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IN DEFENSE OF LAW *AND* MORALITY: WHY LAWYERS SHOULD HAVE A PRIMA FACIE DUTY TO OBEY THE LAW

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In this important essay,[1] William Simon continues and refines his attack on "categorical" legal norms.[2] This latest installment calls into question the categorical norm that has traditionally been the one relatively fixed star in the legal ethics universe: that zealous advocacy stops at "the bounds of the law."[3] He does so by reminding us that the ethical legitimacy of this traditional "boundary claim"[4] depends upon what we mean by "law."

Simon's argument is straightforward and compelling. He begins by asserting that the "Dominant View" of legal ethics defines law in narrow Positivist terms under which the jurisdictional "pedigree" of a legal norm determines both its validity and its relationship to other legal norms.[5] Given this definition, Simon argues that "we cannot provide plausible reasons why someone should obey a norm just because it is 'law'."[6] This is true because "law" is only morally attractive (as opposed to prag-

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1. William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217 (1996).

2. *See, e.g.*, William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993); William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) [hereinafter Simon, *Ethical Discretion*]; William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 [hereinafter Simon, *Ideology of Advocacy*].

3. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1994) (stating "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law"). As I explain below, the bar has never embraced this norm with quite the categorical fervor that Simon suggests. *See infra* notes 40-43 and accompanying text.

4. I have elsewhere called this standard assertion "the boundary claim." *See* David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 471 (1990).

5. Simon, *supra* note 1, at 220.

6. *Id.* at 217.

matically important) to the extent that it is associated with other legitimate social goods such as order, fairness, and democracy.[7] Because laws are often over- and underinclusive, Simon argues, legality does not consistently track any of these three values; in other words, there will be some circumstances in which breaking the law is more consistent with order, fairness, or democracy.[8] When this occurs, Simon asserts that no one has a moral obligation (not even a prima facie obligation) to obey the law because, by definition, the moral grounds for obedience do not apply.[9]

If, on the other hand, one adopts a "Substantive" conception of law under which the validity and importance of a legal norm is defined in terms of general principles that are "indissolubly legal and moral,"[10] then it is easy to see why everyone, including lawyers, has a moral obligation to obey the law. To a radical Substantivist, "[a]ny argument for disobedience to a particular command would also be an argument that the command was an incorrect interpretation of the law."[11] Although the Substantivist may still experience conflict over competing values (i.e., between deferring to democratically elected decision makers and fairness in the particular case), she will understand both sides of these conflicts as implicating "legal values."[12] Thus, whichever option she chooses, she will be obeying the law as she believes it should be interpreted.[13]

Simon does not go so far as to assert that lawyers should all become radical Substantivists.[14] Instead, he argues that, contrary to popular belief, versions of Substantivism are an accepted part of mainstream legal discourse in non-ethics-related areas of the law such as constitutional interpretation[15] and statutory nullification.[16] Applying these insights to legal ethics, Simon

7. *Id.* at 221.
8. *Id.* at 221-23.
9. *Id.* at 248.
10. *Id.* at 223.
11. *Id.* at 227.
12. *See id.*
13. *See id.*
14. *Id.*
15. *See id.* at 228-31.
16. *See id.* at 231-33.

concludes, provides a better account of how lawyers should behave than either the Dominant View or the contrasting vision that posits common morality as an external counterweight to the excesses of Legal Positivism.[17]

Bill Simon has influenced my own thinking about legal ethics more than almost any other author.[18] As a result, it should not be surprising that I find Simon's piece filled with important insights. Nevertheless, I do not share Simon's desire to replace the categorical command that lawyers obey the law with the equally categorical permission to interpret the law so that it inevitably produces morally correct outcomes.[19] Nor, in contrast to one of my other important mentors, David Luban, do I favor a "morality-morality description of professional ethics"[20] that defines the "natural law of lawyering" as being largely unconcerned with whether a given norm has been legally codified.[21] Instead, I want to defend an account of legal ethics that preserves a role for both law *and* morality in defining a lawyer's *professional*, as opposed to personal, responsibilities.

This brief Comment is not the place to offer a full defense of this thesis. Instead, I want to clarify my agreements and disagreements with Simon's, and to a lesser extent Luban's, important contributions to this debate.[22] Part I briefly sets out what I believe Simon is trying to accomplish by unsettling the boundary claim and how his goals relate to my own objectives for legal ethics. Although we share many methodological and normative assumptions, Simon and I focus on somewhat different concerns. In Parts II through IV, I explore how these differences affect three questions embedded within Simon's overall inquiry into

17. *Id.* at 244-47.

18. I am not alone in owing a debt to Simon's work. *See* David Luban, *Legal Ideals and Moral Obligations: A Comment on Simon*, 38 WM. & MARY L. REV. 255, 255 (1996) (acknowledging a similar debt to Simon's work). Indeed, it is fair to say that Simon's seminal article, *The Ideology of Advocacy*, launched the critical tradition in legal ethics against which every scholar must define herself. *See* Simon, *Ideology of Advocacy*, *supra* note 2.

19. *See* Simon, *supra* note 1, at 253.

20. Luban, *supra* note 18, at 264.

21. *Id.*

22. This is not the first time I have attempted this task. *See* Wilkins, *supra* note 4, at 505-15 (discussing Simon's *Ethical Discretion in Lawyering*).

whether lawyers should obey the law: (1) What is law?; (2) What is the moral force of whatever we call law?; and (3) What is the significance of professional role? Based on my answers to these questions, I argue in Part V that legal ethics should place lawyers under a prima facie duty to obey the law, and that the content of this duty should be determined by role-related criteria, as opposed to personal moral criteria. Common morality, therefore, enters the decision-making process as either a reason for overriding the prima facie obligation or as a ground for rejecting the role entirely.

I. WHY UPSET THE APPLE CART?

Simon begins by noting that the traditional claim that lawyers should not counsel or assist their clients in violating the law seems so obvious that few stop to question its validity.[23] Indeed, to the extent that commentators have criticized the boundary claim, they typically fault it for being underinclusive, i.e., for failing adequately to prohibit all of the things that lawyers should not do, rather than for being overinclusive in requiring that lawyers abide by all legal rules.[24] Why then does Simon want to problematize this mainstay of ethical decision making by suggesting that in some circumstances lawyers ought not to obey the law?

In his Comment to Simon's paper, David Luban suggests that the answer to this question can be traced to three themes that have been central to Simon's seminal contributions to legal scholarship in the fields of welfare reform and ethics: (1) the claim that legal ideals are transcendent and universal; (2) the

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23. Simon, *supra* note 1, at 217.

24. Critics have leveled two related charges. First, by using "law"—particularly *criminal law*, as specified in the exceptions to the confidentiality rules—as the defining factor, the boundary claim ignores the many ways in which actions can be legal but immoral nevertheless. David Luban has been the most influential proponent of this view. *See, e.g.*, DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 215 (1988) (explaining that the distinction between criminal and noncriminal action may not be relevant to "the morality of whistleblowing"). Second, the fact that many legal commands are vague, open ended, contradictory, or otherwise indeterminant renders legal boundaries subject to self-interested manipulation by partisan advocates and thus less constraining than they initially might appear. I have elsewhere argued in favor of this view. *See* Wilkins, *supra* note 4, at 478-84.

belief that formal categorical rules undermine these ideals by deflecting attention away from the substance of the ideals; and (3) the faith that professional discretion can better serve these ideals than either formalism or moralism.[25] In order to sharpen the distinction between Simon's premises and my own, I want to address the last two of these themes.

Simon's critique of the Dominant View of legal ethics is not simply that it promotes conduct that undermines transcendent and universal legal ideals. He also believes that the Dominant View is internally incoherent, even when taken on its own terms.[26] The Dominant View posits that lawyers should be amoral facilitators who give their clients access to the public good of law unfettered by the lawyers' own moral values.[27] This conception, Simon asserts, rests on assumptions about the determinacy of both law and client interests that simply are false.[28] Instead, Simon argues that lawyers inevitably shape their clients' understanding of legal norms whether they intend to do so or not.[29] By denying this reality, the Dominant View encourages lawyers to see themselves as both powerless to resist the most instrumentalist conception of law plausibly available to serve the client's interest, and morally blameless for whatever damage this conception brings to third parties or the legal framework.

Viewed from this perspective, situations in which a lawyer believes that *following* the law will produce injustice are particularly troubling. When this occurs, the Dominant View requires the lawyer to surrender her own ethical autonomy in order to

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25. *See* Luban, *supra* note 18, at 257-58.

26. *See* Simon, *supra* note 1, at 218.

27. For a defense of the "amoral" lawyer, see Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

28. *See* Simon, *Ethical Discretion*, *supra* note 2, at 1123-25.

29. *See* William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1102 (1994) (arguing that poverty lawyers "cannot avoid making judgments in terms of their own values and influencing their clients to adopt those judgments"); *see also* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988) (arguing that lawyers inevitably shape their clients' construction of their interests).

facilitate a result that disserves the fundamental goals that make the legal system legitimate in the first instance. Thus, despite the fact that Simon undoubtedly believes that lawyers ought to obey the law—even when understood in narrow Positivist terms—in many (and perhaps even most) situations, the *categorical* requirement to do so alienates lawyers from the very commitments to legality and justice that make professional life rewarding and important.[30]

Given this diagnosis, Simon's rejection of moralism as a solution to the problems created by the Dominant View is understandable. It is not simply, as Luban rightly points out, that Simon believes that the analytical tools of legal analysis "are typically thought more structured and grounded than popular moral discourse."[31] Moralism also fails because making, interpreting, and applying law is the central concern of the lawyer's professional role; it is that role—not the moral duties of ordinary citizens—that Simon is interested in explicating and preserving.

I share Simon's desire to create a morally attractive account of legal ethics that is grounded in the norms and practices of the lawyer's professional role.[32] Luban is correct that common morality stands as the ultimate judge of particular role-related actions as well as of the role itself. Nevertheless, collapsing professional ethics into personal morality misses something important. Lawyers are more than ordinary citizens; they have been given a monopoly by the state to occupy a position of trust both with respect to the interests of their clients and the public purposes of the legal framework. As a result, the kind of deliberation that may be appropriate in the realm of personal moral decision making will not always produce the social goods that society legitimately expects from a regime of professional ethics.[33]

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30. *See* Simon, *Ethical Discretion*, *supra* note 2, at 1144.

31. *See* Luban, *supra* note 18, at 265 (quoting Simon, *supra* note 1, at 247).

32. *See* David B. Wilkins, *Redefining the "Professional" in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 241.

33. *See* David B. Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics*, 108 HARV. L. REV. 458 (1994) (arguing that it

Moreover, collapsing personal and professional ethics underestimates the importance of having normative communities, like the bar, with their own traditions and values that can both stand as a counterweight to the power of the state and serve as a necessary arena for individual human flourishing.[34] To be sure, as Luban notes, discussions across professional boundaries are an important counterweight to professionals' natural tendency towards insularity.[35] But this truth should not obscure the fact that there is also an important role for developing communities that are dedicated to particular values and modes of thought that may not always be shared by those outside the particular community.[36]

Nor, as Simon insists, does defining legal ethics in terms of the lawyer's professional role imply that one must accept the

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is wrong to construct an account of professional deliberation from a model of personal moral deliberation).

34. *See* Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983); Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992); .

35. *See* Luban, *supra* note 18, at 266. I make a similar point in Wilkins, *supra* note 32, at 249.

36. Luban's example about the lawyer discussion group concerning the proposed suicide of a lawyer's gay clients illustrates the importance of both inter- and intraprofessional dialogue. *Id.* at 266-67. Luban correctly points out that the quality of the lawyers' decision making would probably have been improved had they consulted nonlawyers with experience in these sensitive matters. *Id.* at 267. That does not mean, however, that the issues that the lawyers actually discussed—i.e., whether the couple's conduct might run afoul of the assisted suicide law or whether the relevant rules require the lawyers to disclose the pact—were not also important. One of the things that clients legitimately expect from lawyers is the ability to counsel them on the basis of close readings of statutes and rules. Whether the suicide pact violated a criminal law against assisted suicide might plausibly have important consequences for the clients (e.g., what if the attempt failed—as most such attempts do; could the surviving partner be prosecuted?). More important, New Jersey's decision to reject the ABA's version of Model Rule 1.6 (making disclosure of future criminal acts that imminently threaten death or serious bodily injury discretionary) in favor of a regime of mandatory disclosure clearly underscores the state's substantive commitment to preserving life. *See id.* at 266 n.71 (discussing the New Jersey Rules of Professional Conduct). Certainly, a lawyer ought to think carefully about whether this duty applies before agreeing to undertake a representation that implicates such a strongly articulated public policy. Precisely because these are technical legal questions, they are more likely to be raised, debated, and seriously considered (even if they ultimately do not prove to be dispositive) in the context of a lawyer chat-line than in a general discussion group on suicide or AIDS.

Dominant View's understanding of lawyer professionalism. That view, as Simon rightly argues, encourages lawyers to adopt a narrow and instrumentalist conception of both the law and their clients' interests at the same time that it denies the role that lawyers inevitably play in shaping both of these factors.[37] A morally plausible account of legal ethics must therefore instantiate a more public-regarding conception of lawyer professionalism that reflects accurately the lawyer's discretionary power.

To acknowledge that lawyers inevitably exercise discretionary power, however, does not answer the question of whether legal ethics ought to incorporate rules that seek to shape how that discretion is used. Because both Simon and I are interested in fashioning a regime of professional ethics, we must justify the norms and practices we support in terms of ends that society legitimately expects the legal profession to serve.[38] These social goals, I believe, are unlikely to be served by the kind of discretionary regime Simon posits.

To see why this is so, we must return to Simon's definition of the problem. Simon implies that the major question for legal ethics regarding the relationship of lawyers to the law is that legal rules too often preclude lawyers from doing the right thing.[39] Simon overstates this effect in one important respect. Although the boundary claim instructs lawyers to abide by legal rules, the bar's official pronouncements urge lawyers to narrowly construe, and in some cases openly defy, interpretations of the law of lawyering by state actors that contradict the bar's own interpretation.[40] Thus, the bar takes the position that lawyers

37. *See* Simon, *supra* note 1, at 218-20.

38. *See* Simon, *Ethical Discretion*, *supra* note 2, at 1128 n.97 ("Although the discretionary approach is designed to safeguard the lawyer's ethical autonomy, it is principally concerned with those elements of her moral identity bound up with her commitment to the lawyering role and to the values of legal merit."); Wilkins, *supra* note 33, at 459 (arguing that when defining the ideals of the legal profession, the moral autonomy of lawyers must ultimately be subservient to the social goods produced by lawyers).

39. Simon, *supra* note 1, at 218.

40. *See* Koniak, *supra* note 34, at 1478-85; Susan P. Koniak, *When Courts Refuse To Frame the Law and Others Frame It to Their Will*, 66 S. CAL. L. REV. 1075, 1091-103 (1992) (cataloguing numerous instances in which the bar has instructed

may (and perhaps even *should*) refuse to comply with lower court orders requiring disclosure of information that the lawyer believes to be confidential, even in circumstances in which the clear weight of legal authority mandates disclosure.[41] Similarly, bar leaders continue to urge lawyers to defy an IRS regulation requiring lawyers to report cash payments by clients above a certain amount.[42] Given these examples, the command that lawyers "obey the law" is far less categorical than it might at first appear—particularly in circumstances in which a lawyer believes that state law threatens her ethical responsibilities as defined by the bar. As Simon and I have both argued with respect to the Kaye, Scholer case, a lawyer's defiance of the state's construction of legal rules in the name of "higher" principles such as confidentiality and client loyalty often produces severe negative consequences for third parties and the public at large.[43] At a minimum, this should lead us to question Simon's claim that lawyers are less willing to accept Substantivism in the field of legal ethics than in other areas.

Moreover, the bar's willingness to disregard state law when it conflicts with the bar's own view of legal ethics highlights a critically important aspect of this topic that Simon does not directly address: lawyers who routinely violate the law for self-interested reasons.[44] Thus, in addition to asking whether the boundary claim's categorical injunction to obey the law sometimes alienates lawyers from their professional commitment to justice, one must also consider whether drawing this bright

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lawyers to narrowly construe, challenge, or defy "state law" that contradicts the "bar's law") [hereinafter Koniak, *When Courts Refuse*].

41. *See* Koniak, *When Courts Refuse*, *supra* note 40, at 1102 (noting that numerous ethics opinions urge lawyers to resist court orders to disclose client names and the amount of fees paid by the client even though the overwhelming majority of courts reject the bar's claim that this information is privileged).

42. *See* Koniak, *supra* note 34 (describing the bar's resistance to this regulation).

43. *See* David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145 (1992); WILLIAM H. SIMON, THE KAYE, SCHOLER AFFAIR (1996) (unpublished manuscript on file with author).

44. I am grateful to Susan Koniak, who in her remarks at the W.M. Keck Foundation Forum on the Teaching of Legal Ethics at William & Mary, insisted that this fact must be at the center of any discussion about whether lawyers should obey the law. *See* Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1 (1995).

line around legal compliance helps to reduce self-interested law breaking by lawyers.[45] Simon correctly states that there is no inherent reason why discretionary norms will produce either more unacceptable lawyer conduct or less effective disciplinary enforcement than a more categorical system.[46] Nevertheless, from the perspective of a system designer,[47] there are good reasons to believe that under current conditions, Simon's proposal is likely to produce one or the other of these adverse effects. To understand why, it is necessary to examine how Simon's answers to the three questions implicit in the inquiry into whether lawyers should obey the law—the definition of law, the moral force of law, and the significance of professional role—are likely to affect the decision-making calculus of lawyers at both the "good faith" and the "self-interested" ends of the spectrum.

II. WHAT IS LAW?

Simon posits two characterizations of the law: narrow Positivism and Substantivism.[48] David Luban, in his Comment, suggests a third alternative: "wide positivism," under which one would be entitled to consider the purposes underlying legal commands when defining and interpreting law.[49] I believe that "wide positivism," or what Simon himself previously called "Purposivism"[50] provides a better account of what law means in our current culture than either narrow Positivism or Substantivism.

Narrow Positivism fails as both a descriptive and a normative

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45. *Cf.* LUBAN, *supra* note 24, at 34-35 (asserting that arguments about the moral obligation to obey the law must address both concerns about civil disobedience and self-interested law breaking).

46. *See* Simon, *Ethical Discretion*, *supra* note 2, at 1126-27 (arguing that although discretionary norms like "good faith" and "due care" may be more difficult to apply, they can be more restrictive than categorical norms because they allow the decision maker to tailor the enforcement effort directly to the purposes underlying the particular command).

47. *See* Wilkins, *supra* note 4, at 508-15 (discussing the difference in the considerations relevant to system designers and individual lawyers).

48. *See* Simon, *supra* note 1, at 220-27.

49. Luban, *supra* note 18, at 258.

50. *See* Simon, *Ideology of Advocacy*, *supra* note 2, at 62.

theory largely for the reasons Simon posits.[51] Descriptively, narrow Positivism cannot account for the fact that some things that have all the trappings of "law" (e.g., statutes against fornication) are widely considered to carry none of the moral force of law. Nor can narrow Positivism account for the gaps, conflicts, and ambiguities that render many legal commands indeterminant in the absence of some appeal to background norms and purposes. Normatively, narrow Positivism deflects attention away from the underlying values that make "law" more than the simple exercise of coercive force. When carried to the extreme, this orientation produces either blind obedience or the destruction of mutually beneficial cooperative schemes in an orgy of self-interested manipulation.[52]

Substantivism also fails at both the descriptive and normative levels. Descriptively, Substantivism ignores the fact, mentioned but then dismissed by Simon, that "for whatever reasons, people simply do regard the law as binding."[53] Thus, when people drive in excess of the speed limit, they do not generally consider that they have a "right" to drive faster than fifty-five miles per hour, or that the legal limit is really seventy miles per hour.[54] Instead, most people acknowledge that they are "breaking the law" when they drive seventy miles per hour even though they may also believe that the latter speed is the one better designed to promote the underlying values of safety and efficiency that speed limits are supposed to further.

The fact that most people actually view law as binding also underscores the normative dangers of Substantivism. By pointing to one of the most common and pernicious examples of nullification—the refusal of southern white juries to convict white people accused of crimes against blacks—Simon acknowledges the pernicious side of Substantivism: its tendency to "erode com-

51. *See* Simon, *supra* note 1, at 221-23.

52. As Robert Gordon has noted, if everyone really acted as though the law was nothing more than the cost of noncompliance discounted by the probability of enforcement, the social order quickly would collapse under the weight of either noncompliance or oppressive enforcement. *See* Gordon, *supra* note 29, at 20.

53. Simon, *supra* note 1, at 221.

54. *See id.* at 234 (discussing compliance with the speed limit).

mitments to a stable institutional structure.[55] He argues, however, that these dangers are often exaggerated. As proof, he points to the fact that driving (at least in most places) is not "anarchy" even though many drivers ignore the fifty-five miles per hour speed limit.[56] Nor did the Supreme Court's decision to "nullify" its prior understanding of the Fourteenth Amendment in *Brown v. Board of Education*[57] plunge the country into chaos. These examples, however, trade on the fact that most people do not operate on the Substantivist view that Simon advocates. The fact that safety improved even though many Americans did not decrease their rate of speed after the speed limit was lowered to fifty-five miles per hour is plausibly the result of the fact that drivers who are exceeding the posted limit are driving more carefully *precisely because they know that they are breaking the law* and therefore run the risk of being sanctioned. Similarly, one reason why the *Brown* decision did not plunge the nation into civil war[58] is because many Americans, including many politicians who vehemently disagreed with the decision (most notably President Eisenhower, who detested *Brown*),[59] believed that the ruling should be respected because it was the law.[60] To the extent that the motoring public or white Americans who disapproved of *Brown* adopted the kind of Substantivist stand towards law currently being espoused by those in the militia movement, the threat of anarchy would have been much more pronounced.[61]

More important, a functioning legal system should do more

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55. *Id.* at 227.

56. *See id.* at 234.

57. 347 U.S. 483 (1954).

58. Anyone who remembers Orval Faubus or George Wallace standing in school house doors to block the path of federal marshals attempting to integrate the schools in Arkansas and Alabama will recall how perilously close we came to such a confrontation.

59. Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A response to Professor McConnell*, 81 VA. L. REV. 1881, 1930 n.131 (1995).

60. For recent discussions of various aspects of *Brown* see Symposium, Brown v. Board of Education *After Forty Years: Confronting the Promise*, 36 WM. & MARY L. REV. 377 (1995).

61. For an excellent description of the militia or "Common Law" movement's disdain for state law and the potential consequences for our polity, see Susan P. Koniak, *When Law Risks Madness*, 8 CARDOZO STUD. L. & LIT. 65 (1996).

than protect against anarchy. Although theorists frequently exaggerate the extent to which legal rules actually produce the kind of objectivity, predictability, consistency, and accountability associated with "the rule of law,"[62] these values nevertheless constitute important aspirational goals. Despite the fact that it aims directly at achieving these ends, Substantivism, by removing boundaries between legal and moral decision making, is likely to underproduce important qualities associated with the rule of law.

Simon asserts that legal reasoning, although "loose," is "typically thought [to be] more structured and grounded than popular moral discourse."[63] Unlike Luban, I am inclined to agree with this assessment.[64] I suspect that this is true, however, because the conventions and practices of legal reasoning relegate the kind of broad, natural-law-based nullification arguments employed by Simon to a few, well-regulated areas of legal discourse. In each of the areas where Simon claims that nullification is considered a part of the law (as opposed to an act of conscientious objection *to* the law), the ground for treating the action as legitimate is plausibly linked to the special circumstances in which the act takes place. Thus, when Congress votes to ignore a specific constitutional provision,[65] a judge nullifies an outdated statute,[66] or a prosecutor refuses to bring charges on the ground that it would not serve justice,[67] each of these decisions has been made in such a manner that

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62. *See generally* Richard H. Fallon, *The Rule of Law As a Concept in Constitutional Discourse*, 97 COLUM. L. REV. (forthcoming Jan. 1997) (discussing the rule of law); Plato, *Crito*, *in* CIVIL DISOBEDIENCE: IN FOCUS 13 (Hugo A. Bedau ed., 1991) (discussing the importance of accepting legal judgments); Herbert J. Storing, *The Case Against Civil Disobedience*, *in id.* at 85 (cataloging the benefits of an accepted legal system).

63. Simon, *supra* note 1, at 247.

64. *See* Luban, *supra* note 18, at 265. Like Luban, however, I also believe that moral reasoning is more grounded than Simon, and most other legal scholars, appear to believe. In any event, my reason for preferring legal reasoning to moral reasoning has more to do with my interest in defining an account of legal ethics that is connected to the lawyer's professional role than it does to any claim about the relative determinacy of these two discourses.

65. *See* Simon, *supra* note 1, at 230-31 (discussing the Emoluments Clause).

66. *Id.* at 231 (discussing statutory nullification).

67. *Id.* at 226 (discussing prosecutorial nullification).

the decision maker's interpretive choices are on the record and subject to review. Similarly, jury nullification is tightly constrained both procedurally and substantively.[68] Proposals to liberate it from these constraints—particularly those that arguably seek to accomplish this goal by covert manipulation—are generally greeted with alarm.[69] Even the civil disobedience of the 1950s and 1960s, frequently cited by Simon as a shining example of Substantivism,[70] was subject to the constraints of publicity and accountability. Whether marching without a permit or sitting at a segregated lunch counter, Martin Luther King, Jr. and his compatriots believed in openly defying what they considered to be unjust laws and subjecting themselves to judgment from both the courts and the court of public opinion.[71]

Simon acknowledges the importance of publicity and accountability, but argues that "the Substantivist is open to considering that these institutional values, even where present, might be outweighed by competing values."[72] This, however, conflates the moral weight of law with the definition of law. As I argue in the next section, there certainly will be circumstances in which legal and moral concerns, separate and apart from considerations of publicity and accountability of the interpretive process, will counsel against obeying the law. Nevertheless, in order to decide what the law *is*, we must first agree on a set of evaluative criteria. Those criteria, in turn, must be defined in terms of the conventions of the practice—legal reasoning in this case—that give meaning to the enterprise. Legal reasoning confines arguments about nullification to certain spheres of

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68. *Id.* at 225-26 (discussing jury nullification).

69. *Sixty Minutes* anchor Mike Wallace's incredulous reaction to Professor Paul Butler's proposal that black juries should refuse to convict black defendants who are legally guilty of nonviolent crimes typifies the public's response. Interestingly, Professor Butler does not dispute that these defendants are "legally" guilty even though he believes that the jury should nullify their convictions. *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

70. *See* Simon, *supra* note 1, at 223-34.

71. *See* Martin Luther King, Jr., *Letter from Birmingham City Jail*, *in* CIVIL DISOBEDIENCE: IN FOCUS, *supra* note 62, at 72.

72. *See* Simon, *supra* note 1, at 241.

legal decision making. To do otherwise, as Simon's argument amply demonstrates, threatens the very integrity of the practice as a whole.

Martin Luther King, Jr.'s brilliant *Letter from Birmingham City Jail* captures the importance of the limitations imposed by the conventions of a practice.[73] King made two different arguments—directed at two different interpretive communities—in defense of his decision to violate the Alabama state court's injunction prohibiting him from marching without a permit, and more generally to challenge southern segregation laws.[74] The first, directed to the ministers and other religious leaders who chastised his actions in the *New York Times*, was that Jim Crow laws were not deserving of respect because they conflicted with "God's Law."[75] This argument, and his supporting references to the Bible and other religious sources, fell squarely within the interpretive traditions shared by King and his religious interlocutors. In this tradition, "God's law" is jurisdictionally superior to state law.[76] King recognized, however, that these same arguments would not be appropriate for a secular audience. He therefore defended his actions to secular readers on the ground that segregation laws were morally repugnant because they made difference legal, and that his violation of their prescriptions was done "openly," and "lovingly," with the full intention of taking whatever consequences that the law required.[77] Nowhere did King assert that these prescriptions were not state (as opposed to God-given) law. Instead, he argued that the laws were *evil* and should therefore be disobeyed but in a way that showed proper deference to the fact that they were law.[78]

Neither narrow Positivism nor Substantivism, therefore, pro-

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73. *See* King, *supra* note 71.
74. *See id.* at 77-78.
75. *See id.*
76. *See id.*
77. *See id.* at 78.
78. *See id.* at 78-79. Indeed, in Henry Hampton's award winning documentary *Eyes on the Prize*, Andrew Young stated that Martin Luther King, Jr. defied the court's order in *Walker* precisely so that he could be arrested and join his followers in jail. According to Young, this was the true beginning of King's leadership. EYES ON THE PRIZE (PBS 1986).

vides an adequate definitional account of law. Instead, in order to both account for the ordinary understanding of "law" and to facilitate the development of a legal system that promotes the values of order, fairness, and democracy, the definition of law can neither be severed from these underlying values nor subsumed within them. Purposivism aims at providing such an account. Briefly, Purposivism insists that legal rules must be interpreted in light of the purposes or social functions that the law is designed to serve.[79] These purposes, in turn, must be defined against the backdrop of practices and conventions that make legal analysis moderately, as opposed to radically, indeterminate.[80] Central to this practice is "a moral commitment to the rule of law itself, to government according to general laws, impartially and equally administered."[81] This allegiance includes a commitment to regard government commands, enacted according to established legal processes, as presumptively "law." A Purposivist always is open to the possibility that what at first appears to be the law may in fact not be entitled to this designation. Examples of this situation include: when a literal reading of the law would undermine its intended purposes; when the enforcement agency actually wishes to induce something less than perfect compliance; or when changes in social conditions have sapped the command of a law's legitimate authority. A Purposivist, however, is committed to reaching judgments about the authority of law on the basis of interpretive arguments that are appropriate to the time and place where the decision will occur.

As I will argue below, it is this commitment to using interpretive norms that are appropriate to the circumstances of the particular case that underscores the importance of professional role. Before reaching this issue, however, it is first necessary to say something about what happens when a Purposivist decision maker concludes that a given legal command is both legal and immoral.

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79. For a more detailed account of Purposivism, see Gordon, *supra* note 29, at 23-24.

80. *See* Thomas D. Morgan & Robert W. Tuttle, *Legal Representation in a Pluralist Society*, 63 GEO. WASH. L. REV. 984, 1018 (1995); Wilkins, *supra* note 4, at 496-99.

81. Morgan & Tuttle, *supra* note 80, at 1020.

III. THE MORALITY OF LAW

There are three possible answers to the question of whether citizens have a moral obligation to obey the law: that they have an absolute obligation; that they have only a prima facie obligation; or that they have no obligation whatsoever.[82] Simon argues as if the Dominant View of legal ethics incorporates the first answer by placing lawyers under a categorical duty to pursue any client objective that satisfies the minimal test of legality from the perspective of narrow Positivism.[83] Although some theorists appear to take this view,[84] Simon's characterization overstates the traditional model's approach to lawyers who morally disapprove of their client's goals.

The Model Rules make clear that a lawyer is free to decline representation (or to resign, providing this can be accomplished without prejudicing the client) if the client seeks to pursue an objective that the lawyer finds morally offensive.[85] Once representation commences, however, a lawyer risks both professional discipline and malpractice liability if, without the client's consent, she fails to pursue the client's legal objectives by all legally available means. Nevertheless, not even the most ardent defenders of the Dominant View of legal ethics, or of Positivism more generally, believe that either lawyers or citizens are under an absolute moral obligation to obey the law no matter how evil or corrupt. Certainly since Nuremberg, the argument that "I was just following orders" has lost any shred of ethical legitimacy. The real question, therefore, is whether there is a prima facie duty to obey the law, and if there is, how this obligation should be defined.

Over the years, theorists have posited a number of arguments

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82. In passing, Simon notes a fourth possibility: that one ought categorically to *disobey* the law. Simon, *supra* note 1, at 221. He then concludes, "hardly anyone has ever asserted such a position." *Id.*

83. *Id.* at 247.

84. *See, e.g.*, Pepper, *supra* note 27, *passim* (arguing that lawyers should only refuse to pursue a client's legal objectives in extraordinary circumstances).

85. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1994); *see also* Charles Fried, *The Lawyer As Friend: The Moral Foundation of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) (arguing that lawyers have the right to refuse to represent clients with whom they disagree).

for why citizens are under a prima facie duty to obey the law.[86] I will not reiterate these reasons here. Suffice it to say that I believe that a combination of the following reasons persuasively establishes that a prima facie duty to obey the law does, in fact, exist: the fact that legal and moral norms often overlap; the need for an ordered society to enact morally neutral coordinating rules (such as driving on the left or right side of the road); the common intuition that disobeying the law frequently connotes disrespect for fellow citizens; and the importance of collectively supporting just institutions by presumptively obeying the laws these institutions create.[87]

Although Simon specifically disavows these arguments, his actual account of how a Substantivist would go about determining whether to follow an arguably over- or underinclusive rule incorporates a set of presumptions about the normal functioning of institutions and rules that comes close to establishing a general presumption in favor of complying with at least some legal commands.[88] Thus, Simon contends that it is incorrect to accuse Substantivism of ignoring the values of relatively centralized and institutionalized legal decision making.[89] To the contrary, a Substantivist will take these issues into consideration while she simultaneously willingly considers "that the general association between legislative and judicial processes and the values of notice, democracy, and decisional quality may not hold in the

86. *See generally*, LUBAN, *supra* note 24, at 31-49; Morgan & Tuttle, *supra* note 80, at 1002-120.

87. Simon argues that all of these arguments fail because their proponents cannot show that "[f]irst, . . . the jurisdictional principles that define the law constitute a process that is intrinsically just, . . . and therefore entitled to presumptive respect. Or . . . that as a matter of fact the law . . . process is usually just." Simon, *supra* note 1, at 248. Once we understand law in Purposivist (as opposed to narrow Positivist) terms, these objections are diminished substantially. In deciding what the law is, a Purposivist must consult the policies and values underlying a given legal command. This process will reduce the number of laws that fail to promote legitimate schemes of social cooperation by eliminating literalistic interpretations that undermine a given law's legitimate social purposes. In a society such as the United States that is tolerably just and democratically accountable, it is reasonable to conclude that, in the absence of evidence to the contrary, obeying the laws is presumptively necessary to maintain these tolerably just institutions.

88. *See id.* at 239-41.

89. *Id.* at 240-41.

particular case."[90] As a conceptual matter, it is hard to separate this style of reasoning from David Luban's view that the prima facie obligation to obey the law is overridden if the decision maker offers a reason "based on more than self-will, self-interest, or caprice for disobeying the law."[91]

The real question for Simon, Luban, and me is the weight that will be attached to these background presumptions. Both Simon and Luban suggest that the answer is: "not . . . very much."[92] Indeed, Luban suggests that when the law is "wrong, stupid, or unfair, or there [are] extenuating circumstances in the particular case," the prima facie obligation to obey the law is not only overridden, but was never actually formed at all.[93] I believe that this understates the legitimate moral respect that the law should receive.

Consider the following example described by Luban:

> Drunken teen-agers smash fourteen six-packs of Heineken's empties on your street, making it impassible for autos. Your neighbors grab rakes, shovels, and brooms, and clean up the glass; you sit on your front porch (meditatively downing a nice, frosty Heineken's) and watch them. As soon as the glass is gone, you climb into your car and drive off into the sunset.[94]

Luban argues that the neighbors' efforts constitute the kind of socially beneficial cooperative scheme that would normally create a duty to reciprocate by doing your fair share. He goes on to contend, however, that if you have a good reason for not participating, for example, because you are home alone minding your baby, that you have no obligation—not even a prima facie obligation—to cooperate.

This solution fails to give the cooperative scheme (or the neighbors) its (or their) full respect. To say that the person minding the baby is under no obligation whatsoever to cooperate

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90. *Id.*; *see also* Simon, *Ethical Discretion*, *supra* note 2, at 1098 (arguing that the discretionary approach contemplates that lawyers will adopt "weak presumptions" in favor of the reliability of relevant institutions and procedures).

91. LUBAN, *supra* note 24, at 47.

92. *Id.* at 46.

93. *Id.* at 46-47.

94. *Id.* at 39-40.

implies that he or she has no duty to try to find other ways to assist the cooperative scheme, for example, by offering to provide refreshments or perhaps agreeing to take a leading role at some later date. This is important because, as will often be the case in generally beneficial schemes of social cooperation, individuals frequently have plausible grounds for claiming that they should be exempted from their obligation to participate. Although Luban rightly insists that these reasons cannot be self-interested, the line between "self" and "other" in this context is likely to be difficult to draw—particularly in light of the fact that, at least in the first instance, individuals will be weighing the bona fides of their own moral conduct.[95] Given that socially beneficial schemes of this kind depend primarily upon voluntary cooperation, one can make a strong argument that conceiving of the prima facie duty as a rebuttable presumption, as opposed to an obligation that does not even arise when there is a good moral reason for disobedience, is likely to place these fragile schemes on a firmer foundation.

Indeed, I would go so far as to argue that much like the "moral remainder" that constitutes the moral claim of a course of action that, all things considered, it is nevertheless right to reject, the prima facie obligation to obey the law continues to exert moral force even after it is overcome.[96] Thus, in cases like Luban's beer bottle example, I believe that any person claiming an exemption based on exigent circumstances should consider herself under a heightened moral obligation to assist in the long-term system of neighborly cooperation in the future. Even in cases where noncompliance is justified because the law is, in

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95. Thus, imagine that one of the other neighbors was a chief negotiator for the FBI's counterterrorism unit and that he was expecting a phone call that might produce a break in a hostage crisis. What about another neighbor who is worried that if she takes the time to participate in the clean-up she may be fired from her job for not showing up on time?

96. *See* JAMES F. CHILDRESS, MORAL RESPONSIBILITY IN CONFLICTS: ESSAYS ON NONVIOLENCE, WAR, AND CONSCIENCE 55, 69-70 (1982) (discussing "moral traces," or residual effects); Bernard Williams, *Ethical Consistency, in* MORAL DILEMMAS 115 (Christopher W. Gowens ed., 1987) (discussing moral remainders). For a defense of this concept in the field of legal ethics, see Morgan & Tuttle, *supra* note 80, at 1000; David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1059-60 (1995).

Luban's terms, "immoral, unfair, or grossly stupid"[97] the prima facie duty to obey the law still ought to have continuing significance. As Martin Luther King, Jr. argued, those who disobey the law on the grounds that it is morally wrong should be careful to do so in ways that do not undermine the moral force of law generally.[98] Moreover, those who refuse to comply with morally unacceptable laws ought to view themselves as under some duty to try to change those laws (subject, of course, to their ability to do so), or at least to publicize the laws' defects so that others can try to change them.

This last point suggests that the prima facie obligation to obey the law should have a special significance for lawyers. As the "social curators of . . . legalism"[99] lawyers have always presented themselves as having a special responsibility to support legally sanctioned schemes of social cooperation and to ensure that the law remains an instrument of justice. To assess the strength of these arguments, we must turn our attention to the moral significance of professional role.

IV. THE IMPORTANCE OF ROLE

Notwithstanding the title to his paper, very little of Simon's argument hinges on claims that are unique to lawyers. Essentially, Simon argues that lawyers do not have a categorical duty to obey the law because no one is under such an obligation.[100] Moreover, to support his argument about legal ethics, Simon makes frequent comparisons to the acceptance of Substantivist principles in the decision making processes of other legal actors such as judges, jurors, legislators, and public prosecutors.[101] By so doing, he hopes to reduce the distance between the styles of deliberation accepted in these domains and the ethics of lawyers.

I have argued elsewhere at some length that conflating the jurisprudential styles of lawyers and judges is a mistake.[102]

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97. LUBAN, *supra* note 24, at 45.

98. *See* King, *supra* note 71, at 78-79.

99. *See* Gordon, *supra* note 29, at 24.

100. *See* Simon, *supra* note 1, at 236-39. Luban concurs in this view. *See* Luban, *supra* note 18, at 259.

101. *See* Simon, *supra* note 1, at 224-26.

102. *See* Wilkins, *supra* note 4, at 475-78. Indeed, it is never appropriate to as-

Our acceptance of discretionary judgment on the part of judges and other public officials is inextricably intertwined with the institutional checks and balances within which this discretion is exercised. Lawyers, on the other hand, operate in a world of legally and constitutionally sanctioned secrecy. Consequently, in order to establish a meaningful precedent, arguments for extending the discretionary power of judges and other legal actors to lawyers must be accompanied by proposals to replicate some of the legal and institutional checks and balances governing judges to this new context. In the last section of this paper, I propose that we ought to do just that.

Before embarking on this task, however, it is important to emphasize two characteristics about the legal profession that, when taken together, suggest that lawyers stand in a different relationship to the duty to obey the law than do either citizens or other legal actors.

First, unlike ordinary citizens, lawyers have expressly promised to obey the law. Virtually every lawyer takes an oath to support and defend the law as a condition of gaining admission to the bar.[103] By expressly undertaking this commitment, lawyers have entered into a voluntary agreement with society that, like any other promise, has independent moral weight.[104]

Simon and Luban might contend that there is a simple solution to this problem: either stop requiring that lawyers make this promise, or reinterpret this commitment to require only that lawyers obey the law when doing so furthers the underlying goals of the legal system.[105] Although both these proposals

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sume that all *judges* ought to share the same jurisprudential philosophy. As Sanford Levinson has cogently argued, even if originalism is an appropriate judicial philosophy for a Supreme Court Justice, the orderly functioning of the legal system depends upon lower court judges assuming a "remarkably positivistic" stance toward constitutional interpretation. Sanford A. Levison, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 851 (1993). Levinson therefore concluded that "the meaning assigned to the notion of 'constitutional interpretation' is interpreter-relative." *Id.*

103. *See* Morgan & Tuttle, *supra* note 80, at 1004 & n.103 (documenting this requirement).

104. *See* KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 78 (1987); Morgan & Tuttle, *supra* note 80, at 1004-05.

105. *Cf.* Luban, *supra* note 18, at 259 (advocating that various ethics rules prohibiting lawyers from either violating legal rules or counseling or assisting law breaking

would change the terms of the debate, they would not negate the claim that lawyers have a contractual obligation to obey the law that is higher than that of an ordinary citizen.

Even if no individual lawyer promised to obey the law, the regulatory structure that permits lawyers to exercise rights and privileges unavailable to ordinary citizens rests on an implicit commitment to legality emanating from the profession as a whole. Lawyers are given access to virtually every aspect of the legal framework. In addition, they receive special permission to engage in conduct (for example, keeping client confidences or helping known-to-be-guilty clients avoid punishment) that would subject ordinary citizens to sanction. In return, society has the right to expect that lawyers will not abuse their power "so as to subvert and nullify the purposes of the rules."[106] The common claim that lawyers are officers of the court—whether they want to be or not—is a reflection of this implicit social bargain. To be sure, this obligation to legality should be understood in Purposivist, as opposed to narrowly Positivist terms. As we have seen, however, this construction does not license the full range of interpretive tools contemplated by Simon's strong commitment to Substantivism.

Luban concedes that lawyers are situated differently from ordinary citizens.[107] In his view, however, this counts as a reason why lawyers should be under a less stringent obligation to obey the law.[108] "[B]ecause lawyers are often better positioned than nonlawyers to realize the unfairness or unreasonableness of a law, lawyers often should be among the first to violate or nullify it, or to counsel others that it is acceptable to violate or nullify it."[109] This brings me to the second ground for separating the obligations of lawyers from those of ordinary citizens.

Luban's argument underscores the fact that law breaking by lawyers will often produce different consequences than similar

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by their clients should be rewritten to provide an express exemption for conscientious objection).

106. Gordon, *supra* note 29, at 23.

107. Luban, *supra* note 18, at 5.

108. *Id.* (arguing that he draws "the opposite conclusion" from the ABA's assertion that lawyers should especially respect the law).

109. *Id.*

conduct by nonlawyers. Luban rightly calls our attention to the fact that a lawyer's unique skill and training make her well-positioned to contribute to the development of the legal framework by identifying laws that either poorly serve their intended purposes or conflict with other important moral or legal values. It is largely for this reason that the ethics rules encourage lawyers to engage in law reform activity.[110] By the same token, however, noncompliance by lawyers is likely to have larger negative consequences than similar actions by clients. Given their status as knowledgeable insiders, lawyers have a greater ability to avoid the kind of checks and balances that either constrain or legitimate law breaking by ordinary citizens. Moreover, the attitudes that lawyers convey about the law are likely to rub off on their clients, thereby multiplying the effects of lawyer noncompliance.[111] Even nonclients are likely to pick up important messages about the appropriate moral standing of law from the conduct of lawyers.[112]

Luban points out that all of these multiplier effects are beneficial if we assume that the lawyer has reached a correct determination about the moral or legal validity of the command she has decided to violate. This, of course, will not always be the case. Moreover, even if society approves of the grounds on which a particular lawyer has acted, there is no guarantee that those who are inspired by that lawyer's example will reach similarly good judgments.

None of this should be taken to imply that the unique position occupied by lawyers places them under an absolute duty to obey every legal command. Lawyers—like citizens—are under only a prima facie obligation to obey the law. The content of that prima

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110. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 ("A Lawyer Should Assist in Improving the Legal System").

111. *See, e.g.*, Gordon, *supra* note 29, at 29 (arguing that lawyers who treat the law in cynical terms are likely to encourage their clients to do so as well); Pepper, *supra* note 27, at 624-28 (discussing the problem of legal realism).

112. Consider, for example, how the public would react to the news that lawyers were not only speeding more than the general public but were also, because of their superior knowledge of the traffic enforcement system, getting away with it more. *Cf.* N.J. LAW., Feb. 19, 1996 (quoting a spokesman for the House Ways and Means Committee justifying legislation to tighten IRS controls on lawyers on the view that "attorneys are not subject to the same scrutiny as other Americans are").

facie duty, however, must respond to the distinctive character of the lawyer's role. I close by briefly setting out how one might go about defining the scope of this duty and separating it from the prima facie duty owed by other legal actors and by ordinary citizens.

V. IN PRAISE OF LAW AND MORALITY

A full account of a lawyer's prima facie obligation to obey the law is beyond the scope of this Comment.[113] The above analysis suggests that any plausible account must take account of the following arguments.

First, a Purposivist redefinition of the boundary claim must make law and morality separate, but nevertheless independently important, parts of a lawyer's ethical decision making. As I indicated above, Simon and I agree that allegiance to legal values is at the core of the lawyer's role. Once we reject radical Substantivism, however, it is clear that simple allegiance to "law" will sometimes involve the lawyer in immoral conduct. Moral argument across professional boundaries, as Luban suggests, provides the key to showing lawyers how to avoid or, if necessary, cope with these situations.

Second, decisions about how to balance the conflicting demands of legality and morality must pay careful attention to context. For example, as I have argued previously, lawyers representing a federally insured savings and loan ought to take a different stand toward discovering and applying the law than lawyers who represent indigent criminal defendants.[114]

Third, lawyers who disobey the law on moral grounds have an ethical obligation to replicate, to the extent possible, some of the institutional checks and balances that legitimate conscientious objection in other arenas. Two of the most important of these legitimating principles are candor and publicity. Consider the following scenario, loosely based on a recent incident involving two District Attorneys in New York state.[115] True to his cam-

113. For a thoughtful example of such an attempt, see Morgan & Tuttle, *supra* note 80.

114. *See* Wilkins, *supra* note 43, *passim*; David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992).

115. *See* Karen Friefeld, *Just Do Job: Rudy Goads DAs Wary of Death Penalty*,

paign promises, the new Governor of New York recently signed into law a statute authorizing capital punishment. Both District Attorneys are morally opposed to the death penalty. One District Attorney publicly declares that he will refuse to seek the death penalty in any case—even in cases in which it is clearly called for under the newly mandated criteria—on grounds of both legal merit and morality. The second District Attorney, although also having decided that he will never seek the death penalty for reasons similar to those articulated by the first DA, simply states that he will review each death penalty decision on a case-by-case basis, correctly perceiving that his commitment never to invoke the new statute will be more difficult to detect and sanction than his colleague's open defiance. In my judgment, so long as we assume that we are living in a tolerably just world in which the commands of the legislature are entitled to presumptive weight,[116] the first District Attorney has acted more ethically than the second.

Finally, any plausible account of legal ethics must address lawyers at all points along the "good faith" spectrum. System designers must anticipate the degree to which the combination of broad discretionary norms coupled with inadequate enforcement might encourage lawyers to engage in even more self-interested manipulation of legal rules. Although every system of legal regulation depends substantially on a measure of voluntary compliance, it is only by facing up to the most banal—and undoubtedly the most common—examples where lawyers fail to obey the law that we can create an understanding of legal ethics

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NEWSDAY, Mar. 9, 1985, at A5; Gene Mustain, *DAs Oppose Capital Punishment*, DAILY NEWS (New York), Mar. 8, 1995, at 5.

116. This caveat is important. If, for example, we imagine district attorneys acting in Nazi Germany, open defiance (with its predictable consequences) would probably not be the ethically correct response. Undoubtedly, some will argue that given racial and economic discrimination in the administration of the death penalty, the situation described in the text is perilously close to the example of Nazi Germany. Despite being a death penalty abolitionist, in part because of its racially and economically discriminatory application, I do not share this view. For those who do, however, their concerns constitute a moral argument for rejecting not only the duty of candor on the part of the DA, but also any allegiance to the law of New York (or at least that part of the law that pertains to the death penalty). Suffice it to say that such a complete rejection of the laws of the state requires a high level of justification.

that promotes the goals that Simon, Luban, and I all seek to achieve.