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## Busting the Professional Trust: A Comment on William Simon's Ladd Lecture

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BUSTING THE PROFESSIONAL TRUST:  
A COMMENT ON WILLIAM SIMON'S LADD LECTURE

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BUSTING THE PROFESSIONAL TRUST: A  
COMMENT ON WILLIAM SIMON'S LADD LECTURE

W. BRADLEY WENDEL\*

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It is truly an honor to be asked to Comment on the work of William Simon, one of the scholars who has done the most to contribute to the reputation of legal ethics as a field with intellectual rigor and depth, as well as one with significant implications for legal theory generally. The power of his critical faculties is unmatched: the platitudes offered by the organized bar in defense of the dominant view of legal ethics lie in tatters after the sustained assault in the first three chapters of *The Practice of Justice*.<sup>1</sup> In fact, it can be difficult to find objections to the dominant view that Simon has not already articulated more forcefully. But his project is not merely critical, as his construction of the alternative contextual view of ethics shows. His Mason Ladd Lecture is a welcome extension of the contextual view, moving from the micro-evaluation of the ethics of individual lawyers into the macro level of institutional analysis and questions of regulatory regime design. Section I of this Comment is a brief review of this proposal.

Simon's work has been a tremendous influence on my own thinking about legal ethics,<sup>2</sup> so I have good reason to fear the ignominious fate of commentators who end up agreeing with the subject of their evaluation. Indeed there is a great deal in this Lecture to agree with. Some of his suggestions for reform are so far-reaching, however, that one is bound to have a few reservations and questions. Section II of this Comment contains some questions about the details of using a market-based approach and a diversity of ethical norms to regulate lawyers. Simon has anticipated many of these objections, none of which are likely fatal to his project, but some of which seem to be a bit more problematic than he acknowledges. For example, even if a

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1. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 1-76 (1998).

2. In this I am not alone. See David Luban, *Legal Ideals and Moral Obligations: A Comment on Simon*, 38 WM. & MARY L. REV. 255, 255 (1996); David B. Wilkins, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 WM. & MARY L. REV. 269, 271 (1996). The fact that Luban and Wilkins, two other writers who have influenced me enormously, also cite Simon as an influence makes me doubly cautious in this critical undertaking.

sufficient number of clients desire to hire high commitment lawyers, the transaction costs involved in matching up high commitment lawyers and clients may be sufficiently high to thwart the operation of the reputational market Simon envisions. Section III takes issue with the argument that nonlegal methods of regulation can avoid the corruption of regulation by self-interested professionals. Although nonlegal regulation offers many advantages over a formal scheme of legally enforceable rules, it is no less susceptible to capture by powerful actors than a system of legal regulation.

### I.

There are two interrelated proposals in Simon's Lecture: The first is to consider additional sources of *legal* regulation of lawyers, such as courts and legislatures in addition to bar associations, which tend to become corrupted by the economic self-interest of lawyers.<sup>3</sup> Institutions not under the control of lawyers have a better record of looking out for the interests of non-clients, and once these other institutions have articulated different norms of lawyering, there is a chance they may catch on more widely. For example, the response of the Office of Thrift Supervision (OTS) to the law firms that assisted Lincoln Savings focused the attention of many in the profession and the academy on the justification for strenuously partisan norms of lawyering in the context of counseling and advising clients.<sup>4</sup> Even if the OTS's approach did not ultimately carry the day, the debate was useful. Thus, there is an intrinsic value in a diversity of normative approaches to lawyering, provided there is some way for regulators or lawyers themselves to select among them.

Another way to diversify the legal norms that may potentially be applicable to lawyers is to free states from the American Bar Association's (ABA) monopoly on the drafting of disciplinary rules.<sup>5</sup> The hope is that one or more states may seek to establish a reputation for regulatory norms that are more protective of third-party interests than the current crop of ABA models, including those recently proposed by the Ethics 2000 Commission. But why would a state do this, if the lawyers who control the organized bar have a selfish interest in limiting the protections offered by the rules to third parties? Here is where Simon's second proposal comes in: namely, to rely on informal, decentralized mechanisms of social control to do some of the work currently entrusted to formal legal regimes.<sup>6</sup> There is a certain irony

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3. William H. Simon, *Who Needs the Bar?: Professionalism Without Monopoly*, 30 FLA. ST. U. L. REV. 639, 639-40 (2003).

4. *Id.* at 640.

5. *Id.* at 648.

6. *Id.* at 652-54. The contrast between "formal" and "informal" methods of regulation and "legal" and "nonlegal" regulation is intended to track the usage of these terms in

here, because the talk of markets, “reputation bonds,” and mechanisms for reducing information costs that inevitably attends this kind of proposal relies, at its root, on the self-interest of the contracting parties. It is almost as though Simon’s idealistic side hopes that states, freed from the ABA’s regulatory monopoly, will aspire to rules that reflect a greater commitment to protecting third party interests, while his realistic side acknowledges the pervasiveness of market rhetoric and economic self-interest among lawyers,<sup>7</sup> and has therefore tailored a proposal for reform that takes these realities into account. In the end, however, Simon’s market-based mechanism may be just as susceptible to corruption by the self-interest of lawyers as the formal, profession-based scheme of regulation that is the target of the critique in this Lecture.

It is important to clarify the usage of the term “professional monopoly” in the Lecture. Three different senses of the term crop up, and as a result Simon’s arguments against the professional monopoly can occasionally be inconsistent. One is that the profession seeks a regulatory monopoly vis-à-vis anything that can plausibly be characterized as “providing legal services.” Simon is right that there is no principled distinction between, say, tax planning as performed by a lawyer and by an accountant, so we have reason to be suspicious of this aspect of the professional monopoly.<sup>8</sup> A second sense of monopoly, though, exists *within* the profession, because each state maintains a monopoly over the practice of law within its borders, enforced through prohibitions on the unauthorized practice of law.<sup>9</sup> The notorious *Birbrower*<sup>10</sup> case showed the expansive definition of practicing law within a state that may be articulated by an ambitious state aiming to protect local practitioners from out-of-state competition. Simon is again correct that it is almost impossible to draw principled lines here.<sup>11</sup> Corporate lawyers in New York interpret Delaware law all the time, so the source of law cannot be dispositive. Physical presence is not only an illegitimate proxy for the source of law, as Simon notes,<sup>12</sup> but an anachronistic standard given the prevalence of tech-

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ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). Ellickson’s study of cattle ranchers and farmers in Shasta County, California, showed that residents of this rural county relied on informal norms of neighborliness, not formal legal entitlements, as the starting point for bargaining to settle issues such as cattle trespasses and boundary fence disputes.

7. Simon, *supra* note 3, at 5, at 653; *see also* Jonathan R. Macey, *Professor Simon on the Kaye Scholer Affair: Shock at the Gambling at Rick’s Place in Casablanca*, 23 *LAW & SOC. INQUIRY* 323, 324 (1998).

8. Simon, *supra* note 3, at 644.

9. *Id.* at 641-44.

10. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 2-3 (Cal. 1998).

11. Simon, *supra* note 3, at 645-47.

12. *Id.* at 644-45.

nology that facilitates interactions between lawyers and clients. And finally, there is no reason to suspect that resident lawyers are more competent than out-of-state lawyers, particularly since the law has such a marked tendency toward national uniformity, with local quirks being just that: quirks that can easily be mastered by an out-of-state lawyer. This leads to the third sense of professional monopoly as used in the Lecture, “monopolistic federalism,”<sup>13</sup> which is another way of referring to the hegemonic effect of disciplinary rules drafted by the ABA and the ALI’s *Restatement of the Law Governing Lawyers*.<sup>14</sup> Those two sources of regulatory norms exert so much influence that it is difficult to find much variation among states in the legal restrictions they place on lawyers.

Actually, one might quibble with the last claim. Some rules vary quite a bit among the states, and one of the provisions of the ABA Model Rules that most directly implicates the protection of non-clients, the scope of exceptions to the duty of confidentiality, is the one on which the diversity of state variation is the most pronounced. The rules supplement I use in my professional responsibility course even contains an elaborate chart, prepared by an insurer of large law firms, which details each state’s rules on the confidentiality rule and its exceptions.<sup>15</sup> Nitpicking aside, though, Simon’s “competitive federalism” proposal is worth thinking carefully about. The heart of the programmatic portion of the Lecture is a celebration of polycentric regulation, from a diversity of state-based licensing approaches to a range of private mechanisms through which lawyers can signal their levels of ethical commitment, letting the market take over some of the task of post-admissions monitoring of lawyers’ conduct. I will concentrate on the second (and least developed) of these proposals, which is the most radical in its challenge to the regulatory monopoly of the organized bar.

In Simon’s view, the current disciplinary rules, at least in the ABA’s model version, articulate a low commitment standard of ethics in the sense of sacrificing legitimate interests of third parties, and the substantive justice of a matter, to the interests of lawyers and clients.<sup>16</sup> The classic example is the strict rule against disclosing any

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13. *Id.* at 649.

14. The inconsistency in the attack on the professional monopoly is between the objections to the second and third definitions of monopoly. If the *Birbrower* decision is objectionable because the practice of law is essentially national in scope anyway, because of the increasing homogenization of the law itself, as well as the nationwide uniformity in legal education and bar examinations, then it seems to make sense to regulate lawyers on a national basis as well.

15. ABA MODEL RULES OF PROF’L CONDUCT app. A (2001), reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 134 (2002).

16. Simon, *supra* note 3, at 652.

information relating to the representation of a client even if its disclosure would avert a major financial catastrophe to a third party;<sup>17</sup> but one could cite many others. Adversarial discovery practice, the norms governing deception in negotiations, the permissibility of confidentiality agreements in settlements (particularly in products liability cases), and settlement patterns in class actions are all areas in which the current law governing lawyers protects the self-interest of lawyers while imposing substantial externalities on non-clients. As a result of the indifference of the organized bar to the costs to third parties of the strongly role-differentiated adversary system, lawyers have forfeited the trust and respect of the public.<sup>18</sup> Hence the double meaning inherent in the title of this Comment: the bar has bankrupted its reserves of public trust, so it is now time to play Teddy Roosevelt and break up the power of this group to articulate the sole authoritative body of rules governing lawyers. One method of accomplishing this objective might be to supplant legal regulation altogether—or certain domains of lawyering—with non-legal regulation.

## II.

If the existing structure of rules expresses a default position of low commitment ethics, and if that structure is resistant to change because of the political power of the organized bar, giving individual lawyers the power to opt into a system of high commitment ethics would permit them to make an end-run around the regulatory monopoly of the bar. As Simon uses these terms, high commitment refers to a principled reluctance or refusal by the lawyer to take an action that is unjust, even if legal, and solicitude for the rights of third parties.<sup>19</sup> The old-fashioned term for high commitment lawyers is “officers of the court.”<sup>20</sup> Low commitment refers to acceptance of the dominant view of lawyering, in which the lawyer will take any arguably legal action on behalf of a client.<sup>21</sup> The colloquial term for low commitment lawyers might be “hired guns.”<sup>22</sup> An obvious, but misplaced, objection to this proposal might be that self-interested clients would never select a high commitment lawyer. Lawyers often claim that clients are seeking “attack dog” lawyers, and that market pressures nudge them in the direction of low ethical commitment and a

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17. MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983).

18. Macey, *supra* note 7, at 324-25.

19. SIMON, *supra* note 1, at 204-05; Simon, *supra* note 3, at 654.

20. See, e.g., James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court"*, 48 BUFF. L. REV. 349 (2000).

21. Simon, *supra* note 3, at 654.

22. See, e.g., W. William Hodes, *Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better?*, 87 KY. L.J. 1019, 1929 (1999).

“take no prisoners” style of practice.<sup>23</sup> Clients don’t care about costs inflicted upon third parties, but they do care about prevailing in litigation or obtaining a good deal in a transaction. Why in the world would they ever opt for a high commitment lawyer?

The response to this objection is twofold. In litigated disputes, there are institutional players, such as courts and other tribunals, who look after the interests of third parties. These decision makers are likely to give more weight to the representations of high commitment than low commitment lawyers, because in their experience, high commitment lawyers engage in less tendentious readings of the factual record and the law, do not file motions merely to drive up their opponents’ costs, and generally urge the court to adopt a position that is not grossly inconsistent with the merits of the dispute.<sup>24</sup> There are numerous close calls in pretrial litigation and at trial: motions that could go either way, discovery disputes in which the ethical conduct of the parties is an issue that must be decided by the judge, evidentiary issues decided on the fly by the judge. Although it would be almost impossible to gather empirical proof of this proposition, it stands to reason that a lawyer who is known for honesty and probity in dealing with the tribunal would do better in some of these close cases than a low commitment lawyer.<sup>25</sup> In business transactions, if the assumption is that everyone is behaving in a self-interested manner, affected third parties will take costly steps to protect themselves. If another party in a transaction is dealing with a low commitment lawyer, she is likely to demand a thorough “due diligence” process or seek other kinds of assurances that the factual representations made by the lawyer are accurate, such as an “ex-

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23. Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 371, 392-94 (1991); Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors That Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 FORDHAM L. REV. 773, 778, 792 (1998); Austin Sarat, *Enactments of Professionalism: A Study of Judges’ and Lawyers’ Accounts of Ethics and Civility in Litigation*, 67 FORDHAM L. REV. 809, 828 (1998); see, e.g., *In re First City Bancorp. of Tex. Inc.*, 282 F.3d 864, 865 (5th Cir. 2002). In this case, the lawyer got caught and the court affirmed a \$25,000 sanction against him, but one could imagine the lawyer engaging in a cost-benefit calculation, factoring in court-imposed sanctions as a cost, discounted for the probability of their imposition.

24. Cf. Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 18-19 (1998) (arguing that the attorney-client privilege and professional duty of confidentiality penalize clients who have nothing to hide, because lawyers for low quality clients can mimic the actions of lawyers for high quality clients, making it difficult for judges to differentiate between the two).

25. The only things that one could offer as evidence for this claim are the comments by judges and lawyers that tend to get made at conferences where civility and professionalism is the topic. See, for example, the remarks of Judge Marvin E. Aspen at a panel entitled “The Rambo Litigator,” *The Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 146 F.R.D. 205, 229 (1992), and the anecdote in John A. Humbach, *The National Association of Honest Lawyers: An Essay on Honesty, “Lawyer Honesty” and Public Trust in the Legal System*, 20 PACE L. REV. 93, 97 (1999).

press 10(b)-5 warranty” that no material information has been withheld.<sup>26</sup> A party dealing with a high commitment lawyer, on the other hand, may be more willing to accept that lawyer’s representations at face value, without a lot of duplicative investigation or formal warranty documents.<sup>27</sup> In both the litigation and transactional cases, a rational client would prefer the high commitment lawyer because that lawyer will either maximize the client’s chance of prevailing in the litigation or minimize the transaction costs associated with a deal.

In order for the market to reward high commitment lawyers, there must be a means for clients to discover lawyers’ commitment levels. The most straightforward method is for the client to have a history of dealings with the lawyer, in which they can observe both the lawyer’s level of commitment and the response of institutional decision makers or transaction partners to that lawyer. In a repeat-dealing relationship, if the client prefers a high commitment lawyer, the lawyer has an incentive to stick to her principles of working for her client within the constraints of justice, because she will lose the benefit of future employment by the client if she abandons them.<sup>28</sup> Almost as good is a small community of lawyers and clients in which all the relevant actors know one another and have ample opportunity to verify the commitment levels of others through face-to-face interaction. Thus, even if a client has not employed a given lawyer in the past, she may have been opposite that lawyer in a transaction or litigated matter, and had a chance to deal extensively with the lawyer. Even where the two lawyers have not dealt with one another in the past, the length of their professional dealings with one another over the course of a discrete matter still provides each lawyer an opportunity to learn about the other’s tendencies and adjust her behavior accordingly.

Lawyers deal with one another in discrete but lengthy interactions that may be modeled as repeated games.<sup>29</sup> They face numerous opportunities within a single deal or litigated matter to cooperate or defect from the cooperative solution, as various small conflicts arise

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26. SIMON, *supra* note 1, at 205.

27. See, e.g., Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 269-73 (1984).

28. In the jargon of law and economics, the lawyer has a “relationship-specific prospective advantage” as a result of a history of dealings with the client, but risks forfeiting that advantage by ignoring the client’s wishes for a high commitment lawyer. David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 392-97 (1990).

29. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 520 (1994); see also SIMON, *supra* note 1, at 66-67, for a recognition of the arms race or prisoner’s dilemma structure of adversarial litigation.

over issues like scheduling and the logistics of discovery or due diligence. In a typical two-party situation, both lawyers would be better off adopting cooperative approaches at the outset, agreeing to reasonable requests for schedule changes, not filing unduly burdensome discovery requests or unfairly evading requests, behaving themselves at depositions, and so forth.<sup>30</sup> Each risks that the other side will exploit her cooperativeness, however. One response is the familiar game theory strategy of “tit-for-tat”: cooperate on the first move, and then continue cooperating unless the other player defects, and then respond by defecting.<sup>31</sup> Litigators report that they sometimes feel out their adversaries early in the process, to see if they are inclined to be cooperative, for example by “experiment[ing] with minor agreements with opposing counsel early in a case to assess whether they could be trusted throughout the proceedings.”<sup>32</sup> A lawyer’s acquiescence in her opponent’s request for an accommodation is in effect a “reputational bond,” which secures her right to reciprocal cooperation from the opponent.<sup>33</sup> As long as both lawyers cooperate, things operate much more smoothly and costs are kept down. If a lawyer gets burned, she forfeits the adversary’s bond by refusing to extend reciprocal courtesies in exchange, and the litigation becomes more expensive.

The information about lawyers’ tendencies to cooperate or defect may be pooled within the community of lawyers, through the legal press, judicial opinions, social interactions at bar association events and CLEs, and other informal gossip networks. A lawyer who has earned a reputation for flexibility, reasonableness, and honesty obtains the benefits of reciprocity from adversaries.<sup>34</sup> Conversely, ac-

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30. Not all lawyers may perceive this benefit from cooperation and, indeed, some lawyers may prefer pretrial litigation that is bogged down in extensive motions practice if they are billing by the hour. This qualification is supported by the report of some in-house lawyers, who observe “the economic interest of the hourly fee lawyer to ‘churn’ cases and to use discovery disputes to run up fees.” Sarat, *supra* note 23, at 830; *see also* Gilson & Mnookin, *supra* note 29, at 516-17. Simon’s reliance on the market to encourage high commitment lawyers is thus undermined by the way in which most lawyers bill for their services. I am grateful to Andrew Perlman for this point. Note, however, that it is still in the interests of each *client* for the lawyers to cooperate. The problem then becomes designing a mechanism so that clients can learn about the propensities of lawyers to cooperate or stir up disputes in order to churn fees and giving them effective and inexpensive sanctions to use against lawyers who run up bills. The difficulty in providing this information to potential clients is discussed *infra* notes 42-46 and accompanying text.

31. ROBERT AXELROD, *THE COMPLEXITY OF COOPERATION: AGENT-BASED MODELS OF COMPETITION AND COLLABORATION* 16, 20-21 (1997).

32. Nelson, *supra* note 23, at 776; *see also* Bartlett H. McGuire, *Reflections of a Recovering Litigator: Adversarial Excess in Civil Proceedings*, 164 F.R.D. 283, 295 n.44 (1996).

33. Charny, *supra* note 28, at 393.

34. *See* Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1756 (2001); Gilson & Mnookin, *supra* note 29, at 522-23. Similarly, some firms have acquired reputations for forthrightness and intolerance of gamesmanship. One example is Wilmer Cutler & Pickering, and in particular partner William McLucas, the former head of the SEC’s en-

quiring a bad reputation may mean that a lawyer's opponents do not play tit-for-tat, but instead start out by assuming that the lawyer will be uncooperative.<sup>35</sup> This drives up the cost for the client, one reason why Simon is right to argue that clients would prefer a high commitment lawyer in many cases.<sup>36</sup> Unfortunately for these clients, information about a lawyer's level of ethical commitment may be well known by other lawyers, but as a practical matter not accessible to clients. It is well understood that individual clients, who are generally one-shot players within the legal system, have difficulty assessing the competence of lawyers and bargaining over the structure of the lawyer-client relationship, as would be required in order to give effect to Simon's proposal to permit clients to select from a menu of levels of commitment to which they could hold lawyers.<sup>37</sup> Even highly sophisticated clients may not be able to tap into the information networks used by lawyers, however, particularly if they are not repeat players with respect to a particular geographic legal community or one defined by a specialized kind of practice. A large manufacturer of consumer products, for instance, may get sued in any state, and it is unlikely that it could keep adequately informed about the reputation of lawyers in each of these locations. Such clients also may have only episodic need for lawyers in some subspecialty, like environmental or securities law, while making more frequent use of product liability or patent lawyers. Perhaps the problem can be addressed by Simon's proposal that lawyers be required to disclose their commitment level up front in negotiations with a prospective client,<sup>38</sup> but it seems unlikely that the organized bar (which is, in Simon's view, not interested in ceding any of its authority over professional regulation) will require an explicit discussion of commitment levels between lawyers and prospective clients. For this reason, highly visible actions that function as *signals* of commitment become even more important.

Signaling is a concept from game theory, which assumes that two strangers are interested in cooperating in order to achieve gains that

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forcement division. Calling in Wilmer to perform an internal investigation is a strong signal to outsiders that a corporation is serious about rooting out wrongdoing. Otis Bilodeau, *What Happened to Mark Belnick?*, LEGAL TIMES, Sept. 16, 2002, at 1, 18.

35. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 64 (1963).

36. There may, of course, be cases in which the client is specifically looking for a low commitment lawyer. As Andrew Perlman pointed out, the tobacco industry relied for many years on law firms with a reputation for scorched-earth litigation to deter prospective plaintiffs from filing lawsuits. Cf. Gilson & Mnookin, *supra* note 29, at 516-17. Simon's market-based response to the professional monopoly would do nothing to ameliorate this sort of unethical conduct by lawyers.

37. See, e.g., Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 114-19 (1974).

38. Simon, *supra* note 3, at 656-57.

they could not realize acting alone.<sup>39</sup> Each party would like to know whether the other is inclined to cooperate, or to defect, if the possibility exists of realizing a greater gain by cheating than by maintaining cooperation. This disposition, however, is private information, not subject to verification by third parties. To put it another way, talk is cheap, so a low commitment lawyer might induce a client who is interested in the benefits of a high commitment lawyer to hire him, merely by professing to be a high commitment lawyer. Although talk is cheap, actions are costly, so a high commitment lawyer can take the kind of costly action that would be avoided by a low commitment lawyer.<sup>40</sup> This action is the signal. An example of a signal might be joining a law firm with a reputation for probity or an organization whose admissions procedures are designed to screen out unethical applicants.<sup>41</sup> The purpose of signaling is to bring high commitment lawyers together with clients who are seeking that type of lawyer (call them high commitment clients). High commitment lawyers will be able to gain a competitive advantage over their low commitment colleagues if the signals are effective and, crucially, if there is a sufficient number of high commitment clients to make it worthwhile to invest resources in actions that function as signals.

In order to function as a signal, though, an action must be clear and unambiguous, as well as difficult to mimic by low commitment lawyers. Belonging to Firm X is only a signal of being a high commitment lawyer if Firm X effectively screens out low commitment lawyers through its hiring process. Some research suggests that firm affiliation is not useful as a signal, because the conduct of lawyers within a firm is variable, as well as the actions of the firm in different cases.<sup>42</sup> It is entirely plausible that Firm X may have two powerful partners, H.C. and L.C., who vary in their commitment to lawyering within Simon's contextual view, paying due regard to the interests of third parties. In fact, in the ABA litigation section's study of ethics of large firm litigators, plaintiffs' lawyers in two cities were asked to name the three most and least ethical firms.<sup>43</sup> The result was "only weak convergence," with a wide disparity of votes, and some firms even appearing on both lists.<sup>44</sup> As one of the study authors concludes, firms may have reputations for litigation style, but

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39. See DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 122-42 (1994); Edward Rock & Michael Wachter, *Meeting By Signals, Playing By Norms: Complementary Accounts of Nonlegal Cooperation in Institutions*, 36 U. RICH. L. REV. 423, 425-29 (2002).

40. ERIC A. POSNER, *LAW AND SOCIAL NORMS* 19-22 (2000).

41. See, e.g., Bernstein, *supra* note 34, at 1765.

42. See Gilson & Mnookin, *supra* note 29, at 557; see also John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569, 617-19 (1989).

43. Nelson, *supra* note 23, at 796-97.

44. *Id.*

these reputations can vary across cases.<sup>45</sup> The same may be true for voluntary associations such as the American Academy of Matrimonial Lawyers, particularly if they do not sanction members for violating their high commitment standards. A member of the Academy may be a high commitment lawyer or a low commitment lawyer, but the fact of membership alone does not provide the necessary information.<sup>46</sup> Contrast organizations like the cotton shippers' associations, who expel members for refusing to comply with arbitration awards,<sup>47</sup> or the trade associations who employ voting procedures and membership criteria designed to weed out untrustworthy applicants.<sup>48</sup> Continuing membership in one of these associations is a signal at least of the willingness of the member to abide by the organization's dispute-resolution procedures, which in effect means assent to a substantial body of trade norms and practices of fair dealing. The organizations Simon mentions, however, do not screen out low commitment applicants or sanction low commitment members,<sup>49</sup> so low commitment lawyers may join in the hopes of duping high commitment clients into retaining them. The value of membership as a signal is considerably reduced if it does not enable the creation of a separating equilibrium in the market for legal services, in which high commitment lawyers and clients match up only with one another, and do not inadvertently match up with those of low commitment.<sup>50</sup>

The discussion of signaling points in the direction of a significant complexity elided in the Lecture, namely the definition of a "high commitment" to ethics. This is certainly not the place to re-enter the

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45. *Id.* at 797.

46. Simon reports that the Academy does not sanction members for violating their ethical commitments, although it could. SIMON, *supra* note 1, at 197. The Academy's bylaws permit expulsion for "failure to maintain the principles of ethics and disciplinary rules of the Academy." Bylaws of the American Academy of Matrimonial Lawyers, at <http://www.aaml.org/bylaws.htm> (last visited Jan. 12, 2003) (on file with Florida State University Law Review). But evidently the Academy does not take an active interest in purging its ranks of violators. Simon is correct that this inaction diminishes the value of Academy membership as a signal of commitment. See SIMON, *supra* note 1, at 214. For a similar proposal to create a voluntary association with a signaling function, see Humbach, *supra* note 25, at 100-06. Members of the "National Association of Honest Lawyers" would agree to provide "full and fair disclosure of all material facts and evidence that come into their possession" to anyone with whom their clients have dealings. *Id.* at 100. The proposal that this association be empowered to sanction violations of this norm strikes me as wildly unrealistic, given the ambiguity of terms such as "fair" disclosure and "material" facts and the information costs that would be associated with proving these violations. These are the sorts of standards that market participants may be able to discover and monitor, but which are incapable of verification before a tribunal, at least without extremely expensive and cumbersome proceedings. See Bernstein, *supra* note 34, at 1760-61; Charny, *supra* note 28, at 404-05.

47. Bernstein, *supra* note 34, at 1737-38.

48. *Id.* at 1765.

49. Simon, *supra* note 3, at 658.

50. See POSNER, *supra* note 40, at 19-20.

debate over the extent to which the lawyer's role should take account of the justice of the client's position, the merits of the case, or the effect of the representation on third parties. Although I have a somewhat different view about the nature of the lawyer's obligation to the law and am not as enthusiastic a proponent of nullification as Simon,<sup>51</sup> I do agree that the lawyer's moral agency requires in some cases that she either seek to persuade the client to change her position, withdraw, or accept moral responsibility for harms caused by the client. The problem is that this approach, at best, serves only one of several competing views within the academic legal ethics community,<sup>52</sup> and is decidedly a minority view among practicing lawyers. Simon does not call his rhetorical adversary the "dominant" view for nothing. Given the prevalence of the dominant view, it would not be surprising to learn that many lawyers and law firms proclaim their commitment to ethics in the sense of zealous client service. Perhaps this is only a problem of labels, which could be solved by clarifying our terms, but I fear that making ethical commitment the basis of reputational markets and signaling behavior will only lead to confusion. For example, what is the "high commitment" response to the following cases?

(1) The defendant's lawyer files a request for an extension of time to answer a complaint, but through a clerical error it is misdirected. The plaintiff's lawyer, knowing of the mistake, has the opportunity to file a motion for a default judgment.<sup>53</sup> Does she do it?

(2) In a product liability case, the defendant's lawyers define the terms in a discovery request narrowly, to avoid producing an inculpatory document. The plaintiffs do not object or file a motion to compel.<sup>54</sup> Is the defense lawyer's conduct proper?

(3) A defendant is charged with armed robbery and has admitted the crime to his lawyer. At the preliminary hearing the victim testified that the crime took place at midnight, when the defendant was (truthfully) playing cards with three friends, all of whom have a good reputation in the community and will probably be be-

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51. Cf. William H. Simon, *Moral Pluck: Legal Ethics in Popular Culture*, 101 COLUM. L. REV. 421 (2001).

52. For powerful moral arguments that lawyers are permitted or required to take all actions on behalf of their clients within the framework of law without regard to the justice of their clients' ends, see, for example, Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); W. William Hodes, *Accepting and Rejecting Clients: The Moral Autonomy of the Second-to-the-Last Lawyer in Town*, 48 U. KAN. L. REV. 977 (2000); W. William Hodes, *Lord Brougham, The Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075 (1996); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

53. *Sprung v. Negwer Materials, Inc.*, 775 S.W.2d 97, 101 (Mo. 1989).

54. A slight modification on the facts of *Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp.*, 858 P.2d 1054 (Wash. 1993).

lieved by the jury.<sup>55</sup> Unfortunately, the victim was mixed up on the time, probably because the defendant had hit him on the head in the course of the robbery. (The crime actually occurred at 2:00 a.m.) The defendant is not going to take the stand. May the lawyer call the friends to testify about the card game?

(4) A man whose lifelong dream has been to run a restaurant persuades a millionaire cousin to lend him \$100,000; the man signs a demand note to the cousin. The restaurant is a spectacular success, so the conniving cousin immediately calls the note and brings an action on it, intending to acquire the restaurant in a foreclosure sale. The man goes to a lawyer who, seeing little in the way of defense on the merits, files a series of dilatory motions to give the cousin time to pay back the note from revenues from the restaurant. The motions are not frivolous in the Rule 11 sense, but they are extremely unlikely to affect the result on the merits. Is this a high commitment or low commitment stance with respect to ethics?

Does the answer change if the client is a construction company whose falling debris injured a single mother of three children who worked as a housekeeper and is now permanently disabled, and where the delay will put pressure on the plaintiff to settle early and cheaply?<sup>56</sup>

Because the boundaries of the relevant context are contestable, I suspect that there would be little convergence on a single answer to each of these cases, even among lawyers who accept the basic outlines of the contextual view.<sup>57</sup> Thus, high commitment lawyers would have to figure out a way not only to signal that they “take ethics seriously,” but that their understanding of ethics has a particular result in a given case, which matches up with their prospective clients’ understanding.<sup>58</sup> Again, I do not think it is implausible that a lawyer or law firm might find this approach desirable, but to the extent Simon’s proposals depend on information sharing, reputation, signaling, and decentralized mechanisms of enforcement, clarity is of the essence. Transaction costs would become prohibitive if lawyers and prospective clients had to introduce all the relevant contextual factors into a discussion of ethical commitment levels.

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55. See Mich. Bar Ass’n Ethics Comm., Informal Op. CI-1164 (1987), available at <http://www.michbar.org> (last visited Jan. 12, 2003) (on file with Florida State University Law Review).

56. These hypotheticals are taken from Stephen Gillers, *Can a Good Lawyer Be a Bad Person?*, 2 J. INST. STUDY LEGAL ETHICS 131, 136-37 (1999).

57. Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709, 712-13 (1998) (stating that because ethical evaluation calls for complex discretionary judgment, it is difficult to generalize).

58. Simon does acknowledge that the lawyer and prospective client would need to flesh out what it means for the lawyer to promise to adhere to the “highest ethical standards.” Simon, *supra* note 3, at 655. I think he is correct to worry about the effect of this informational asymmetry on decentralized enforcement mechanisms, but too optimistic about the institutional means for alleviating the problem.

A committed contextualist client with sufficient bargaining power could always structure the attorney-client relationship contractually, so that the lawyer would be obligated to act in the interests of justice. Because of the difficulty in specifying what it means to practice contextually, or in the interests of justice, the transaction costs involved in this kind of approach appear daunting. However, Simon responds, in his book and in the Lecture, that this obstacle could be surmounted if lawyers and clients had a diverse stock of ethics rules from which to choose.<sup>59</sup> Often, nonlegal mechanisms of regulation offer transaction-cost savings as compared with the legal system,<sup>60</sup> but Simon is right to point out that institutional actors can nevertheless play a role in the process of decentralized regulation by, for example, providing a menu of contract provisions that parties may incorporate into their agreements.<sup>61</sup> There is no particular reason to suppose that this menu must take the form of state disciplinary rules developed under a regime of competitive federalism—voluntary associations could perform the drafting function—although authoritative groups like the organized bar do have the salutary effect of collectivizing the costs of this project, preventing free-riding.<sup>62</sup> The problem with this proposal is still disseminating the relevant information throughout the pool of prospective clients. Even assuming there is a substantial population of high commitment clients who are not seeking “attack dog” lawyers, they still must be educated that they can demand a high commitment lawyer, and that there are standardized provisions governing the lawyer’s conduct that they can insist be inserted in retainer agreements.<sup>63</sup> This education campaign would be expensive, so only organized groups would be able to fund it, again because of free-rider problems that would make collective action by individual high commitment lawyers difficult. The dilemma for Simon, therefore, is that the only actors in the market for legal services who are capable of solving the problem of the organized bar’s corruption are exactly those actors who are alleged to be corrupt. The grassroots activism of high commitment lawyers and clients risks being swamped by the “noise” in the market created by the dominance of low commitment actors.

Finally, the contexts in which reputational markets and informal sanctions have shown promise are those in which there are a large number of potential transactors and the interactions between them

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59. SIMON, *supra* note 1, at 207-08; Simon, *supra* note 3, at 657.

60. See, e.g., Charny, *supra* note 28, at 403-08; Macaulay, *supra* note 35, at 63-65.

61. Simon, *supra* note 3, at 656.

62. Bernstein, *supra* note 34, at 1742-43; Charny, *supra* note 28, at 412.

63. One way of doing this would be to adopt “commitment-forcing rules,” which require lawyers to inform clients that they have a choice of commitment levels for their lawyer. SIMON, *supra* note 1, at 211.

are entirely *voluntary*. Lisa Bernstein has produced richly detailed studies of nonlegal regulation in the diamond and cotton industries,<sup>64</sup> and in both cases, there are enough buyers and sellers that it is relatively costless to avoid doing business with someone in the industry who has a bad reputation. There are significant differences in the market for legal services. Most lawyer-lawyer relationships are not voluntary at all. A plaintiff's lawyer cannot avoid suing the entity responsible for her client's injury just because it is represented by the Low Commitment Law Firm. The only thing the lawyer can do in that case is protect herself by not attempting to cooperate early in the relationship. But this only protects the client from the costs of having her lawyer's cooperation exploited at some later time in the lawsuit, not from the greater costs of the lawyers' inability to cooperate from the outset. A larger number of client-lawyer relationships are voluntary, at least in some areas of practice, like commercial litigation and criminal defense, although there are some highly specialized practices in which an oligopolistic market for lawyers' services exists. With respect to one-shot litigants, however, the episodic nature of their interaction with lawyers and the social differentiation of these populations of lawyers and clients make it extremely difficult to acquire the information necessary to seek out high commitment lawyers (if that is their desire) and to structure the legal relationship with their lawyer accordingly.<sup>65</sup>

### III.

Simon worries very much about the corruption of formal entities such as the organized bar, which is beholden to its economically self-interested members. The dismal record of the state bar associations in controlling unethical behavior by lawyers is almost taken for granted, and there seems to be no reason to quarrel with Simon's assessment on this point.<sup>66</sup> Despite powerful critiques by Simon and others,<sup>67</sup> lawyers as a whole do not seem terribly interested in finding an alternative to the dominant view, in which they can sell zealous advocacy to clients and rest easy that they will not be held morally accountable for their clients' ends. Nevertheless, the hope expressed

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64. Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115-16 (1992); Bernstein, *supra* note 34, at 1724.

65. See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 151-75 (1994); Galanter, *supra* note 37, at 116-17.

66. See also RICHARD L. ABEL, AMERICAN LAWYERS 156-57 (1989); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE 158-65 (2000).

67. See, e.g., MARVIN E. FRANKEL, PARTISAN JUSTICE (1980); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

in Simon's Lecture is that nonlegal regulation will be less susceptible to capture by lawyers who are not committed to practicing law in the interests of justice. At the risk of sounding an unduly pessimistic note on this hopeful occasion, I wonder whether the informal, non-state-centered mechanisms he favors are any more insulated from the pressures of lawyer self-interest than the formal, monopolistic, profession-based regulatory regime he attacks.

The reason for this pessimism is not related only to the persistence of the dominant view, the hired gun ethic, the ideology of advocacy, or whatever one wants to call it, among practicing lawyers. Rather, Simon's alternative is vulnerable to capture by self-interested lawyers by reason of the structure of its enforcement mechanism. As noted above, reputational markets, gossip, informal means of retaliation, and decentralized control mechanisms work better among parties who are repeat players with respect to each other. In a small town, all the lawyers may have incentives to cooperate with one another;<sup>68</sup> in larger cities there may at least be specialized bars in which lawyers follow norms of reciprocal fair dealing with each other.<sup>69</sup> The situation becomes more complicated when we introduce the lawyer-client relationship. A lawyer may be a repeat player with respect to judges and other lawyers, but only a one-shot player with respect to the client. In addition, the client may herself be only a one-shot player with respect to the litigation system.<sup>70</sup> This asymmetry gives rise to a "confidence game" structure, in which the lawyer's primary loyalty is to other institutional players, who assist her in duping the client into believing that the client is receiving zealous representation.<sup>71</sup> As Marc Galanter puts it, the "real" clientele of a lawyer who represents individuals who have only episodic contact with the legal system are the other institutional actors.<sup>72</sup> Good relationships among, for example, criminal defense attorneys, prosecutors, judges, and court personnel such as clerks and bailiffs, are essential in order to facilitate the resolution of cases through plea-bargaining.<sup>73</sup> Furthermore, in order to do well in her own career, a defense lawyer must have access to courthouse personnel who can cut her client breaks. By obtaining this access, the defense lawyer

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68. See, e.g., DONALD D. LANDON, *COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE* 140-44 (1990).

69. See, e.g., Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. BAR FOUND. RES. J. 217, 240-41.

70. See Gilson & Mnookin, *supra* note 29, at 512-13, 551.

71. Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, LAW & SOC'Y REV., June 1967, at 15, 38.

72. Galanter, *supra* note 37, at 117.

73. Blumberg, *supra* note 71, at 18-22.

becomes a “fixer” who has a valuable commodity—access—to sell to clients.<sup>74</sup>

A profound tension thus exists between the procedural entitlements of the client and the systemic interest in the efficient processing of cases. To put it unkindly, criminal defense lawyers sell out some of their clients in the interests of procedural justice and of long-term economic success. To make the same point more sympathetically, if each client received what he was entitled to under law—a full, adversarial trial on the merits—the machinery of criminal justice would grind to a halt. As officers of the court, lawyers have some obligation to facilitate the fair and efficient processing of disputes. The alternative to accepting some of this responsibility is the ethic of zealous advocacy within the bounds of the law that Simon decries. After all, the reason he criticizes lawyers who take formally non-frivolous but substantively unwarranted legal positions is that they are neglecting their responsibility to facilitate the just resolution of disputes.<sup>75</sup> It may be objected, of course, that a lawyer in Simon’s contextual view is not permitted to “sell out” her client’s interests merely to enhance the lawyer’s reputation with other courthouse regulars. We need not take this uncharitable view of settlement in all cases, however. Some settlements may be just, if they are calibrated to the value of the plaintiff’s claims, discounted for the probability of a defense verdict at trial.<sup>76</sup> Moreover, Simon explicitly includes the effective functioning of the system within his definition of justice, and charges contextualist lawyers with making the procedural apparatus as efficient as possible, consistent with deciding cases on the legal merits.<sup>77</sup>

To the extent that this Lecture can be understood as a brief for shifting some of the responsibility for regulating the profession onto nonlegal mechanisms, the problem noticed by Blumberg becomes more acute. Simon argues that reputational markets should encourage lawyers to increase their level of ethical commitment, because clients would seek a high commitment lawyer over an attack dog in order to benefit from the lawyer’s good reputation.<sup>78</sup> In litigation, one way to acquire a good reputation is to acquiesce to reasonable requests by opposing counsel, not annoy judges unduly, and generally refrain from rocking the boat. “[A] tribunal might reward lawyers who appear to adhere to high-commitment ethics with procedural accommodation or more ready acceptance of their representations.”<sup>79</sup>

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74. *Id.* at 25-26.

75. SIMON, *supra* note 1, at 140-41.

76. *Id.* at 141.

77. *Id.* at 143.

78. Simon, *supra* note 3, at 651-52.

79. SIMON, *supra* note 1, at 205.

Everything works beautifully if the judge, other lawyers, and assorted courthouse regulars, like clerks, are interested in doing justice, in the sense of deciding cases on their merits. The trouble is that the tribunal and all the supporting players may be no more interested in justice than the dominant-view lawyers Simon criticizes. Or, to put the point less harshly, other institutional actors may act under a Weberian, bureaucratic conception of justice, emphasizing docket-clearing, expeditious handling of cases through settlements and plea bargains, and efficiency rather than resolution of cases after careful consideration of the parties' factual and legal contentions.<sup>80</sup> In such a system, lawyers' incentives would be largely as Blumberg described them—to contribute to the realization of administrative values such as the saving of cost, time, and labor.<sup>81</sup>

In *The Practice of Justice*, Simon recognizes the alienating effect that the rationalization of professional practice through categorical norms of ethics has on lawyers,<sup>82</sup> and argues for the contextual view as a way of returning meaning to lawyers' work. By vesting lawyers with the autonomy to make flexible, substantive decisions regarding the application of law to their clients' cases, the contextual view returns artisanal values like personalization, judgment, and craft (i.e. non-fungibility of one's work product) to the practice of law, as well as connecting lawyers' lives more directly with the pursuit of social justice.<sup>83</sup> His diagnosis of alienation is perceptive, and he may be right to look to the idealism of law students and young lawyers as a source of hope for the renewal of the profession's aspirations. As noted at the outset, however, this idealism makes an uncomfortable fit with enforcement mechanisms that depend so critically on the reputation of lawyers within the professional community. If professional norms become differentiated into low commitment and high commitment, the only way to avoid a race to the bottom is to make high commitment strategies more beneficial to clients, which in turn is plausible only if the consequences of adopting a low level of ethical commitment are visited on the clients. Unfortunately, the most likely mechanism for creating this feedback effect creates divided loyalties on the part of lawyers, who must please other institutional actors whose commitments may not be to substantive justice. This means that the lawyer may have an incentive to sell out the short-run inter-

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80. See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994).

81. Blumberg, *supra* note 71, at 23; see also Steven Lubet, *Professionalism Revisited*, 42 EMORY L.J. 197, 204-07 (1993) (recounting experience as a legal aid lawyer in landlord-tenant and collections court, in which the courts had "become bureaucratized to the point that they bec[a]me concerned with delivering results rather than doing individual justice").

82. SIMON, *supra* note 1, at 121-23.

83. See *id.* at 123-24, 131-32.

ests of one client in favor of her own long-run interests in maintaining good relationships with the other actors.

Perhaps I am exaggerating the problem because I have unwittingly subscribed to the dominant view position that the lawyer ought to be primarily loyal to her client, not to the system of justice generally.<sup>84</sup> One person's "double agent"<sup>85</sup> is another's Brandeisian lawyer for the situation.<sup>86</sup> Nothing in Simon's Lecture is inconsistent with the ideal of loyal client service. His point is rather that a lawyer provides better client service by realizing that opposing counsel and courts are interested in achieving a cooperative solution to various problems, such as discovery abuse and misrepresentations in negotiation, and assuming a cooperative posture with respect to these other institutional players. I do think, though, that the tension between procedural and substantive justice is not likely to go away if the professional monopoly is dissolved. The market, no less than the organized bar, is a rough instrument for regulating lawyers' behavior. Simon's categorical view is a response to the tension between procedural and substantive justice, and he envisions trade-offs between the two conceptions of justice as the merits of a particular representation require.<sup>87</sup> Precisely because legal ethics is so contextual, these subtle distinctions cannot be translated into clear, unambiguous signals of a lawyer's level of ethical commitment, which can be used by participants in the market for legal services. In the end, Simon may not be able to have it both ways, with a flexible, contextual, case-by-case approach to lawyers' ethics and an enforcement mechanism that depends on clarity and the absence of ambiguity.

Depending on one's attitude toward the rhetoric of professionalism, whether one regards it as self-serving window dressing or as genuine ideals to which lawyers ought to respond, Simon's embrace of nonlegal regulation is either regrettable or welcome. Authentically high commitment lawyers presumably adopt this level of commitment because they believe it is morally obligatory, not because they believe it will help them attract clients. On the other hand, even morally ambitious lawyers have to eat and pay the mortgage, and it would be comforting for them to expect that their ethical commitments will not result in losing a race to the bottom. There is a long tradition in moral philosophy of trying to show that doing the right thing is ultimately conducive to one's happiness. This Lecture attempts to show that the marketplace will encourage a race to the top,

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84. See generally William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (arguing that even critics of the adversary system tend to accept the ideology of advocacy without question).

85. Blumberg, *supra* note 71, at 39.

86. SIMON, *supra* note 1, at 127-32.

87. *Id.* at 139-40.

if only it could be freed from the strictures of the organized bar's low commitment rules. It is an extremely ambitious and hopeful, but not utopian, claim. Simon does not think we are all angels, only that our self-interested natures may drive us in the direction of beneficial cooperation.<sup>88</sup> A reader looking for more idealism will be disappointed in this stance, but what we know about lawyers' ethics in practice suggests that any serious proposals for reform will have to contend with the pervasiveness of self-interest and the erosion of professional ideals.<sup>89</sup> If morality is all about striking the appropriate balance between values, then Simon is to be commended for recognizing the balancing act inherent in professional regulation, and offering a proposal for reform that attempts to get it right.

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88. Cf. DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986).

89. "As market forces take on greater and greater salience and the competitiveness of the legal market increases, the very meaning and viability of professionalism as an ideal guiding law practice is being called into question." Sarat, *supra* note 23, at 811.