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Misplaced Fidelity

LAWYERS AND FIDELITY TO LAW. By W. Bradley Wendel. Princeton, New Jersey: Princeton University Press, 2010. 286 pages. \$35.00.

Reviewed by David Luban*

I. Introduction: Situating *Lawyers and Fidelity to Law*

The contemporary subject of theoretical legal ethics began with a handful of papers in the 1970s and early 1980s, mostly by moral philosophers troubled by the apparent dissonance between impartial morality and the one-sided partisanship of the lawyer's role.¹ The so-called standard conception of the lawyer's role, captured in the mantra of zealous advocacy, combines three elements: partisanship, neutrality, and nonaccountability.² Partisanship requires lawyers to pursue lawful client ends by any lawful means necessary, regardless of the morality of the ends or the damage the means might inflict on the innocent.³ Neutrality means that lawyers must not exercise moral judgment over their clients' lawful ends or the lawful means

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1. E.g., ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* (1980); *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* (David Luban ed., 1983) [hereinafter *THE GOOD LAWYER*]; Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); William H. Simon, Commentary, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975). Simon's article focused less on moral philosophy than on jurisprudence, and in subsequent works it became clear that Simon's own questions and answers differ significantly from those of the moral philosophers. See David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873, 879–85 (1999) (describing and analyzing the shift in Simon's position between *The Ideology of Advocacy* and his 1998 book, *The Practice of Justice: A Theory of Lawyers' Ethics*); Simon, *supra*, at 32 (establishing that the article analyzes various jurisprudential doctrines).

2. The term *standard conception* originated, I believe, in Postema, *supra* note 1, at 73. More or less simultaneously, Simon and Postema identified the three components of the standard conception. *Id.*; Simon, *supra* note 1, at 36–37. Murray L. Schwartz also identified two of the three components—partisanship and nonaccountability. Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 671 (1978). In a well-known paper, Ted Schneyer denied that there is anything standard about the conception and complained that it amounted to moral philosophy's standard *misconception* of legal ethics. Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1569. I continue to think that the conception is standard. See generally DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 393–403 (1988) [hereinafter LUBAN, *LAWYERS AND JUSTICE*] (responding to Schneyer). But to avoid begging questions, I now prefer the more descriptive term *neutral partisanship* in place of *standard conception*. I will stick with Postema's label here because it is the one Wendel uses.

3. Postema, *supra* note 1, at 73.

used to pursue them.⁴ And lawyers cannot be held morally accountable for acting on their clients' behalf.⁵ The central question raised by the standard conception is why lawyers get a free pass from morality in a pastime that is far from victimless. As Richard Wasserstrom and Gerald Postema observed, the lawyer does her work through speech and persuasion.⁶ Her moral faculties are fully engaged in a way that seems uniquely hard to square with nonaccountability.⁷

The general issue animating most of this work is the problem of role morality: how can it be that her professional role might require a lawyer to do things that would be morally forbidden to a nonlawyer? Charles Fried asked, "Can a good lawyer be a good person?"⁸ And Wasserstrom wondered whether "the lawyer-client relationship renders the lawyer at best systematically amoral and at worst more than occasionally immoral."⁹ To the response that the adversary system requires lawyers to play a partisan role, philosophers scrutinized the "adversary system excuse" and found it wanting.¹⁰ Others defended both the standard conception and the adversary system.¹¹ The critics were less concrete in identifying alternatives to what Wasserstrom called the "simplified moral world" of the standard conception.¹² Postema reconceived the lawyer's role as a "recourse role," meaning that it has built into it the recourse of breaking role when morality requires it.¹³ Wasserstrom and Simon called for deprofessionalization (although Simon eventually developed a different approach).¹⁴ My own position replaces the standard conception with a stance that I labeled "moral

4. *Id.*

5. *Id.*

6. *Id.*

7. Postema, *supra* note 1, at 76; Wasserstrom, *supra* note 1, at 14.

8. Fried, *supra* note 1, at 1060.

9. Wasserstrom, *supra* note 1, at 1.

10. See, e.g., David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER*, *supra* note 1, at 83, 83–118 (coining the expression *adversary system excuse* and explaining why the excuse is insufficient); Simon, *supra* note 1, at 130–44 (decrying the adversary system excuse as inadequate); see also DAVID LUBAN, *The Adversary System Excuse*, in *LEGAL ETHICS AND HUMAN DIGNITY* 19, 19–64 (2007) (revising Luban's 1983 essay).

11. See, e.g., MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 9, 12 (1975) (championing the adversary system as protective of individuals' fundamental rights and emphasizing the importance of partisanship and neutrality); STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* (1984) (advocating for the adversary system).

12. Wasserstrom, *supra* note 1, at 2.

13. Postema, *supra* note 1, at 81–83 (attributing the recourse-role concept to MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY* 31–36 (1973)).

14. See Simon, *supra* note 1, at 130–44 (positing that personal ethics and respect for clients should guide lawyers' conduct); Wasserstrom, *supra* note 1, at 21–23 (proposing that lawyers should strive to do what is best for their clients as humans, not to simply exercise their own legal competency most effectively). Simon's later approach calls for contextual analysis and the pursuit of legal justice. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 9 (1998).

activism,” in which lawyers must act as they would if the adversary system excuse was unavailable to them.¹⁵

Obviously, these writers were not the first to question the lawyer’s role in a philosophical spirit. Arguably, the critique goes back as far as Plato’s *Gorgias* and *Theaetetus*,¹⁶ and in the twentieth century, Lon Fuller raised similar questions and provided a sophisticated defense of the adversary system excuse.¹⁷ But the burst of activity in the 1970s and 1980s revived legal ethics as a serious theoretical subject after a long hiatus.

Since the turn of the millennium, philosophical legal ethics has taken a new turn, with energetic, sophisticated writers who reject the earlier critiques of the standard conception and the focus on role morality in favor of different questions and answers. These authors include Tim Dare, Kate Kruse, Daniel Markovits, and Norman Spaulding.¹⁸ Among the most prominent and productive of this new wave of ethics theoreticians is W. Bradley Wendel,

15. See DAVID LUBAN, *Introduction*, in *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 10, at 1, 11–12 (declaring that lawyers cannot avoid moral accountability and, thus, should accept moral responsibility for their practice of law).

16. PLATO, *GORGIAS* *465c; PLATO, *THEAETETUS* *172e–173b.

17. See Lon L. Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 35, 45 (Harold J. Berman ed., 1972) (arguing that an adversarial presentation of a controversy may be “the most effective means we have of combating the evils of bureaucracy”); Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160–62 (1958) (offering an analysis of lawyers’ responsibilities within the adversary system, including those of advocate and counselor, designer of a framework of collaborative effort, and public servant). For further discussion, see David Luban, *Rediscovering Fuller’s Legal Ethics*, 11 *GEO. J. LEGAL ETHICS* 801, 819–28 (1998).

18. See, e.g., TIM DARE, *THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER’S ROLE* (2009) (providing a contemporary argument in defense of the standard conception); DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 2* (2008) (arguing in part that an alternative approach to legal ethics based partly on “distinctively lawyerly virtue” can render lawyers’ lives ethically appealing); Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 *GEO. J. LEGAL ETHICS* 103, 129–44 (2010) (proposing a model for lawyer ethics that looks beyond zealous advocacy to how partisanship can most effectively operate when working with “three-dimensional clients”); Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 *MINN. L. REV.* 389, 391–93 (2005) [hereinafter Kruse, *Challenge of Moral Pluralism*] (asserting that situations where a lawyer fundamentally morally disagrees with his client should be addressed under a moral conflict-of-interest analysis); Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 *ARIZ. L. REV.* 493, 496 (2011) (suggesting that jurisprudential theories in legal ethics serve as an “attractive alternative” to moral theories); Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 *STAN. L. REV.* 1931, 1938–41 (2008) (criticizing moral-activist lawyers for romantic individualism); Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 *U. COLO. L. REV.* 1, 6–7 (2003) [hereinafter Spaulding, *Reinterpreting Professional Identity*] (arguing that the lawyer’s role is founded in notions of service to the client, regardless of the client’s personal, moral, or ideological inclinations, rather than identification with the client); Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 *CORNELL L. REV.* 1377, 1377–78 (2008) (arguing that certain situations where lawyers violate human dignity and morality stem *not* from an adherence to traditional notions of professional responsibility within the adversary system, but rather from deviations from such notions).

whose many distinguished articles have culminated in the much-anticipated book that is the subject of this Colloquy.¹⁹

II. Pluralism and Political Morality

Writers in the new wave differ significantly from each other, but it seems to me that their writing shares two main themes, both of which figure prominently in Wendel's work. First is an abiding concern with moral pluralism—the fact that reasonable people can disagree in their moral views even about fundamental matters.²⁰ Moral pluralism is not simply a regrettable by-product of human difference and contentiousness. For Wendel, value is itself plural.²¹

Given the central fact of value pluralism, the new-wave writers are troubled at proposals for lawyers to, in effect, impose their own moral views on their clients by withholding services on moral grounds.²² Viewed in this light, moral activism looks more like moral imperialism, and the lawyer who refuses to advance a client's ends on moral grounds is guilty of, at the very least, self-righteousness. But that is not all. "Legality," Wendel reminds us, "is important because it enables people to live together in a relatively peaceful stable society, despite deep and persistent disagreement about moral ideals, values, and conceptions of the good life."²³ So a lawyer who, on grounds of conscience, refuses to press a client's legal entitlements is sabotaging the very mechanism that allows us to manage value conflicts without falling into a war of all against all. The moral activist is not merely self-righteous. She is reckless and irresponsible toward a political settlement that we all need.

This takes us to the second theme that Wendel and the other new-wave writers press. They criticize moral philosophers for neglecting the political dimension of law practice—the fact that a legal system is a political institution that serves indispensable political ends.²⁴ Here, the argument is that framing legal ethics as a purely moral issue (the problem of role morality) fundamentally misunderstands the subject. The lawyer's obligations are political obligations, not moral ones, and the philosophical disciplines for addressing them are political philosophy and jurisprudence, not moral philosophy. As Wendel puts it, "legal ethics is part of a freestanding political

19. W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010).

20. See Kruse, *Challenge of Moral Pluralism*, *supra* note 18, at 391 ("Moral pluralism recognizes the existence of a diversity of reasonable yet irreconcilable moral viewpoints, none of which can be objectively declared to be 'right' or 'wrong' from a standpoint outside of its own theoretical framework.").

21. WENDEL, *supra* note 19, at 5, 214 n.12 (explaining that ethical values are diverse and not capable of being reduced to one "master-value" that sets forth what constitutes an ethical existence).

22. E.g., Spaulding, *Reinterpreting Professional Identity*, *supra* note 18, at 51–53.

23. WENDEL, *supra* note 19, at 36.

24. See *id.* at 91 (emphasizing that laws are a product of "political institutions" and therefore are only legitimate if enacted according to "fair procedures").

morality,” and he therefore doubts that “the toolkit of moral concepts that should be brought to bear on the analysis is the same toolkit used elsewhere in moral philosophy.”²⁵

For Wendel, the most important concept in the revised toolkit is political obligation in the form of *fidelity to law*.²⁶ Unlike the standard conception, Wendel believes that lawyers are morally accountable—but their accountability runs to the law, not to individuals.²⁷ Furthermore, unlike the standard conception, lawyers’ loyalty consists in fidelity to law, not to client interests.²⁸ At the same time, Wendel and the other new-wave writers energetically defend lawyers’ obligation to pursue the client’s legal entitlements, even in the face of countervailing moral reasons not to. Wendel insists that fidelity to law would rule out a great many games that lawyers play to frustrate discovery, coach witnesses, and throw adversaries off balance.²⁹ So his view is not lacking in critical bite. But his overall position defends a constrained version of the traditional lawyers’ self-conception against its philosophical critics.

Wendel’s position has an intuitive attractiveness. It seems to occupy the Aristotelian mean between two extremes, the standard conception and its critique. Wendel and the other new-wave writers draw their argumentative resources from two unquestionably important truths: the fact of pluralism and the fact that a legal system is a political institution for managing pluralism and civilizing conflict.

The position has other attractions as well. Wendel takes very seriously the undertheorized role of lawyers as advisors on the meaning of law, an issue that he explores through the case of the lawyers who wrote the torture memos. He believes that “the lawyer’s central role is to evaluate whether the client is legally entitled to pursue some objective”—in effect subordinating even the advocate’s role to that of interpreters of law.³⁰ This is a position that I find very appealing. (My own work has moved in a similar direction.)

25. *Id.* at 23. In this respect, Wendel agrees with Simon, who argues that problems of legal ethics are jurisprudential, not moral. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* 15–18 (1998). In other respects, they disagree sharply.

26. See WENDEL, *supra* note 19, at 168 (“[T]he lawyer–client relationship should be structured by the ideal of fidelity to law—not to clients—that is, by legal and ethical ideals of fiduciary obligations.”).

27. *Id.* at 12.

28. *Id.* at 2.

29. *Id.* at 191. Here, Wendel’s view is not far from that of Fuller and Randall, who argued that a lawyer “plays his role badly, and trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision.” Fuller & Randall, *supra* note 17, at 1161. This was written in 1958, and it is safe to say that the trial bar in the ensuing half century has completely ignored this prescription, viewing the good litigator’s job precisely as muddying the headwaters of decision when doing so benefits the client. The smart money would predict that Wendel’s ethical prescription that litigators refrain from lawyer games will end up in the same boat—which, I can report, is the same boat that critics of the adversary system and the ideology of advocacy have always been in.

30. WENDEL, *supra* note 19, at 56.

Fidelity to law means not only pursuing legal entitlements, but also interpreting the law faithfully, a point to which I return below. In addition, like the process theorists of the 1950s, Wendel places special emphasis on the craft values of the legal profession as an ethic designed to make the process work as it is supposed to work. This will hold obvious appeal to conscientious lawyers who believe that high-quality work is usually more ethical in every sense than sloppier work.

Finally, the book is attractive as a piece of argumentation. Wendel is philosophically sophisticated, and political philosophy securely anchors his argument, but he wears his learning lightly and avoids philosophical complexities for their own sake. He knows the law of lawyering, he engages with the scholarly literature, and he makes telling use of examples. All in all, *Lawyers and Fidelity to Law* is admirably lucid and carefully done.

However, I disagree with important aspects of the theory. Ultimately, it seems to me, Wendel puts too much faith in existing legal institutions and too much faith in procedure at the expense of substantive justice. In places, he writes as though the existing legal system is about as good as it can get. There is, I fear, complacency here as well as excess willingness to discount substantive injustice as little more than collateral damage in a basically just system. I discuss these issues in Part III.

I next examine Wendel's basic metaphor of fidelity to law. The view I shall defend is that outside the specific context of legal interpretation, law is not the kind of thing that deserves fidelity. In its primary meanings, associated with marriage, friendship, and religious faith, fidelity pertains to personal relationships, not a relationship with an abstract entity like "the law" or even an institutional arrangement like "the legal system." Furthermore, in its primary meanings, fidelity is a narrow concept, narrower than loyalty or professional or personal obligation. Properly understood, the moral obligation to respect the law—when it exists—is different from fidelity and is actually an obligation running not to the law but to fellow members of the community the law governs. It is, moreover, an obligation based on reciprocity, so that laws and legal systems marred by structural or systematic inequalities do not deserve respect to the extent Wendel thinks they do. Flawed legal systems exercise a lesser claim on us, one that can be overridden by countervailing moral concerns. This is Part IV.

In the final part, I ask where the morality went. In Wendel's view, the legal system provides second-order reasons not to ask first-order moral questions, but the questions surely do not go away. Wendel, too, is concerned about this difficulty, and he tries to address it. I conclude that his strategies either fail or move Wendel to a position that is not so far from moral activism after all.

III. The Best of All Possible Legal Systems

In conspicuous ways, Wendel's political philosophy is a return to the legal-process theory of the 1950s. Process theorists observed that every society needs an "institutional settlement"—a kind of social contract establishing the lawmaking and dispute-resolution mechanisms for the society.³¹ Once the institutional settlement is in place, we must comply with it: "[D]ecisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding upon the whole society unless and until they are duly changed."³² The words are Hart and Sacks's, but they capture Wendel's argument as well.³³ The three *dulys* in this sentence hammer home the fundamental point that the institutional settlement represents society's chosen way of doing things, which threatens to unravel if people cut corners or take shortcuts. People must pursue their interests within the terms of the settlement, and lawyers are the agents of that pursuit.

For Wendel, fidelity to law means respect for law, where *respect* is a term of art meaning obedience-plus: not only obeying law, but "conducting one's affairs with due regard for the legal entitlements of others."³⁴ The question is why the law deserves obedience-plus, given that the law can, after all, be pretty awful.

It appears that Wendel's commitment to obedience arises from an important condition he stipulates: "The conception of legal ethics set out here is limited to lawyers practicing in a more or less just society."³⁵ That is because "the normative attractiveness of the lawyer's role depends on the normative attractiveness of legality."³⁶ The fact that the society is more or less just guarantees that acceding to the institutional settlement is not a morally outrageous thing to do.

At this point, I believe, Wendel runs into trouble. He understands perfectly well how flawed many features of the American institutional settlement are and takes pains to catalogue them: "electoral politics . . . skewed by the influence of wealthy donors"; participation limited for many by disparities in wealth; structural inequality in education; persistent discrimination; and "intrusive policing and bureaucratic indifference."³⁷ Although he assures us that his "point . . . is not to present an apologia for American society,"³⁸ Wendel sees no problem for the legitimacy of the

31. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 3–4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

32. *Id.* at 4.

33. See WENDEL, *supra* note 19, at 91 ("Laws that are the product of these political institutions are legitimate if they are enacted using adequately . . . fair procedures. This is admittedly a thin basis for solidarity, but it is likely the best we can do.").

34. *Id.* at 88 n.*.

35. *Id.* at 96.

36. *Id.* at 92.

37. *Id.* at 91.

38. *Id.* at 92.

American system and excuses the procedural evils he has just catalogued as “often the byproduct of good-faith disagreements.”³⁹ In his view, “the legitimacy of procedures is not based on optimizing fairness but on doing as well as possible,”⁴⁰ and he believes that American law “does as well as possible at treating the views of all citizens as presumptively entitled to respect.”⁴¹ Our flawed institutional settlement is “likely the best we can do.”⁴² Wendel quotes Churchill’s aphorism that democracy is the worst form of government except for all others.⁴³

I am all for not letting the best be the enemy of the good, and I agree with Wendel that legal ethics must be a theory for the nonideal world. But the concept of possibility at work in assertions that our law “do[es] as well as possible” is slippery.⁴⁴ Does he mean that no major reforms could make it better, or merely that reform is politically impossible given the process flaws he himself has catalogued? Wendel has not shown the former or even tried to. As for the latter, it is hard to see why a flawed system in which entrenched interests can block worthwhile reforms deserves undeviating obedience. If it did, then any system with an entrenched, self-reproducing power structure—Stalinist Russia, for example—would qualify as “the best we can do” and would be “do[ing] as well as possible.”⁴⁵

In places, Wendel lapses into apologetics for the status quo. Thus, at one point Wendel considers the objection that partisanship in shaping the factual record has nothing to do with value pluralism or the purposes of the legal system.⁴⁶ Why not forbid lawyers from resisting the discovery of damaging truths? Wendel’s response comes close to an assertion that the existing rules are the best they can be:

The rules of the adversary process, including rules of pleading, discovery rules, and rules governing motions practice, represent a balance among considerations of efficiency, fairness, respect for the privacy interests of litigants, and the desire to resolve disputes accurately on the merits. *Thus*, . . . permitting or requiring litigators to take a partisan stance with respect to the facts of a dispute is still justified on the grounds that the legal system has established a framework for the orderly resolution of disagreement.⁴⁷

39. *Id.*

40. *Id.* at 99.

41. *Id.* at 114.

42. *Id.* at 91.

43. *Id.*

44. *See id.* at 99 (“[T]he legitimacy of procedures is not based on optimizing fairness but on doing as well as possible given the need for both equal respect and finality.”).

45. *See id.* at 91, 114 (“[A] procedure that does as well as possible at treating the views of all citizens as presumptively entitled to respect . . . represents the best we can do . . . to embody equality in our relations with one another . . .”).

46. *Id.* at 57–59.

47. *Id.* at 59 (emphasis added).

To which one might respond: why suppose that the balance is the right one or that the orderly framework is a sufficiently just one? Where does the “thus” come from?

In the same vein, Wendel writes that “[t]he procedures of the legal system . . . constitute a means for living together, treating one another with respect, and cooperating toward common ends, despite moral diversity and disagreement.”⁴⁸ This, however, would have to be shown, not simply claimed. What would Wendel’s response be to those who find grotesque injustice in the American legal system—for example, in our practices of mass incarceration and long-term solitary confinement, or in the unavailability of civil legal services for the fifth of Americans who today qualify for legal aid? Reassuring us that the law “does as well as possible” is no answer.

IV. The Concept of Fidelity

In this part, I examine the concept of fidelity, the guiding metaphor in Wendel’s theory. In ordinary language, it combines elements of several related concepts, each appropriate in certain contexts but less appropriate in others. One context concerns personal relationships: fidelity in marriage, friendship, and religion (viewed as a relationship with God or the gods). I will call this *personal fidelity*. Different from personal fidelity is what I will call *interpretive fidelity*: fidelity in interpretation, translation, performance, or representation. Wendel pretty clearly works with the concept of interpretive fidelity, particularly when the lawyer takes on the role of advisor, charged with offering the client an opinion on whether the client can legally do what she wants. But Wendel also relies on a concept of obligation to the law that he calls fidelity, and I think this is a mistake unless it means obligation to persons and not to an impersonal system. Conflating the two senses is also a mistake because interpretive and personal fidelity are different.

A. *Personal Fidelity*

1. *Marital fidelity*.—The most basic ordinary-language use of the term *fidelity* is marital fidelity, and it means, quite simply, not cheating on your spouse by having sex with someone else. By extension, this usage has come to include fidelity between unmarried intimate partners; but to keep the discussion simple, let us focus solely on marriage.

Importantly, marital fidelity carries no implications of devotion to the spouse beyond nonbetrayal, and it refers quite specifically to one species of nonbetrayal, namely sexual monogamy. Marital fidelity does not require you to be a good husband or wife; it does not demand love or lovingness, or even living together: spouses who separate may still opt for fidelity. In ordinary

48. *Id.* at 89.

language, all fidelity demands is not going to bed with anyone else—in other words, *fidelity* means little more than no infidelity, and *infidelity* means sex outside the relationship, nothing more and nothing less.

Thus in its most primordial usage, *fidelity* is a limited concept and a severely minimal virtue. It is far narrower than something we might superficially take as a synonym, namely *loyalty* or *devotion*. An example will illustrate the difference. A wife surreptitiously loots the couple's joint bank account in preparation for deserting her husband (or the other way around). That certainly counts as disloyalty to a high degree, but until the moment she has sex with someone else, she has not been unfaithful in the primary, ordinary-language sense of the word. Disloyal, yes; unfaithful, no. Infidelity is not simply lack of loyalty. It is something stronger. It is betrayal in the primordial sense of betraying one person in favor of another.

This specific sense of marital infidelity gets lost if we redescribe it as breaking one's marital vows. That euphemism loses the important implication that the unfaithful spouse has not merely violated an abstract norm, but has *gone over to a concrete rival*. The sex act between spouse and rival signifies transfer of allegiance and not merely loss of allegiance. Marital infidelity is a three-party relationship involving two spouses and a rival, not a two-party relationship involving spouses alone, and certainly not a relationship between a person and the abstract object called marital vows.

The nearest political counterpart to infidelity in this sense appears to be treason, which according to the U.S. Constitution "shall consist only in levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort."⁴⁹ A citizen can despise the United States, steal from the government, or even commit acts of espionage or terrorism without being a traitor. Like marital infidelity, treason means something graver and more specific than disloyalty. It means switching allegiance to an enemy. Someone who merely disobeys the law, or takes the Holmesian bad man's "what's-in-it-for-me?" attitude⁵⁰ toward the law has not betrayed anything or anyone, and has not engaged in infidelity to the law.

2. *Friendship*.—Other contexts may involve only two parties. To call someone a "faithless friend" carries no connotations that she abandons me for another friend, only that she cannot be relied upon. The faithful friend is one who visits me in the hospital, takes me out to dinner when I'm blue, goes the extra mile in helping out when I've lost my job, and does not keep score in the game of reciprocation. In this context, *fidelity* and *faith* belong side by side with a family of terms, mostly etymological cousins—*trust*, *true*, *truth*, *troth*, *betrothed*—in which trustworthiness and constancy span the whole range of behavior, not merely sexual nonbetrayal. When, in a classic legal

49. U.S. CONST. art. III, § 3.

50. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (defining the "bad man" as one "who cares only for the material consequences" of the law).

ethics article, Charles Fried coined the metaphor of “lawyer as friend,” he was appealing to precisely this conception of lawyerly fidelity to clients.⁵¹ Wendel, on the other hand, rejects a vision of lawyers’ ethics founded on personal loyalty of lawyer to client, in favor of fidelity to law.⁵² I take it, therefore, that this context of fidelity is not at work in Wendel’s version of legal ethics—unless, as I believe, fidelity to the law is really a way of being faithful to persons.

3. *Religion*.—These observations take us to the next primary context of fidelity, namely, religion. Etymologically, *fidelity* comes from *fides*, the Latin word for *faith*,⁵³ and in religion it means being true to one’s faith. Or more exactly, it means being true to one’s God—and that is an important point because it conceives faith in its primary sense as a personal relationship between a human person and the divine person. Hewing to one’s faith in the sense of orthodoxy, ritual, or belief in such abstractions as articles of faith represents a distinctively secondary sense; we are more likely to use words like *devout*, *pious*, *observant*, or *practicing* than the word *faithful* to describe this attitude toward religion.

In the Hebrew Bible, religious fidelity carries powerful overtones of sexual fidelity. The chief sin of the Children of Israel, and their chief temptation, is idolatry, the worship of other gods.⁵⁴ The Second Commandment forbids idolatry in powerful terms: “Do not have any other gods before me. You shall not make for yourself an idol. . . . [F]or I the Lord your God am a jealous God.”⁵⁵ Jealous of what? Of something akin to adultery with a rival god. As Moshe Halbertal and Avishai Margalit demonstrate, the dominant understanding of idolatry in the Hebrew Bible likens it to sexual infidelity, and the prophets convey the warnings of the jealous God through powerful sexual imagery.⁵⁶ The Children of Israel must not “lust after their [foreigners’] gods”;⁵⁷ if they do, God will punish Israel for its “whoredom . . . when, decked out with earrings and jewels, she would go after her lovers, forgetting me.”⁵⁸ God accuses Israel of playing the harlot

51. Fried, *supra* note 1, at 1060–61.

52. See WENDEL, *supra* note 19, at 168 (“[T]he lawyer–client relationship should be structured by the ideal of fidelity to *law*—not to clients . . .”).

53. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 465 (11th ed. 2003).

54. See, e.g., *Exodus* 32:1–30 (detailing Israel’s worship of the golden calf after the exodus from Egypt and God’s resulting anger); 1 *Samuel* 15:22–23 (“Has the LORD as much delight in burnt offerings and sacrifices, as in obeying the voice of the LORD? . . . For rebellion is as the sin of divination, and insubordination is as iniquity and idolatry.”); *Psalms* 97:7 (“Let all those be ashamed who serve graven images . . . ; worship Him, all you gods.”).

55. *Exodus* 20:3–5, appearing in slightly different words in *Deuteronomy* 5:7–9.

56. MOSHE HALBERTAL & AVISHAI MARGALIT, *IDOLATRY* 1, 11–20 (Naomi Goldblum trans., Harvard Univ. Press 1992) (1989). I take the biblical passages quoted below from their discussion and follow their translation.

57. *Exodus* 34:15–16.

58. *Hosea* 1:2, 14–15.

and “lavishing your favors on every passerby,” like “the adulterous wife who welcomes strangers instead of her husband.”⁵⁹ “On every high hill and under every verdant tree, you recline as a whore.”⁶⁰ One might almost say that religious fidelity is subsumed under marital fidelity. The crucial point about religious faith conceived in this way is that it involves a relationship with a divine person, not an impersonal divinity like Aristotle’s or Spinoza’s.

In each of these contexts, it matters crucially that fidelity appears within a direct personal relationship, unmediated by a relationship with an impersonal or abstract entity like marital vows or articles of faith—or, I suggest, “the law.”

What, then, might be the personal relationship involved in devotion to the legal system? In my own writing, I have argued that respect for the law really means respect for the people in one’s political community. When the law represents a genuine scheme of social cooperation, disobedience is a form of free riding, and it expresses disdain for one’s fellows.⁶¹ Although expressing disdain is not the same as infidelity (because it does not necessarily mean betraying one’s fellows by allegiance to a rival), it commits a moral wrong, and avoiding that wrong is the source of moral obligation. That does not mean one must never disobey the law; other moral obligations can outweigh the obligation of obedience. Even then, however, the respect we owe to our fellows demands that we could (at least in principle) offer a reasoned account to our fellows about why our disobedience represents something more than free riding.⁶²

But what if the law does not represent a genuine scheme of social cooperation—for example, what if it systematically discriminates against a group? In that case, the rationale for obedience to law fails because of a fundamental lack of reciprocity. This is what Martin Luther King Jr. called “difference made legal,”⁶³ and like King, I believe that when difference is made legal, the victims of discrimination have no obligation to obey because their fellow citizens have snapped the bonds of reciprocity.

59. *Ezekiel* 16:15–26, 28–34.

60. *Jeremiah* 2:18–20.

61. For a more detailed account of this argument, see LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 32–43. What I summarize here is a version of a fair-play argument. It views the law as a cooperative scheme that creates obligations when five conditions are met: (1) the scheme creates benefits; (2) the benefits are general, accruing to the entire community; (3) the scheme needs widespread participation to succeed; (4) it actually elicits widespread participation; and (5) the scheme is a reasonable or important one. *Id.* at 38; David Luban, *Conscientious Lawyers for Conscientious Lawbreakers*, 52 U. PITT. L. REV. 793, 803 (1991) [hereinafter Luban, *Conscientious Lawyers*]. I believe that some of my arguments in the latter paper—in which I criticize Philip Soper’s argument that we can be obligated by an unfair cooperative scheme because an unfair scheme is better than none at all—apply to Wendel’s position as well. See Luban, *Conscientious Lawyers*, *supra*, at 803–07 (laying out the points against Soper’s argument).

62. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 46–47.

63. MARTIN LUTHER KING, JR., *WHY WE CAN’T WAIT* 83 (1964).

To sum up, solidarity with our fellow citizens can provide moral reasons to respect the law, but those reasons (a) can be outweighed and (b) exist only when the law itself is sufficiently fair. A crucial point is that disobedience to law in the face of a moral emergency is not necessarily disrespectful to one's fellows, and it is not like the paradigm form infidelity takes: betraying one person by going over to a concrete rival.

B. Interpretive Fidelity

Matters are different when we turn to interpretive fidelity. If an artist paints a portrait, we sometimes call it a faithful representation of the sitter; audio equipment is often described as "high fidelity"; translations can be more or less faithful to the original text. In each of these contexts, *fidelity* and *faithfulness* refer to mimetic accuracy. In such contexts, *fidelity* has to do with representation—literally, re-presentation—or interpretation.

Interpretive fidelity involves being faithful to an original. The original need not be a person; indeed, ordinarily it is not a person: the object of fidelity is a musical score, a performance tradition, a written text or verbal utterance, or the way light and shadow look on the façade of Rouen Cathedral at 7:00 p.m. on a summer evening. Even in the case of a faithful portrait of a person, we mean a faithful rendition of what the person looks like, not a moral relationship of loyalty to the subject of the portrait.

That is not to say that interpretive fidelity to an original lacks moral significance. An author who turns her novel over to a translator crosses her fingers and hopes for a faithful translation; a reader likewise counts on the translator to get it right. A trial witness testifying in a foreign language relies on the interpreter. These are moral relationships of trust, but they are different from relationships of personal fidelity.

When Wendel discusses the role of legal advisor and the torture memos, the form of fidelity to law he invokes is interpretive fidelity, not personal fidelity.⁶⁴ The "torture lawyers" were, in effect, faithless interpreters. Of course, their clients very much wanted them to give the answers they did. That fact is irrelevant to the ethics rules, which require independent, candid advice (faithful translation) and which, in my view, are right to demand it.⁶⁵ In the context of legal advice, I believe Wendel is right to demand fidelity to

64. WENDEL, *supra* note 19, at 178–84.

65. I have written extensively on the torture lawyers, and my views are eye-to-eye with Wendel's. *What Went Wrong: Torture and the Office of Legal Counsel in the Bush Admin.: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 111th Cong. 11–14 (2009) (statement of David Luban, Professor of Law, Georgetown University Law Center); DAVID LUBAN, *The Torture Lawyers of Washington*, in *LEGAL ETHICS AND HUMAN DIGNITY*, *supra* note 10, at 162; David Luban, *Liberalism, Torture, and the Ticking Bomb*, in *THE TORTURE DEBATE IN AMERICA* 35 (Karen J. Greenberg ed., 2006); David Luban, *Tales of Terror: Lessons for Lawyers from the 'War on Terrorism,'* in *REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS* 56 (Kieran Tranter et al. eds., 2010).

law—but here it means interpretive fidelity, not the obligation to obey the law that is Wendel’s central topic in other chapters.

Clearly, interpretive fidelity is not a sufficient condition of obedience or respect for the law—you can interpret the law faithfully and still choose to violate it—but what about the other way around? After all, if a lawyer interprets the law unfaithfully in advising a client, the client following the lawyer’s interpretation will disobey the law as it actually is written. If so, interpretive fidelity appears to be a necessary condition of respect for law. I believe, however, that the relationship between interpretive fidelity and respect for law is more complicated than one-way logical entailment. For one thing, even if a law deserves disobedience rather than respect or obedience, one might still object to disobeying it through unfaithful interpretation. It is one thing to announce, “This law is immoral and I won’t obey it”—the forthright stance of conscientious disobedience—but quite another to protest, “I am not disobeying the law” because under a clever bad-faith interpretation the law permits my action. The latter is the weasel’s way out. Interpretive fidelity is therefore a self-standing virtue, not merely an entailment of obedience.

V. The Remainder of Morality

A. *Second-Order Reasons*

Wendel’s argument for displacing common morality with professional morality draws on Joseph Raz’s theory of practical reasoning. The basic idea is that reasons exist at multiple levels: we of course have “first-order” reasons for or against beliefs and actions, but we also have “second-order” reasons, meaning “reasons not to act on reasons.”⁶⁶ Raz focuses on a class of second-order reasons called “exclusionary” because they are absolute preemptions from engaging in first-order moral reasoning. For Raz, exclusionary reasons are central to understanding the concept of authority (and in particular the authority of law), and it is part of the very meaning of authority that it creates exclusionary reasons not to take your own first-order moral reasoning into account on a matter that the authority has settled.⁶⁷

The problem, of course, is that it begs the question to assert that law has authority in Raz’s sense, just as it begs the question to assert that legal reasons are exclusionary. The analysis of concepts alone will never break us out of the closed circle of concepts. One would have to show independently that legal reasons are exclusionary. After all, urgent moral reasons one might have for breaking the law will equally be grounds for denying the exclusionary character of legal reasons.

66. WENDEL, *supra* note 19, at 21.

67. JOSEPH RAZ, *Authority, Law and Morality*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 194, 214–15 (1994).

Perhaps with these concerns in mind, Wendel breaks from Raz in two respects. First, he weakens the claim that legal reasons are exclusionary. On his view, “law creates presumptive, not conclusive obligations.”⁶⁸ Whatever second-order reasons law creates, they are not absolutes, and presumably, a suitably weighty moral consideration can override them.

This position is far more plausible and attractive than the absolutist view that law always and everywhere preempts morality, but the attractiveness comes at some cost. Wendel’s seemingly minor modification actually undermines the Razian architecture of multiple levels of reasons. How can a person know whether the tough choice she now faces falls under the exclusionary presumption or counts as one of the exceptional cases when she should engage in first-order moral deliberation? The only way she can decide is by engaging in first-order moral deliberation. In that case, the two levels collapse into one, and in place of Raz and Wendel’s split-level structure, the agent must simply engage in first-order balancing of the moral obligation to respect law against the countervailing obligation to break the rule, with a presumption on behalf of sticking to the legally defined role. This view turns out to be nearly identical to my own version of moral activism.⁶⁹ It may be that the only difference between Wendel’s conception of legal ethics and mine is that he assigns greater (but not absolute) weight to upholding the legal system because he finds it more fair and just than I do; he himself suggests this at one point.⁷⁰

The second way that Wendel differs from Raz is that rather than deriving his theory of (semi)exclusionary reasons from conceptual analysis, he offers a normative argument for it.⁷¹ The normative argument consists of the political defense of legal procedure and institutions based on value-pluralism, which we have already examined. It rests on a premise that Wendel does not articulate in so many words but that seems like the necessary source of his anxiety about the bad consequences of lawyers acting as moral free agents. The premise is that the legal system is comparatively fragile. Its system of roles cannot fulfill the purposes of legality if “officials and quasi-officials”⁷² break from their roles to work equity in the face of

68. WENDEL, *supra* note 19, at 107; see also *id.* at 21 n.*, 113. Wendel is occasionally less careful and backslides to Raz’s view—for example, when he asserts that “roles do real normative work by *excluding* consideration of reasons that someone outside the role would have to take into account,” and when he writes that “the lawyer’s professional obligations *exclude* resorting to ordinary moral considerations in deciding how to act.” *Id.* at 171 (emphasis added).

69. I develop this “deontological” version of moral activism—in which the role creates a presumption that may be overcome—in David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424, 425–35, 443–52 (1990).

70. WENDEL, *supra* note 19, at 241–42 n.67 (“To the extent [Professor Luban] believes that a legally established framework is fair and reasonable, our positions may not diverge substantially.”).

71. *Id.* at 113–14.

72. *Id.* at 171. For Wendel, a lawyer is a quasi-official. *Id.*

what Wendel calls “localized injustice.”⁷³ The system will be undermined unless its functionaries work to rule.

This premise is an empirical hunch. Fair enough, but my own hunch is quite the opposite. In labor–management settings from factories to police forces, “work to rule” is a form of job action, a kind of strike without actually going on strike. That is because in the real world we expect people to make the innumerable minor adjustments that rules cannot capture, and if they refuse to exercise discretion, the enterprise will grind to a halt. The system of rules works best when it sets broad guidelines with the expectation that people will deviate from them when common sense demands it. That is the way the world works, and good systems of rules count on it.

I believe the same is true with moral common sense: we need people to act on it. There are countless forms of antisocial behavior that the law does not prohibit, and individual conscience by itself cannot be counted on to control. Instead, we rely on informal social mechanisms of approval and disapproval, smiles and frowns, sharing and shunning to make the system work. Among those mechanisms is withdrawal or tempering of assistance.⁷⁴ As between a system followed unswervingly by role players and a system of recourse roles in which the functionaries are willing to deviate when moral common sense requires it, I think the latter actually works far better than the former. The legal system works best, I conjecture, if people keep their conscience switched on, just as they keep their common sense switched on.

These observations about the role of morality and the structure of moral reasoning are somewhat abstract, and it will help to look at an example to which Wendel devotes considerable attention: the much-discussed *Spaulding v. Zimmerman*.⁷⁵ *Spaulding* concerns a lawsuit by a youth badly injured in an auto accident. The defense did their own X-rays and their doctor discovered a potentially fatal aortic aneurism that Spaulding’s own doctor had not found.⁷⁶ Rather than increase their client’s financial exposure by warning Spaulding that he could drop dead at any minute, the defense lawyers kept silent and settled the case cheaply⁷⁷—as the duty of confidentiality under the standard conception requires. This strikes most people as morally outrageous. *Spaulding* poses an awkward problem for Wendel, who thinks that in legal ethics the moral question is the wrong question. In Wendel’s view, “it is a hard case, which is why it has become a classic in legal ethics.”⁷⁸

73. *Id.* at 103.

74. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 116–69.

75. 116 N.W.2d 704 (Minn. 1962). For extensive discussion, including interviews with participants, see Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63 (1998).

76. *Spaulding*, 116 N.W.2d at 708.

77. *Id.*

78. WENDEL, *supra* note 19, at 74.

On the contrary: *Spaulding* is not a classic because it is a hard case but because it is an easy one. We know the right thing to do. Wendel himself finds “non-disclosure intolerable for moral reasons” and adds that Zimmerman’s lawyers should “disclose anyway and run the risk of professional discipline.”⁷⁹ Exactly. What makes the case unnerving is that everyone knows the right answer, but until fairly recently, the law of lawyering made it impossible to get there.⁸⁰ Although *Spaulding* is not a hard case, it is a hard case for Wendel’s theory.

B. Moral Remainders

Wendel is sensitive to the concern that his ethics of fidelity to law excludes morality too much. As we have seen, one way he deals with the concern is by weakening the exclusionary force of law so that it can be overcome by sufficiently strong moral reasons. Another is through the notion of a moral remainder, a concept that Wendel borrows from the philosopher Bernard Williams.⁸¹ When we make moral choices in which every option involves some moral wrong—call these “tragic choices”—then even the right choice will leave claims of morality unfulfilled, and these “moral remainders” do not go away—they are not simply cancelled in a moral cost-benefit analysis that leaves a net profit.⁸² Wendel argues that the claims of ordinary morality that get subordinated by the lawyer’s role morality can be regarded as moral remainders.⁸³

The question is what work moral remainders do. Are they there simply so that “the actor feels lousy about having made the decision”?⁸⁴ Wendel doubts that this is enough, although he hopes that painfully experiencing the moral remainder might lead political actors to better decisions.⁸⁵ But what more is there? Wendel speculates that “moral remainders give rise to a retrospective obligation to make atonement in some way, perhaps by working against injustice in the system in areas that do not [a]ffect the representation of one’s clients.”⁸⁶

The demand for atonement seems to take moral remainders seriously, but the form of atonement Wendel proposes makes matters too easy. The

79. *Id.* at 75.

80. Wendel believes that the rules at the time of *Spaulding* (the 1908 Canons of Professional Ethics) may have permitted disclosure. *Id.* at 170 n.* (citing Cramton & Knowles, *supra* note 75, at 80). That would be so, however, only if we accept the court’s argument that because *Spaulding* was a minor, failure to disclose at settlement is a fraud on the court. My own belief is that this argument was a reach on the part of the court in order to get the right result.

81. *Id.* at 12, 172–73.

82. *See id.* at 167–72 (noting that sometimes lawyers may act with “dirty hands,” which may result in a “moral remainder attach[ing] to the lawyer’s decision”).

83. *Id.* at 172.

84. *Id.*

85. *Id.* at 173.

86. *Id.* at 12 (footnote omitted).

proposal fits nicely with the bar's anodyne ideology of public service. On this view, pro bono on some matters atones for anti-bono on others. The problem is explaining why atonement can take so indirect a form. Genuine atonement, it might be thought, requires rectification to the victim.⁸⁷ Why not, then, tell a lawyer faced with a moral remainder to apologize to the victims and make financial restitution to them? That Wendel does not even consider the direct form of atonement suggests that he does not really believe that moral remainders require atonement. In that case, it seems to me that the concept of a moral remainder does no real work.

VI. Conclusion

Lawyers and Fidelity to Law is a major book that deserves careful study. One feature that my criticisms may have obscured is the essential decency of its moral sensibility—a decency that shines through every page. The virtue Wendel's position exhibits is liberal tolerance for plural values; the virtues he demands from lawyers are fidelity to the rule of law, honesty in interpretation, and craft. All of these are admirable. As I have interpreted him, however, Wendel's position is decency at odds with itself. He wants to exclude everyday morality from legal ethics, but not completely. He recognizes deep problems in our legal institutions, but he wants to say that they still demand near absolute obedience. He wants to acknowledge moral remainders, but only within the parameters of bar ideology. Of course, anyone who writes on legal ethics experiences the same sense of unresolvable contradiction, whether you call it the problem of role morality or, as Wendel does, the political problem of dirty hands. In such a messy reality, fidelity to law is a virtue, but it is no substitute for conscience.

87. Consider the common-sense view of Maimonides: "[T]ransgressions against one's fellow-men . . . are never pardoned till the injured party has received the compensation due to him and has also been appeased," which requires asking his forgiveness, perhaps multiple times. MAIMONIDES, MISHNEH TORAH, LAWS OF REPENTANCE, ch. 2.9, 83a–b. Wisely, Maimonides also imposes a duty on the injured party to forgive, and if he will not even after three attempts, "the one who refused to forgive is now the sinner." *Id.*