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# LEGAL IDEALS AND MORAL OBLIGATIONS: A COMMENT ON SIMON

DAVID LUBAN\*

Since I began to work on legal ethics seventeen years ago, I have admired and more than occasionally appropriated Bill Simon's work. Before assuming the commentator's customary role as critic, I want to begin by placing Simon's paper<sup>1</sup> in the larger context of the extraordinary body of work he has produced since he published *The Ideology of Advocacy* in 1978.<sup>2</sup> I then turn to some points of difference between us.

## I

One should read Simon's writings on legal ethics side-by-side with his papers on the welfare system.<sup>3</sup> I understand both bodies of work to be elaborate arguments about the constructive use of professional power. Broadly speaking, Simon writes from the perspective of critical legal theory,<sup>4</sup> which often exhibits a reflexive mistrust of power hierarchies.<sup>5</sup> Simon's posture, however, is that of a sympathetic critic of the critics. He argues that there is actually no such thing as a nonhierarchical relationship between professionals and clients for us to aim at even as an

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

2. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

3. See, e.g., William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985) [hereinafter Simon, *Welfare Rights*]; William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983) [hereinafter Simon, *Welfare System*].

4. See, e.g., Simon, *Welfare System*, *supra* note 3, at 1232-33.

5. See *id.*; Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 208-11 (1984).

ideal, and that efforts to curb the power of professionals often backfire. For example, welfare-rights lawyers who were suspicious of paternalistic social workers delivered welfare clients from the social workers' hands into the considerably less sympathetic hands of clerks and bureaucrats.<sup>6</sup> In a 1980 paper, Simon argued that progressive lawyers and clinicians who tried to bridge the power-gulf between lawyers and clients by teaching lawyers to focus on their clients' feelings simply substituted a formalism of feeling for a formalism of doctrine—in both cases, at the expense of a genuinely political vision of legal practice.<sup>7</sup> Elsewhere, Simon has argued that theorists who criticize lawyer paternalism in the name of client autonomy overlook the fact that it is the lawyer who often constructs client autonomy, no matter how hard the lawyer tries not to influence the client's choices.<sup>8</sup> More recently, Simon has criticized progressive lawyers who insist on giving deference to client groups.<sup>9</sup> In his view, these theorists overlook the "Dark Secret of Progressive Lawyering . . . that effective lawyers cannot avoid making judgments in terms of their own values and influencing their clients to adopt those judgments."<sup>10</sup>

It is within this context that we should read *The Ideology of Advocacy*,<sup>11</sup> *Ethical Discretion in Lawyering*,<sup>12</sup> *The Ethics of Criminal Defense*,<sup>13</sup> and the present paper. In much the same way that poverty lawyers sometimes make a fetish of transfer-

6. See Simon, *Welfare System*, *supra* note 3, at 1214-16 (summarizing the shift of responsibilities from professional social workers to clerical workers in the administration of Aid to Families with Dependent Children). The lawyers also constructed a less-subtle jurisprudence of welfare rights than that developed by social workers in the 1930s and 1940s. See Simon, *Welfare Rights*, *supra* note 3, at 1.

7. See William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487 (1980).

8. William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 217 (1991).

9. 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 (1994).

10. *Id.* at 1102.

11. Simon, *supra* note 2.

12. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

13. William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993).

ring discretion from the lawyer to the subordinated client,<sup>14</sup> the zealous advocacy model of mainstream legal ethics insists that lawyers have no discretion to deviate from their clients' instructions except by resigning. The reasons behind both of these no-discretion models, according to Simon, are almost invariably formalistic. By this, Simon means that in place of a full-bodied assessment of actions from an impersonal standpoint, the models schematically focus on a single set of interests—for example, those of the criminal defendant—at the expense of the interests of victims and the community at large.

Simon is skeptical of efforts to elevate private interests at the expense of public norms and suspicious of arguments purporting to show that the one-sided advancement of private interests is *really* in the public interest. Viewed in this way, his ideas about legal ethics fit together with his defense of market socialism in the important paper *Social-Republican Property*.<sup>15</sup> Simon believes that legal norms, like property, should be held in trust for the beneficial enjoyment of the community.<sup>16</sup> Lawyers who argue that one-sided advocacy is in the public interest are like entrepreneurs who argue that making them rich will benefit everyone.

The opposite of these formalistic efforts to shackle professionals is the ideal of professional discretion that Simon defends throughout his work.<sup>17</sup> Simon insists that lawyers should shake free of rigid, categorical rules and analyze each situation in terms of the purposes underlying legal norms and institutions.<sup>18</sup> In this way, professional discretion can proceed unfettered without being standardless.<sup>19</sup>

The following, then, are what I take to be the central themes of Simon's work. The first central theme is a defense of what he calls "the legal ideals of transcendence and universality."<sup>20</sup> In

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14. See Simon, *supra* note 9, at 1103-04.

15. William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335 (1991).

16. *Id.* at 1350-56.

17. See Simon, *supra* note 1, *passim*; Simon, *supra* note 2, at 130-44; Simon, *supra* note 8, at 224-25.

18. See Simon, *supra* note 1, at 223.

19. *Id.* at 247.

20. Simon, *supra* note 7, at 541.

the present paper, Simon defends the purposes and ideals underlying legal norms against both positivism and moralism.<sup>21</sup> A second central theme is a critique of rigid categorical rules whose formalism undermines those legal ideals.<sup>22</sup> Here he criticizes the commonly held idea that lawyers must categorically obey the law.<sup>23</sup> And a third central theme is a defense of professional discretion in the service of those ideals.<sup>24</sup> Today, he promotes discretionary judgment in the form of nullification.<sup>25</sup>

## II

Simon argues that lawyers have no obligation to obey the law if the law is understood "in narrow Positivist terms[,]"<sup>26</sup> as hard-and-fast rules that are literally understood. (The term "narrow" in the expression "narrow Positivism" is not redundant, because there is also such a thing as wide positivism, which includes in the legality-conferring pedigree of a rule the broad, purposive interpretive standards that Simon favors.) Having a good positivist pedigree is insufficient to create a moral obligation.

I agree with this argument, and indeed I, too, have argued that lawyers do not lie under an obligation to obey the law simply because it is the law.<sup>27</sup> In my view, we have an obligation to obey a law only when (1) the legal requirement corresponds with a moral requirement, in other words, when violating the legal requirement would be *malum in se*; or else (2) when the law establishes a fair and reasonable scheme of social cooperation.<sup>28</sup> Even in the latter case, however, the obligation to do one's fair share in a reasonable cooperative scheme does not establish a categorical requirement to obey the law under all circumstances.

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21. Simon, *supra* note 1, at 220-27.

22. *Id.* at 220.

23. *Id.* at 217.

24. *Id.* at 218-20.

25. *Id.* at 225-27. Simon describes nullification as an "effort to alter or erase enacted law." *Id.*

26. *Id.* at 217.

27. See David Luban, *Conscientious Lawyers for Conscientious Lawbreakers*, 52 U. PITT. L. REV. 793, 797-801 (1991).

28. *Id.* at 803.

Other morally relevant concerns can override the obligation.<sup>29</sup>

Simon and I agree that the reason lawyers do not have a categorical obligation to obey the law is that *no one* has a categorical obligation to obey the law.<sup>30</sup> This runs contrary to a common view that lawyers have a greater responsibility to abide by the law than do citizens in general. As the ABA Model Code puts it, "[t]o lawyers *especially*, respect for the law should be more than a platitude."<sup>31</sup> I draw the opposite conclusion, and I expect that Simon would agree: because 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.

Both the ABA's Model Code and Model Rules prohibit lawyers from counseling or assisting clients in illegal conduct, regardless of whether the illegal conduct is undertaken for reasons of conscience.<sup>32</sup> Reading these prohibitions in conjunction with both codes' prohibitions against violating the codes<sup>33</sup> yields the result that lawyers who participate in nullification subject themselves to professional discipline. In my view, we should reinterpret or redraft these rules to permit lawyers to engage in conscientious disobedience without jeopardizing their licenses.<sup>34</sup>

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29. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 33, 44 (1988).

30. Compare Simon, *supra* note 1, at 235-36 (describing the societal benefits derived from conscientious disobedience of the law) with LUBAN, *supra* note 29, at 44 (arguing that no person has a categorical duty to obey the law).

31. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-5 (1983) (emphasis added).

32. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (d) (1994) (prohibiting attorneys from counseling or assisting clients to break the law); MODEL CODE OF PROFESSIONAL CONDUCT DR 7-102(A)(7) (1994).

33. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(a) (prohibiting attorneys from violating rules of professional conduct); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(1) (prohibiting attorneys from violating Disciplinary Rules).

34. For example, one might add the following italicized language to Model Rule 1.2(d):

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, *unless the conduct is undertaken for reasons of conscience, without intended pecuniary gain to the client or lawyer, and with no attempt by either lawyer or client to conceal the unlawful conduct*; but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity,

## III

I have been speaking about a *moral* obligation to obey the law and its possible conflicts with other *moral* obligations. Simon, however, wishes to frame the issue differently. He analyzes the obligation to obey the law, when it exists, as the realization of the *legal* ideals of order, fairness, and democracy; he regards the other values that can conflict with these as *legal* values; he argues that nullification is a *legal* act rather than primarily an act of conscience.<sup>35</sup> Where others see conflicts between law and morality, Simon sees "intralegal"<sup>36</sup> or "law-law"<sup>37</sup> conflicts. He seems to consider this an important difference between his views and those of other writers, including myself.<sup>38</sup> I would now like to explore the difference.

Simon counterposes to positivism a view of law that he calls "Substantivism"—what most writers call "natural law," though that term's "exotic and metaphysical" connotations displease him.<sup>39</sup> It seems from the tenor of his argument, as well as from his characterization of his opponents as "Positivists," that Simon's own sympathies lie with the Substantivists.<sup>40</sup> True, Simon claims that "neither Positivism nor Substantivism, in their uncompromising, full-strength versions, are plausible."<sup>41</sup> However, his own efforts to translate the moral conflicts facing lawyers into legal conflicts make sense only under a Substantivist conception of law, according to which legal norms are "expressions of more general principles that are indissolubly

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scope, meaning, or application of the law.

In parallel fashion, one might add the following italicized language to Model Rule 8.4(a):

It is professional misconduct for a lawyer to violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another *unless the violation is undertaken for reasons of conscience, without intended pecuniary gain to the lawyer, and with no attempt by the lawyer to conceal the violation.*

35. Simon, *supra* note 1, at 232-33.

36. *Id.* at 245.

37. *Id.* at 246.

38. *See id.* at 245-47.

39. *Id.* at 223.

40. *Id.* at 253.

41. *Id.* at 227.

legal and moral."<sup>42</sup> To the extent that Substantivism fails, Simon's law-law characterization of professional conflicts fails.<sup>43</sup> For purposes of analyzing the law-law idea, I therefore treat Simon as a Substantivist.

According to Simon, "[t]o a radical Substantivist there is no distinction between legal and nonlegal norms,"<sup>44</sup> and I suggest that this Substantivist idea explains in part why Simon wants to treat all norms as legal norms. But is it true that no distinction exists between legal and nonlegal norms?

On some constructions of the issue, it clearly is not true. It is not true that every moral norm is also a legal requirement. There are moral norms but no legal norms against hypocrisy, ingratitude, self-pity, and bragging.<sup>45</sup> Conversely, it is likewise not true that every legal norm must also be a moral norm—otherwise the category of *mala prohibita* would be empty.<sup>46</sup>

Can an action be legally required but morally forbidden or, alternatively, legally forbidden but morally praiseworthy? I think that Simon's answer is "no," and that this is the sense in which he finds no distinction between legal and nonlegal norms. My basis for this opinion is Simon's claim that "[a]ny argument for disobedience to a particular [legal] command would also be an argument that the command was an incorrect interpretation of the law."<sup>47</sup> In particular, the law *cannot* command us to do

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42. *Id.* at 223. Simon himself acknowledges that some problems can be characterized as law-law conflicts only on a natural law conception. See Simon, *supra* note 12, at 1115-16 (arguing that "a natural law lawyer" would be able to treat a conflict between a clear statutory expression and a duty of justice as a conflict among legal values rather than a conflict between law and justice).

43. At one point, Simon acknowledges this: "The point . . . at which the lawyer stops thinking of the conflict as intralegal depends on the balance of Positivist and Substantive commitments in his working philosophy." Simon, *supra* note 1, at 245.

44. *Id.* at 226-27.

45. Simon's own arguments about discretion recognize that some acts may be morally wrong but legally permitted; for example, all-white Southern juries of 50 years ago often nullified antilynching laws. See *id.* at 225. More generally, discretion logically implies that abuse of discretion is possible—and abuse of discretion consists of lawfully doing what is morally forbidden. See *id.* at 224.

46. Simon describes a situation in which a statute prohibits a citizen from parking at a metered space, paying for the maximum time, and then putting more coins in the meter when the time expires. *Id.* at 243. Such behavior violates a legal norm but no moral norm. *Id.*

47. *Id.* at 227.



what is morally forbidden, nor forbid us from doing what is morally praiseworthy. If the law seems to command the forbidden or forbid the praiseworthy, we have misinterpreted the law.

Linguists and logicians sometimes refer to the "principle of charity," which says that if your translation of a foreigner's statement would imply that the foreigner has crazy beliefs, then you should assume that the fault lies with your translation.<sup>48</sup> Simon, in effect, applies the principle of charity to legal interpretation: if an interpretation of the law brings legal norms into conflict with morality, then the fault lies with the interpretation.<sup>49</sup> This amounts to a transcendental argument that the law cannot be morally crazy for, if it is, it's not the law.<sup>50</sup> Simon, of course, is not alone in applying the principle of charity to legal interpretation. As I understand it, that is precisely what Ronald Dworkin is up to when he argues that legal interpretation consists in making the law the best that it can be.<sup>51</sup>

The device that Simon uses to secure his argument is nullification. Simon interprets this device broadly to encompass not only jury nullification but also conscientious disobedience of the law and even widespread noncompliance.<sup>52</sup> Importantly, Simon insists that "[t]he power to nullify is . . . a duty to interpret what the law requires."<sup>53</sup> In other words, nullification is our device for putting the principle of charity into practice—our way of making the law the best that it can be by ignoring it when it seems to be worse.

I have my doubts about this way of thinking about nullification. Consider that Dworkin's formula requires us to make the law the best that *it* can be: our interpretation must fit the available legal materials.<sup>54</sup> If the fit is too implausible, then our act of nullification, however justified it may be, is not an *interpreta-*

48. See, e.g., DONALD DAVIDSON, *INQUIRIES INTO TRUTH AND INTERPRETATION* xvii, 196-97 (1984); W.V.O. QUINE, *WORD AND OBJECT* 59 n.2 (1960).

49. See Simon, *supra* note 1, at 226-27.

50. See *id.*

51. See RONALD DWORKIN, *LAW'S EMPIRE* 53-54 (1986).

52. Simon terms such actions "casual nullification." Simon, *supra* note 1, at 233.

53. *Id.* at 226.

54. Ronald Dworkin argues this explicitly in "*Natural*" *Law Revisited*, 34 U. FLA. L. REV. 165, 169-70 (1982).

tion of the law. This conclusion corresponds with our actual way of speaking about the law. To take one of Simon's examples, drivers may nullify the fifty-five miles per hour speed limit by running at a comfortable speed, but few drivers would deny that the speed limit *is* fifty-five miles per hour, nor would they argue that the posted limit *means* "drive at a comfortable speed."<sup>55</sup> This point is important because it implies that the norms to which we speeders appeal to justify nullifying the speed limit are *not* legal norms, and that the conflict lies between law and something that is not law—our sense of safety or reasonableness, perhaps.

As I understand it, nullification requires the following: *first*, a categorical legal rule requiring (or forbidding) an action; *second*, the ability of an actor to avoid (or perform) the action with impunity, either (a) because the actor has been granted unreviewable discretion over the action, or (b) because the rule is not enforced against the actor; *third*, a principled reason for the actor to disobey the rule.

Simon apparently concludes from the fact that the actor has been granted unreviewable discretion, or that the rule is not enforced, that the legal system has incorporated whatever principle leads the actor to disobey the rule.<sup>56</sup> I disagree. Other reasons can exist for granting people unreviewable discretion—for example, that review must stop somewhere—or for deciding not to enforce a rule—for example, that enforcement is too expensive or harsh. Neither of these reasons implies that the law has *incorporated* the actor's principle, only that the law *tolerates* it.

Now there is one sense, emphasized by the Realists, in which any moral principle you choose "belongs" to the law—namely, that legal principles can be found to justify *any* morally plausible proposition. Karl Llewellyn, for example, showed in a famous article that for every canon of statutory construction there is an equal and opposite canon,<sup>57</sup> in this respect, the canons and legal materials more generally are like proverbs. Haste makes

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55. See Simon, *supra* note 1, at 234.

56. See *id.* at 233-34.

57. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950).

waste, but a stitch in time saves nine; too many cooks spoil the broth, but the more the merrier. But this realist observation, I take it, is an uninteresting version of the law-law thesis: a body of principles that explains everything explains nothing.

#### IV

In the final section of his paper, Simon argues that “[t]here is . . . a strong affinity between Positivism and those legal ethicists who portray the core dilemmas of practice as matters of role morality . . . .”<sup>58</sup> As one of the ethicists who portrays the core dilemmas of practice as conflicts between role morality and common morality, I want to disagree. Simon’s argument would be right if role morality meant nothing more than whatever the rules of ethics command lawyers to do. That is not how I understand role morality, however.

Consider the dilemma facing a lawyer whose client has told her in confidence that an innocent person has been imprisoned for the client’s crime. The moral issue of whether to reveal the confidence would exist regardless of what the rule of confidentiality said; it would exist even if there were no rules of legal ethics. It is a dilemma created by the lawyer’s role morality *understood in Substantivist terms*. A lawyer’s role-obligations are the natural law of lawyering:<sup>59</sup> those norms that are functionally necessary for performing the lawyer’s role, which in turn is defined by social institutions such as the adversary system.<sup>60</sup> Keeping client confidences is one of those role-obligations, and that creates the dilemma. Positivism has nothing to do with it, because, at bottom, the dilemma is not a conflict between law and morality at all; it is a conflict within morality.

It will have likely occurred to you by this time that I am counterposing a morality-morality description of professional ethics to Simon’s law-law description. You may also suspect that since Simon subsumes morality under law, and I dissolve law into morality, there is really little more than a verbal difference

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58. Simon, *supra* note 1, at 243.

59. I take this term from David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 43 (1995).

60. See LUBAN, *supra* note 29 at 140.

between us. I suspect the same. Simon offers two reasons for preferring the law-law picture to either the morality-morality or the law-versus-morality pictures of ethical conflict. I wish to conclude by discussing these reasons.

Simon prefers the law-law picture because it "suggests that the matter is susceptible to resolution in terms of the analytical methods and sources of legal argument," which, loose as they are, "are typically thought more structured and grounded than popular moral discourse."<sup>61</sup> Perhaps this is what legal analysis is typically thought to be; however, I am more inclined to agree with Richard Posner about what legal analysis is. The legal analyst, Posner reminds us, deals with "texts—primarily judicial opinions, statutes, and miscellaneous rules and regulations—written by judges, law clerks, politicians, lobbyists, and civil servants. To these essentially, and perhaps increasingly, mediocre texts he applies analytical tools of no great power . . . ."<sup>62</sup> Now, it may be that even the unpowerful analysis of mediocre texts enjoys a comparative advantage over popular moral discourse. If so, I suspect that is only because popular moral discourse is typically shorter and less sustained than legal argument. For a fair test, we should compare a good legal analysis of an issue with a comparably good and comparably long essay, sermon, journalistic think-piece, or short story dealing with the same issue. I suspect that we will not find more illumination in the legal analysis.

A more significant point is Simon's second argument, that the law-law picture of an ethical dilemma "suggests that the profession or some subgroup of it might have some collective responsibility for its resolution," whereas "[m]oral considerations . . . are presumptively a matter for the individual decision maker to resolve privately more or less on her own."<sup>63</sup> Here, I think that Simon has mistaken the nature of moral deliberation, a point that I have learned from Thomas Shaffer.<sup>64</sup> Shaffer insists that,

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61. Simon, *supra* note 1, at 246-47.

62. RICHARD A. POSNER, *OVERCOMING LAW* 90-91 (1995).

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

64. THOMAS L. SHAFFER & MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* (1991); see David Luban, *The Legal Ethics of Radical Communitarianism*, 60 TENN. L. REV. 589 (1993) (book review).

at bottom, moral deliberation takes place within communities—communities that can include friends and families, religious congregations, coworkers, or professional groups.<sup>65</sup> Simon's reminders about the importance of individual professional discretion need coupling with reminders about the importance of humility about our own powers of judgment—powers that are likely to fail us unless we talk matters over with other people when confusion besets us.

My own sense is that the intraprofessional discourse about legal ethics is often of a lower quality than discussions with nonlawyers, precisely because the law gets in the way. Let me illustrate with an example. A gay couple approached two New Jersey lawyers with a proposed change in the couple's wills.<sup>66</sup> One was ill with AIDS, the other was apparently healthy, and the clients explained that they had made a suicide pact.<sup>67</sup> The lawyers were understandably dismayed and told the clients that they needed to think about whether they could accept the assignment to redraft the wills. The lawyers logged onto a legal ethics Internet discussion group, and the discussion quickly turned to issues such as these:<sup>68</sup> Although suicide is not unlawful in New Jersey, assisting suicide is. Would the partner who turned the ignition key of the death-car be assisting suicide?<sup>69</sup> If so, would the lawyers be running afoul of Rule 1.2(d)?<sup>70</sup> Did New Jersey's mandatory-disclosure confidentiality rule require them to reveal the suicide pact to the authorities?<sup>71</sup> Conspicuously absent from the discussion were any of the larger issues about suicide and assisted suicide generally, or any worry that the ill companion may have guilt-tripped the healthy partner

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65. SHAFFER & SHAFFER, *supra* note 64, at 25-28.

66. See Richard Pliskin, *The Ethics of Suicide*, N.J. L.J., June 20, 1994, at 1, 36.

67. *Id.* at 36.

68. *Id.*

69. *Id.* The two men planned to kill themselves by carbon monoxide poisoning in their car. *Id.*

70. N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1995) (prohibiting a lawyer from assisting a client in criminal or fraudulent conduct).

71. N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1995) (requiring a lawyer to disclose information necessary to prevent a client from committing a criminal act which the lawyer believes may result in death or substantial bodily harm).

into suicide.<sup>72</sup>

Simon might object that the real problem was precisely the one he has highlighted for us, namely how impoverished legal discourse is when it treats rules as Positivist conversation-stoppers.<sup>73</sup> Surely the larger issues *are* part of the legal discourse. In one sense, he is clearly right. Simon himself, however, has acknowledged that most lawyers' working philosophies include a healthy dollop of Positivism,<sup>74</sup> whereas popular culture is impatient with legalism and focuses on substance.<sup>75</sup> Focusing on substance is not always a virtue, but in cases such as the double suicide, I suspect that the lawyers would have received better advice from almost any group of their friends than they received from their professional peers.

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72. Pliskin, *supra* note 66, at 36.

73. See Simon, *supra* note 1, at 220-21.

74. *Id.* at 228.

75. See generally *id.* at 236-39 (discussing popular culture film depictions of law and lawyers).