisionmaking severely restricts the range of considerations the decisionmaker may take into account when she confronts a particular problem; a rigid rule dictates a particular response in the presence of a small number of factors. The decisionmaker has no discretion to consider factors that are not specified or to evaluate specified factors in ways other than those prescribed by the rule. [p. 9]

Categorical norms — like the all-but-absolute confidentiality guarantee and the Dominant View's general "arguably legal" norm — require simpler judgments based on a narrower range of factual considerations than do contextual norms. [pp. 69-70]

Simon also writes that "categorical norms require less demanding interpretive efforts than contextual ones" (p. 74); he claims that the legal "profession has promulgated an ideology, backed by disciplinary rules and sanctions, that mandates *unreflective, mechanical, categorical* judgment rather than practical reason" (p. 23; emphasis added). Simon argues that popular films such as *The Talk of the Town* and *The Man Who Shot Liberty Valance* reveal the stunted psyches of those lawyers "disposed to . . . categorical normative judgment" (p. 94). On Simon's interpretation, both films' main characters "exemplify rigidity associated with limited experience of the world. . . . Their rigidity takes two forms that the movies treat as analogous. One is sexual: they are awkward with women. The other is intellectual Their reverence for the law is sanctimonious and naïve" (p. 94). Simon adds:

[T]he movies see the disposition toward categorical judgment as a form of emotional and intellectual maturity. In this condition, people deny or shield themselves from the real world because they are afraid of its complexities and contradictions. Maturity involves acknowledging these complexities and contradictions by abandoning categorical normative judgment without becoming cynical. [p. 95]

All in all, Simon paints a complex picture of categoricity. It involves exceptionless rules that specify the circumstances of their own applicability. Somebody following such rules need not and may not exercise judgment about their applicability when the specified circumstances obtain. It conjures up timidity and immaturity analogous to — perhaps even connected to — sexual naïveté.

This is a somewhat idiosyncratic take on categoricity as a feature of ethical maxims. Kant famously introduced categoricity as a distinguishing feature of moral imperatives. But Kantian ethics certainly does not dismiss judgment from ethical thinking; Kant devotes careful attention to the nature and role of judgment in

practical reasoning.¹⁶ The categoricity Kant has in mind is not about rules having no exceptions or the irrelevance of the particular circumstances in which the agent applies them, it is about the nonexceptionalness of rational agents. That is, on a Kantian view, categorical maxims apply to all rational agents regardless of whatever else is true about them. A maxim may be finely honed to the particularities of a situation, but if it is the sort of maxim that applies to all rational agents and you are one such agent, then the maxim applies to you. Applicability in this sense means something quite specific. It means that the maxim is authoritative: you unconditionally ought to follow it.

I do not wholly embrace Kantian ethics. Even current neo-Kantian moral philosophers recognize Kant's obscurity when it comes to articulating maxims and testing them for universalizability.¹⁷ But these problems do not arise because of categoricity, in either Kant's or Simon's sense of the term. The fact that it is hard to judge what maxim applies to a situation or whether a maxim can be universalized without contradiction is completely separate from the maxim's authority (Kant) or context-insensitivity (Simon). Those who defend the unconditional authority of moral imperatives need not hold that these imperatives are easily ascertained or applied, nor that they must be couched in highly general terms. The sort of categoricity Kantians have in mind is neither oversimplistic rigidity nor blushing naiveté.

Simon himself never claims that the sort of categoricity he opposes is the Kantian sort. I have explained the difference between the two types of categoricity because I believe that Simon overlooks Kantian categoricity, perhaps due to his fervent hostility to the sort of categoricity he sees in the Dominant View. His understandable resistance to rigorous, simple-minded, ethical precepts seems to blind Simon to the need for normativity and specific guidance in a theory of practical ethics. Recall that Simon seems willing to trust individual intuitions about justice to guide attorneys deciding ethical problems. Before, I raised some general doubts about the reliability of such intuitions in that setting. Our examination of Kantian categoricity points to a further problem with this delegation of normative authority.

16. See IMMANUEL KANT, *CRITIQUE OF JUDGMENT* 15-17 (J.H. Bernard trans., Hafner Publg. Co. 1957) (1788); KANT, *CRITIQUE OF PRACTICAL REASON*, *supra* note 10, at 81-86 (discussing the operation of pure practical judgment); see also BECK, *supra* note 10, at 154-63 (explaining Kant's account of judgment in the *Critique of Practical Reason*).

17. See BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* 132 (1993) (noting "endless discussion about how or whether the [categorical imperative] works"); ONORA O'NEILL, *ACTING ON PRINCIPLE: AN ESSAY ON KANTIAN ETHICS* 41, 53-91 (1975) (discussing how to apply the categorical imperative).

Kantian categoricity prohibits ethical exceptionalism. It denies the special pleading people are so tempted to use to justify their own departures from moral standards they themselves would regard as operative. By delegating to individual intuition the job of identifying justice and its requirements, Simon invites just this kind of special pleading from lawyers facing ethical problems. If the point of the Contextual View is to license and encourage lawyers to respond to justice rather than to unduly rigid ethical precepts, the advocate of the Contextual View should take a substantive stand on justice. Otherwise, a system of hard and fast precepts might seem compelling, especially if such precepts had the effect of limiting the natural tendency toward ethical exceptionalism.

THE LIMITS OF JUSTICE

One last concern about the Contextual View: ethics is more than justice. If Simon is correct that the law's fundamental substantive purpose is justice, and this is law's only fundamental substantive purpose, then I doubt that the Contextual View can serve as a complete theory of lawyers' ethics. The Contextual View instructs lawyers confronted with ethical problems to be responsive to the law, which in the Contextual View ultimately amounts to being responsive to justice. But justice is only one ethical end or virtue among many. Kindness, benevolence, loyalty, and integrity are some of the others. It may well be that these values are not part of the law, but it seems strange to exempt lawyers from their commands. Requirements of justice can conflict with requirements of kindness, benevolence, loyalty, and integrity. This is not law's problem, but it is a problem for ethical theory, which aspires to deliver a comprehensive account of what people should do, especially in situations where genuine values or virtues push in different directions. A theory of lawyers' ethics should include this aspiration. If it does not — say, because it restricts the lawyer's ethical obligations to a concern for justice — it threatens to portray the ethical lawyer as a stunted or fanatical ethical actor, one who monomaniacally acts to achieve justice, regardless of sacrificing other values and virtues. This might be a slight improvement on the Dominant View, according to which the lawyer sacrifices every other value and virtue to a peculiarly limited kind of loyalty — fealty to the client. But it is equally ethically narrow-minded.

CONCLUSION

In the end, this review may demonstrate that the opinions of your admirers can be more of a pain in the neck than the views of your detractors. I learned a lot from *The Practice of Justice*; I enjoyed William H. Simon's intelligence, and his book inspired me

to think hard. What thanks does Simon get from such a reader? A request for a sequel, in which Simon specifies at least some substantive principles of justice lawyers ought to heed, and in which he explains whether, and if so why, justice should be the paramount consideration in lawyers' ethics.