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and the Positivist Turn

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

Reviewed by William H. Simon*

I. Introduction

Much of the classic writing on lawyers' ethics has a libertarian flavor. Major works by Monroe Freedman, Stephen Pepper, and others are visibly shaped in response to the specter of an oppressive state.¹ Bradley Wendel's *Lawyers and Fidelity to Law* is the clearest expression of a more recent trend toward authoritarianism. Apparently, what keeps Wendel up at night is the fear, not of totalitarianism, but of anarchy. In particular, he worries about what Norman Spaulding calls "Emersonian" moralism.² The Emersonian view exalts the individual who makes decisions on the basis of her private values without regard to the rules, conventions, and expectations of her society.³ The libertarian and authoritarian impulses converge on resistance to the idea that complex or contextual judgment should play an important role in legal ethics. For the libertarians, such judgment is a threat to the autonomy of the client; for the authoritarians, it is a threat to the social order.

Wendel makes a major effort to develop the issues jurisprudentially. His rejection of expansive ethical decision making rests on a critique of the idealist jurisprudence of Ronald Dworkin⁴ and an appeal to the positivism of Joseph Raz⁵ as well as a more amorphous set of ideas about the role of law in coordinating activity in a pluralist society.⁶

In this Review, I respond to the authoritarian theme in *Lawyers and Fidelity to Law*. In essence, I argue: neither libertarianism nor authoritarianism is a plausible starting point for a general approach to legal

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1. See generally MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 18–20 (4th ed. 2010) (defending an aggressive conception of adversarial advocacy as a check against totalitarianism); Stephen Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 623 (defending an "amoral" lawyer role as a safeguard against misuse of "the vast power of 'the state'").

2. Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1938–42 (2008).

3. *Id.* at 1938–39.

4. W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 46–48 (2010).

5. *Id.* at 107.

6. *Id.* at 116.

ethics. [AU1] It is a great virtue of Ronald Dworkin's jurisprudence that it suggests a conception of law and legal ethics that does not depend on either perspective. Moreover, it suggests a conception of lawyer responsibility that is more plausible than either Emersonianism or moralistic positivism. By gesturing toward positivism and by surrendering to less reflective authoritarian impulses, Wendel's argument underestimates the extent to which social order depends on informal as well as formal norms and adopts a utopian attitude toward constituted power. The book persistently treats as analytical propositions what are in fact empirical assertions for which Wendel has no evidence.

I should acknowledge two qualifications. First, this is not a balanced assessment of the book. I ignore its most valuable features. Wendel's analysis of the meaning of role morality is the most sophisticated in the legal ethics literature, and his argument that the ideal of fidelity to law should be the organizing focus of ethics doctrine is compelling. These efforts deserve appreciation, but I think I can make a greater contribution to the rich discussion the book is bound to promote by focusing on the ways in which I think it goes wrong.

Second, Wendel's book has a relation to my own work that may lead some to view this critique as perverse. I think that key problems of legal ethics should be understood as arising from competing legal values rather than, as many suggest, from a discrepancy between legal and ordinary moral values. I also think that conventional libertarian views of legal ethics suffer from an implausibly narrow conception of the "bounds of the law" that limit the pursuit of client goals.⁷ Wendel shares these views and advances them brilliantly. Thus, you might expect us to be allies on the most fundamental propositions. But Wendel does not see things this way. He spends several pages distancing his view from mine,⁸ and I think he is right to do so. Like those of David Luban and Deborah Rhode, who are also frequently criticized in Wendel's book, my conception of legal ethics makes the idea of justice the central normative touchstone.⁹ By contrast, a central theme Wendel shares with some other recent theorists of legal ethics is that concerns for justice must be subordinated to the needs of social order.¹⁰

7. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 39–40 (1998).

8. WENDEL, *supra* note 4, at 44–48, 133–34.

9. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 12, 15, 18 (1988); DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 3 (2000).

10. Wendel's argument shares a good deal with TIM DARE, *THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE* (2009); DANIEL MARKOVITS, *A MODERN LEGAL ETHICS* (2008); and Spaulding, *supra* note 2. All of these theorists believe that the fact of moral pluralism entails a strong separation of law and morals and a consequent strong differentiation of the lawyer's professional role. This differentiation involves attenuation of the lawyer's responsibility to values of justice.

II. The Authoritarian Impulse

I begin with two examples of the visceral authoritarianism that recurs in the book.

First, in one of his less original moments, Wendel invokes the scene in *A Man for All Seasons* in which Thomas More rejects the suggestion that he forestall the lawless plot on his life by lawlessly arresting one of the conspirators. More declines to “[c]ut a great road through the law to get after the Devil.”¹¹ His refusal is for his own safety, because, he says, “[W]hen the last law was down, and the devil turned round on you, where would you hide . . . ?”¹²

It has always bewildered me that lawyers cite this scene as support for conventional notions of fidelity to law. *Haven’t they seen the end of the play?* The conspiracy proceeds, and More is killed lawlessly.¹³ His own conformity proves no impediment to his destruction whatsoever. Had More followed the suggestion that the play treats as shameful, his own lawless act might have prevented a far more egregious one. I do not intend to debate what More should have done. My point is that the proposition for which the scene is famous is contradicted by the only relevant evidence in the play.

Second, Wendel expresses distress about the Emersonian praise David Luban lavished on Daniel Bibb, a Manhattan prosecutor who “threw” a case he had been assigned to present against defendants he thought, on the basis of a two-year investigation, were innocent.¹⁴ Wendel objects that Luban failed to consider the ethical relevance of the institutional setting in which Bibb acted. His superiors had the publicly conferred responsibility for making the decision. They decided, Wendel reports, that there was “good reason” to conclude the defendants were guilty, and “[p]resumably, they made their decision upon consideration of all of the evidence” of which Bibb was aware.¹⁵ Thus, Wendel asserts, Bibb’s decision to act on his own view involved “disrespect for the legal system.”¹⁶

Wendel is right that institutional structure is pertinent and that lawyers are not routinely privileged or obliged to act on their own views on the ultimate merits of the controversies in which they are involved. And Wendel is also right to concede that the deference Bibb owed to his superiors

11. WENDEL, *supra* note 4, at 132 (quoting ROBERT BOLT, *A MAN FOR ALL SEASONS: A PLAY IN TWO ACTS* 38 (1960)) (internal quotation marks omitted).

12. *Id.* (quoting BOLT, *supra* note 11, at 38) (internal quotation marks omitted).

13. BOLT, *supra* note 11, at 94.

14. WENDEL, *supra* note 4, at 118–19. “Threw” is Bibb’s own characterization. Benjamin Weiser, *Doubting Case, City Prosecutor Aided Defense*, N.Y. TIMES, June 23, 2008, at A1. But, in fact, it appears that all he did was surrender some advantages that were of debatable legitimacy in the first place. He didn’t impeach witnesses he thought were telling the truth, and he shared strategic information with the defense. *Id.*

15. WENDEL, *supra* note 4, at 118–19.

16. *Id.* at 121.

depended in part on whether they had made their decision in good faith and on the basis of the relevant information. Yet, Wendel ignores that the facts on this point were disputed. Bibb claimed that his superiors did not decide in good faith.¹⁷ Surely, such an allegation should not be regarded as *prima facie* incredible in an era where egregious prosecutorial misconduct is frequently documented. Yet, Wendel simply “presume[s]” that the senior prosecutors’ version is correct, apparently for no better reason than that they were Bibb’s institutional superiors.¹⁸

III. Rules vs. Principles: Wendel’s Flirtation with Positivism

Wendel thinks that the key issue that separates him from me, Luban, Rhode, and others concerns respect for institutionalized authority. He faults us for a “pervasive distrust of institutions” and a consequent overreliance on disembodied conceptions of justice that can only be realized in unaccountable individual judgments.¹⁹ He emphasizes the need for deference to institutions in a pluralistic society where individual judgments about justice will often diverge. I disagree that the call for ambitious ethical judgment in the works to which Wendel objects reflects an anti-institutional bias. I think the key issue is not the extent to which institutions deserve respect but the form that respect takes. More generally, the key issue is whether the “fidelity to law” that everyone sees as central to lawyers’ ethics is structured by rules on the one hand or by principles and policies on the other.

As elaborated by Dworkin, rules are explicit and categorical. They are exhaustively specified, and they either apply or do not. Principles and policies, on the other hand, can be implicit and graduated. They can be inferred from language and structure, and they can “weigh[]” in favor of decisions (provide reasons for them) without conclusively dictating them.²⁰

Libertarians and many other ethicists tend to assume that the bounds of advocacy must be specified by rules. Their critics (such as me, Luban, and Rhode) argue or assume that the bounds are typically principles or policies. Wendel agrees that law is constituted by principles and policies as well as rules, but he worries that too much preoccupation with principles and

17. Although the accounts are not completely clear, Bibb’s quoted statements suggest that his superiors were motivated not by a belief that the defendants were guilty, but by a reluctance to take responsibility for the decision to end the proceedings. See Weiser, *supra* note 14 (quoting Bibb as suggesting that his supervisors were “tak[ing] things and throw[ing] them up against the wall’ for a judge or jury to sort out” in this case).

18. WENDEL, *supra* note 4, at 119.

19. *Id.*

20. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22–39 (1978). Prominent features of Dworkin’s work are suggestive and supportive of the arguments I make here and elsewhere. However, Dworkin’s position is complex, and he has not written about lawyers’ ethics. So I cannot say whether he would agree with my arguments.

policies jeopardizes the separation of law and morality. Indeed Dworkin, in rejecting the positivist “Model of Rules,” insisted that the role of principles and policies in the legal system precluded any strong separation.²¹ Principles such as “[n]o one shall be permitted to . . . take advantage of his own wrong” or the duties of reasonableness or good faith in various contexts span legal and moral discourse.²²

We can illustrate the contrast between the rule-based and principle-based perspectives with two hypotheticals. First, there is the problem of impeaching the truthful witness. My client is on trial for robbery. A prosecution witness will testify that he was at the scene of the crime at the relevant time. I know that the testimony is true because my client has conceded it in confidence. I also know that the witness has a prior perjury conviction. Should I impeach him with the conviction? A key position in favor of impeachment emphasizes that no *rule* prohibits impeachment. In situations where no rule prohibits an action the client prefers, libertarian ethicists would have the lawyer adopt a default rule that the client’s decision prevails. On the other hand, the position against impeachment emphasizes that impeachment is inconsistent with the *principle* that the parties should not mislead the trier of fact. In impeaching the witness, the defendant impliedly represents to the trier that the witness might be testifying falsely. Of course, a proponent of impeachment could dispute whether there is any general principle against misleading the trier, or she could argue for impeachment on the basis of the principle that even a guilty defendant is entitled to put the prosecution to proof. But such arguments are explicitly a matter of principle, and when competing principles are recognized, the issues have to be resolved by deciding which are weightier. Rule-based ethics never gets to this point. Once we see there is no rule requiring forbearance, we default to client loyalty.

Wendel seems to agree with the principles-based approach to the truthful witness problem, but he worries about the dangers of excessive appeals to principles and policies.²³ In a pluralistic society, people will tend to disagree about what the relevant principles and policies are or about how they apply in particular situations. We cannot found a social order solely on informal values. We need to defer to the decisions of authoritative institutions. These institutions are legitimated by procedural norms like democracy and due process. These norms can warrant respect for institutional decisions even when we believe they are substantively incorrect.

I doubt if anyone disagrees on this point. But there remains a basic distinction between a rule-based approach to institutional authority and a

21. *Id.* at 348–50.

22. *Id.* at 23.

23. See WENDEL, *supra* note 4, at 191–94 (rejecting deceptive but not explicitly prohibited trial tactics).

principles-based approach. In a rule-based approach, a relevant norm or decision that satisfies the procedural conditions of legality (for example, bicameralism and presentment) is entitled to conclusive respect. The relevant procedural rules are “exclusionary” in Joseph Raz’s terms, and they displace all inconsistent substantive concerns.²⁴ In a principles-based approach, the authority of institutions derives from principles and policies as much as from rules, and the value of institutional authority may be weighed against informal substantive values.

It is not clear how broad the practical range of disagreement between Wendel and me is, but it may be helpful to take an extreme case where we can be fairly confident of Wendel’s position. We are in the 1970s. About a dozen states still have fornication statutes criminalizing consensual sex between unmarried adults. In a majority of the states, these statutes have not been enforced at all for decades. In one county of one of the states, however, the prosecutor occasionally brings charges under the statute against pregnant unmarried women. All of the women prosecuted so far have been charged after seeking assistance under public healthcare programs for low-income people, although it is unclear how the prosecutor identifies them, and all are people of color, who collectively constitute a very small fraction of the state population. In the case we are considering, the client has conceded to her lawyer that she engaged in conduct that violated the terms of the statute. There are no relevant federal statutes. There are state and federal constitutional claims of infringement of privacy and discrimination (and perhaps a state common law claim of desuetude) that might be raised nonfrivolously as defenses. But the prospects that any such defense would prevail in the local trial court are virtually nil, and they would be only slightly better on appeal or collateral attack. The proceedings are causing trauma and humiliation to the client, and a conviction will leave her with a criminal record that could haunt her for the rest of her life. However, there is a way she could almost certainly prevail: if she and the father of her child testify that they were in another state at all times when they engaged in sexual intercourse, they will be acquitted. The problem is that the testimony would be perjury. The question is whether the lawyer can ethically present the perjury.²⁵

24. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON THE LAW AND MORALITY* 17 (2d ed. 2009). Raz’s theory of legal norms seems like an unironic elaboration of Thomas Reed Powell’s ironic definition of a “legal mind”: “If you can think of a subject which is interrelated and inextricably combined with another subject, without knowing anything about or giving any consideration to the second subject, then you have a legal mind.” THURMAN ARNOLD, *FAIR FIGHTS AND FOUL* 20–21 (1965).

25. The example is hypothetical but not unrealistic. For a recent example of such prosecutions, see Mark Hansen, *Miscarriage of Justice? An Idaho Prosecutor Charges Pregnant Unmarried Teens and Their Adult Boyfriends with Sex Crimes*, 82 A.B.A. J. 26 (1996).

There are, of course, rules that forbid perjury and lawyer facilitation of perjury. The question is what ethical force a lawyer should attribute to these rules in the hypothesized situation. If we follow Wendel in regarding “fidelity to law” as the most basic value of legal ethics, we still have to decide whether to understand the relevant law in rule terms or principle terms. If we take the rule-based approach, the analysis is short, and the answer is clear. The prohibitions on perjury and assisting perjury are categorical, and they satisfy the positivist’s procedural test of legal validity. These are the only relevant considerations; they compel us to forego participation in the perjury. If there is any ethical reason to participate, it is not a reason of *legal* ethics.

But from a principles-based approach, the analysis is more complicated. We consider the authority of the prohibitions, not just in terms of their conformity with the procedural rules of lawmaking, but with the principles that underpin these rules—principles of democracy, fairness, and equality. We consider the extent to which these procedural principles seem manifest in the particular process in question. At the same time, we weigh substantive values that appear as principles rather than rules in various authoritative sources—principles of privacy, fairness in the exercise of administrative discretion, and nondiscrimination. It seems likely that the weight of the principles supporting the authority of the rules prohibiting perjury would be relatively weak in this case. Perjury is always bad, but in this case its main effect would be to preclude enforcement of the fornication statute. The fornication statute may be entitled to no respect. For example, it may have been enacted long ago and have survived largely due to legislative inertia, its low visibility, or the political marginality of the people against whom it is applied. Its enforcement in this case would be unfair in legally relevant ways and would do serious personal harm. In this situation, there may be no way to vindicate all the relevant legal values. However, if presenting the perjury were, on balance, the course of action that was least damaging to the relevant principles, it might seem the course of action most consistent with fidelity to law.²⁶

If this conclusion seems radical, consider that principled defiance of constituted authority is an honored tradition in American public life. School children are taught to admire the Montgomery Bus Boycott, the Birmingham march, and the lunch counter sit-ins of the civil rights movement. Although teachers do not always mention it, all three were thought illegal at the time, and if we take a rule-based perspective, that conclusion is hard to dispute

26. Before ethics rules clearly forbade the practice, libertarians argued that lawyers should *routinely* present perjured testimony on behalf of criminal defendants when defendants desired to testify falsely. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1477–78 (1966).

even today for the latter two.²⁷ Or consider that the modern fictional lawyer most often held up as an ethical role model is Atticus Finch of *To Kill a Mockingbird*. Ethical discussion tends to focus on his admirable but ethically conventional defense of an innocent man, but no one seems to have any problem with his later participation in what any lawyer who thought about it would have to concede is a conspiracy to obstruct justice. Finch and the sheriff agree to conceal evidence that Boo Radley killed Bob Ewell because, although Radley has a valid claim of defense-of-another, they do not trust the local judicial system to vindicate him.²⁸

We could characterize such cases as sacrificing legal values to nonlegal values. But that was not how the civil rights protesters understood their actions, and I do not think it is how most people understand either the protesters' actions or Atticus Finch's. The protesters thought they were vindicating constitutional rights. And Finch and the sheriff were acting to protect Boo Radley from what they reasonably feared would be an unfair trial and a wrongful conviction. The principles they were trying to vindicate were legal ones.

Wendel is wary of any violation, however principled, of procedurally valid rules, though there is some ambiguity about the strength of his opposition. He initially takes a rule-based position toward legal authority, invoking Raz's "exclusionary reasons" idea and describing institutional authority as "replacing what would otherwise be reasons for action, as opposed to adding to the balance of reasons on one side or the other."²⁹ This suggests that when we have a procedurally valid statute that dictates conduct, we cannot weigh the policies and principles that underpin it against competing policies and principles. We must treat it as conclusive.

But ultimately, he qualifies this conclusion. Rule-based authority is not conclusively binding but is entitled to a strong presumption.³⁰ Since few would dispute that some kind of presumption is warranted, a lot turns on how strong it is. Wendel does not provide any general indications of how the strong presumption might be rebutted. He concedes the legitimacy of the lawyer assistance to the classic acts of civil disobedience in the civil rights movement. However, he insists that the nonpublic or covert disobedience is

27. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982), suggests that prohibitions of boycotts were unconstitutional, but *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967), specifically confirms the illegality of the Birmingham march. To my knowledge, no one argues that the lunch counter sit-ins were legal in any sense consistent with positivist conceptions of legality.

28. HARPER LEE, *TO KILL A MOCKINGBIRD* 312–18 (40th Anniversary ed. 1999). Principled transgression of positivist legal rules in order to vindicate more fundamental legal principles is a common theme in favorable portrayals of lawyers in popular culture. See William H. Simon, *Moral Pluck: Legal Ethics in Popular Culture*, 101 COLUM. L. REV. 421 (2001) (discussing such portrayals in John Grisham novels, *L.A. Law*, and *The Practice*).

29. WENDEL, *supra* note 4, at 109.

30. See *id.* at 113 (arguing that positivist legality should be regarded as creating "very weighty reasons" for compliance).

not (or perhaps, is rarely) legitimate. He specifically disapproves of the conduct of New York lawyers in presenting perjury to facilitate consensual divorce under an old New York statute that required proof of fault.³¹ He also suggests that the presumption of authority would not apply or would be generally rebutted in a fundamentally and pervasively unjust society like Nazi Germany.³² But the judgment about fundamental justice he contemplates is a global one. Lawyers are entitled to weigh against the claims of legal validity the general characteristics of society, but if these characteristics prove “tolerably fair,”³³ no further consideration of structural fairness or nonrule substantive concerns is encouraged. “To some extent,” he says, “the whole point of legal entitlements is that they are relatively insensitive to justice or injustice in particular cases.”³⁴

Wendel spends more space describing his exclusionary conception of legality than he does explaining why it is a plausible basis for legal ethics. If I understand him, he makes two arguments for it.

First, he thinks this limited conception of legality is implicit in the general social understanding of the value of a legal system. For Wendel, law is fundamentally about conflict resolution. People establish a legal system because they anticipate that they will disagree about the application of substantive norms. Thus, they create a set of procedures and agree to abide by the decisions that emerge from it even if they disagree with the decisions substantively. Wendel uses the arbitration contract as a metaphor for the legal system.³⁵ To refuse to accord respect to a procedurally valid arbitration decision on the ground that it is substantively wrong, he says, is to miss the point of the institution.³⁶

Second, he thinks a legal ethics that prescribed more inclusionary judgment for individual lawyers would threaten anarchy or what he tends to refer to as a failure of “coordination.”³⁷ In the most general sense, law is a matter of coordination to the extent that any one person’s willingness to comply with burdensome obligations is a function of the perceived willingness of others to do so. The social order is based substantially on voluntary compliance sustained by expectations of reciprocation. Perceptible noncompliance with legal obligations threatens social order. Of course, this potential arises only when the noncomplying behavior is viewed as a breach of an obligation. If noncompliance in a situation like the fornication scenario is perceived as justified or excusable, it should not encourage further

31. *Id.* at 134.

32. *Id.* at 96–97.

33. *Id.* at 98.

34. *Id.* at 128.

35. *Id.* at 110–21.

36. *Id.* at 110–12.

37. *Id.* at 112–13.

noncompliance in dissimilar situations. Wendel thinks, however, that if people's obligations are determined by broadly inclusive legal judgments, people will disagree too much about what these obligations are. What one person views as justified noncompliance, others may view as simple lawlessness. And such perceptions will undermine their own willingness to comply. Thus, we need to define obligations in relatively exclusionary terms, and we need to insist on strict compliance with these obligations.³⁸

My view is that the first argument is wrong and that the second, as applied to principles-based inclusionary decision making, is counterintuitive and unsupported.

IV. General Problems with Wendel's Authoritarian Perspective

The social contract idea that underlies Wendel's first argument is wrong because conflict resolution, or the minimization of social friction, is not an adequate description of either the motivation for or the effect of institutionalized legality.

Sometimes, institutionalized legality deliberately undermines social order by disrupting stable, informal social relations. *Liberty Against the Law* is the title of a historical work that chronicles protests against the imposition of capitalist legal norms in early modern England in ways that chaotically disrupted precapitalist social relations.³⁹ For example, customary practices whereby herders were afforded grazing rights after harvest or merchants restrained price increases in times of shortage were eliminated in order to give the owners and merchants more control.⁴⁰ The protests were contentious, but they were responding to what the protestors considered the law's disruption of well-functioning informal relations. A more upbeat story of law-induced social disruption is the civil rights movement in the American south, which uprooted informal relations of racial subordination.

In both these stories, the effect of the imposition of positivist legality was to *increase* conflict, at least in the short term. The goal of those who supported the repression of informal social order in both cases was not peace but rather the attainment of a specific substantively desired state of affairs. The goal in the first story remains controversial; the one in the second is not. Yet both stories illustrate that minimizing social friction is not the single preeminent goal of the legal system. Only Hobbesians think state-enforced peace is a sufficient condition of a legitimate social order, and few people are

38. *Id.* at 111–12.

39. CHRISTOPHER HILL, *LIBERTY AGAINST THE LAW: SOME SEVENTEENTH-CENTURY CONTROVERSIES* (1996).

40. *Id.* at 31–32.

Hobbesians. We want peace, but we also want legal order that encourages fairness, respect, autonomy, and efficiency in relations in civil society.⁴¹

There is a potential tension between the order-focused goals and the justice-focused goals of a legal system. This potential has been traditionally recognized in doctrines such as champerty and maintenance that have forbidden lawyers to encourage people who are not already inclined to assert their rights to do so. These doctrines sacrifice the justice goal of legal order to the coordination goal. However, this tendency has never been consistent, and it seems to have been decisively reversed in the United States in 1977 when the Supreme Court decided *Bates v. State Bar of Arizona*.⁴² In holding that lawyer advertising is protected by the First Amendment, the Court rejected concerns about “stirring up litigation” as a constitutionally legitimate basis for restricting truthful speech by lawyers.⁴³

What counts as conflict and what counts as resolution in Wendel’s story seems highly artificial. Consider our hypothetical about the use of anachronistic fornication statutes to harass a vulnerable social group. On full analysis, the fornication prosecution might look more like the aggressive disruption of informal social relations by a conflict-generating state intervention than the orderly accommodation of differences of opinion. It is true, as Wendel says, that people disagree about what justice means.⁴⁴ But they also disagree about what counts as peace and about what is an acceptable price to pay for it.

Wendel’s second argument is more consequential. People will not agree on when principles-based noncompliance is justified, and if they see too much of it, their sense of obligation and willingness to comply themselves will erode.

It is not clear how this argument applies in situations where lawyer and client are deciding how to act with respect to obligations that are not fully enforced. The fornication statute is an extreme example; it is hardly enforced at all. But no legal norms are perfectly enforced, and many are substantially underenforced. These situations often seem to involve relatively stable levels of voluntary compliance rather than the social unraveling the authoritarians predict. Moreover, perceived noncompliance in discrete areas, like marijuana prohibition, does not seem regularly to spill over indiscriminately into other areas. The more general objection is that the legitimacy of law—its capacity to induce compliance simply on the basis of its status as law—seems likely to depend on factors other than perceived compliance by

41. See generally Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975) (arguing that the legal system reflects both “conflict resolution” and “behavior modification” models of legality).

42. 433 U.S. 350 (1977).

43. *Id.* at 375–77.

44. WENDEL, *supra* note 4, at 88–89.

others.⁴⁵ In particular, it seems likely to depend on the degree to which law converges with ordinary morality. There are, of course, many examples of societies where disrespect for constituted authority, even principled disrespect, is associated with intolerable disorder. The Weimar Republic is an apt one because it seems likely that much of its lawless aggression was motivated by sincere commitments to divergent interpretations of justice and social good. But it is at least as easy to think of examples of societies where discrete acts of principled noncompliance or pockets of noncompliance seem compatible with good social order. Highway speeding laws in the United States are a good example. Some people speed recklessly because they are immoral or lack good judgment, and the police rightly target them for sanctions. But other people—in fact, most people—speed moderately when it seems reasonable under the circumstances, and the police tolerate their conduct. They tolerate it, not just because they have insufficient resources to sanction it, but because traffic flows better when people are accorded this discretion.⁴⁶ Both the efficacy of coordination of driving and the legitimacy of the regulatory system would be reduced by strict compliance.

Wendel concedes, as any credible argument must, that the classic, principled unlawfulness of the now-vindicated civil rights movement proved compatible with general social order. But he wants to confine this concession to open disobedience. Covert disobedience is more of a threat to social order because it is harder to call to account. Yet, after this fact is acknowledged, the question remains whether this disadvantage should be considered a cost that might be outweighed by other concerns in a balancing calculation or rather as categorically preclusive. Sometimes, open noncompliance would undermine the efficacy of the act as it would with the perjury in the fornication hypothetical or the New York divorce story; sometimes, it would subject the actor to unjust retaliation. A principled calculation would treat secrecy as a cost but would consider that the cost might be outweighed by such considerations.⁴⁷

45. I am speaking of “noncompliance” here in Wendel’s exclusionary terms. WENDEL, *supra* note 4, at 200–01. But what Wendel sees as noncompliance with exclusionary legal norms could sometimes be described as compliance with more inclusionary ones. Our legal system fits the exclusionary model only partially and crudely. Doctrines such as the necessity defense (that sometimes justifies an otherwise sanctionable act when the act is necessary to avoid a greater harm) and the authority of the jury to nullify in some states are especially salient repudiations of the idea that legal judgments are necessarily exclusionary. Wendel does not consistently acknowledge such facts. For example, he speaks of jury nullification as if it were simple lawlessness. *Id.* at 47. But, in fact, its creators understood it as a delegation of (inclusionary) legal judgment to the jury. Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 587 (1939). On the necessity defense, see WAYNE R. LAFAVE, *CRIMINAL LAW* 476–86 (3d ed. 2000).

46. See Brock Yates, Op-Ed., *Speed Doesn’t Kill. Bad Drivers Do.*, N.Y. TIMES, July 24, 1995, at A13 (reporting that “[t]raffic studies” show that people tend to drive at what they consider a “comfortable speed,” regardless of posted limits).

47. Wendel quotes the passage from Martin Luther King’s “Letter from Birmingham Jail,” which describes virtuous civil disobedience as something engaged in “openly,” but without quoting

Wendel has neither evidence nor argument to support his contention that desirable social order depends on categorical preclusion. The clearest example he discusses—the New York divorce story⁴⁸—tells against his position. In hindsight, it appears that the perjury practice enhanced social order and coordination by accelerating the convergence of enacted law with the informal values of the majority of people. It neutralized the effects of malfunctions in the regular law-making process—its overresponsiveness to well-organized interests (the Catholic Church) and its class bias (affluent people had relatively easy access to out-of-state divorce).⁴⁹ There is no evidence that the practice had any spillover effects causing indefensible illegality. To the extent that people were aware of it, they seem not to have understood it as undermining the legitimacy of the state or as a signal of general tolerance for lawlessness.⁵⁰

I could be wrong, but my argument does not depend on empirical propositions to the extent that Wendel's does. My view is that neither lawyers nor those who regulate them know enough about the indirect or aggregate consequences of lawyers' ethical decisions to incorporate them into their analyses or rules. Lawyers should focus on the direct consequences of their actions and should try to vindicate justice in the particular case: not their private, idiosyncratic notions of justice but notions of justice that can be defended in terms of legal authority and public values. Regulators should encourage lawyers in such practices, and should hold them accountable when they fail to make such judgments or when their judgments are unreasonable. This is exactly what the regulators purport to do now when lawyers are charged with harming clients. "Reasonable care" is the regulatory

the passage that declares, "An unjust law is no law." WENDEL, *supra* note 4, at 124; Martin Luther King, Jr., Letter from Birmingham Jail, in *The Negro Is Your Brother*, ATLANTIC MONTHLY, Aug. 1963, at 78. It follows from the latter proposition that fidelity to law does not require any respect whatsoever for an unjust law, including the respect implied by open, as opposed to covert, disobedience. Of course, there might still be strategic or moral reasons other than respect for law to act openly.

48. See *supra* note 31 and accompanying text.

49. Editorial, *New York's Antique Divorce Law*, N.Y. TIMES (Jan. 16, 2010), <http://www.nytimes.com/2010/01/17/opinion/17sun3.html> (noting that efforts to enact a no-fault divorce system in New York had endured years of opposition from the Catholic Church, and commenting on the "thousands of dollars" litigants must spend under a fault system in order to obtain a divorce).

50. Wendel claims that Enron's lawyers were willing to facilitate its evasion of disclosure requirements because they accepted arguments of Enron's executives that the requirements should not apply to them because Enron had a more advanced business model than those for which the requirements were designed. WENDEL, *supra* note 4, at 134–35. Wendel cites no evidence of the lawyers' beliefs (as opposed to the executives'). The lawyers themselves have defended their conduct in thoroughly conventional terms. See Patti Waldmeir, *Don't Blame the Lawyers for Enron*, FIN. TIMES, Feb. 21, 2002, at 14 (quoting a Vinson & Elkins spokesperson as describing efforts for Enron as "legally appropriate" and what "every other law firm in America" does).

touchstone. The rule-based approach is applied only when the issue arises from third-party harm.⁵¹

If the lawyer should find herself in a situation where she has reason to believe that an act of principled noncompliance that would otherwise be justifiable would have some specific effect in undermining desirable social order, she could take that into account. I doubt this situation would arise frequently, but a lawyer who determines that it has arisen should treat the damage to social order as a cost. But even if the lawyer were able to assess the indirect effects of her conduct on social order, there is no reason to treat social order as a trump that preempts concerns about justice.

My view is grounded, most basically, in values of moral autonomy and social solidarity. It is a good thing that people do what they think is right and that they try to respect the legitimate interests of their fellows. Wendel and the other law-and-order folks concede this. They all recognize that moral autonomy on the part of the lawyer is a value. They just think that the compromise of this autonomy is a price that has to be paid for the benefits of good social order. But in our current state of knowledge, this belief is a superstition. Once we disabuse ourselves of it, we should return to a focus on justice.⁵²

V. Ambiguities of Coordination

Most often, the threat Wendel sees from inclusionary legal judgment to law's coordination function seems to concern the legitimacy of the system, understood in terms of its willingness to induce voluntary compliance with social norms. But occasionally, Wendel seems to have two other concerns in mind.

The first is the specific type of coordination problem that involves tightly interdependent behavior.⁵³ Some rules are intended to create conventions in situations where it is more important that people adopt a common practice than that the practice they adopt be the best one possible. Rules about driving on the right or the left are the classic example. Rules or protocols for telecommunications and computer networks are further

51. To forestall misunderstanding, I emphasize that the proposal is not that lawyers should have duties to third parties of the same strength and nature that they have to clients. The claim is that duties to third parties should have the same principles-based form that duties to clients currently have.

52. An omission that Wendel's argument shares with most of the legal ethics literature is the failure to distinguish the perspective of the regulator considering general rules of practice and the perspective of the individual lawyer making a judgment at the margin about what to do in a particular situation. Even if Wendel is right about the need for exclusionary legality at the regulatory level, that would not necessarily be the right perspective for an individual making a judgment at the margin. The regulator may need to regulate categorically because it cannot trust the judgment of lawyers in general. But it does not follow that the right advice to give an individual lawyer is to distrust her judgment and defer to exclusionary legality under all circumstances.

53. WENDEL, *supra* note 4, at 94.

examples. Even when deviating from the rule might have some benefits, these benefits would often be swamped by the costs that arise given that other people are likely to continue to abide by the rule. The exclusionary-reason idea [AU2] seems exceptionally powerful here, but even here, qualifications are needed.

Most laws are not about coordination in this specific sense. It is a generally bad thing for me to kill, take other people's property, dump toxins in the water, or fail to pay my taxes regardless of how many other people are doing so or not doing so. There are exceptional circumstances where it might be justifiable or excusable for me to do some of these things—for example, self-defense in the case of killing—but again, what other people in my situation are doing is not the key determinant.

More importantly, even in the realm of specific coordination, exclusionary legal judgment is often not the most appropriate way to achieve our goals. Sometimes it is better to let people make contextual judgments about how the policy behind the rules—coordination—can best be achieved. If rules about which side to drive on lend themselves to exclusionary reasoning, rules about highway driving speeds lend themselves to inclusionary reasoning. Traffic flows better when people drive at what they consider a reasonable speed given the conditions they observe around them. Strict enforcement of the rules would impede this coordination.

The potential of exclusionary interpretation of legal norms to *impede* coordination in such situations has been widely observed. “Working to rule” is the name of a protest tactic used by workers in some industries to disrupt coordination.⁵⁴ Officials committed to fostering coordination often find they must balance respect for formal norms with respect for informal norms. In a book that examines this theme, Eugene Bardach and Robert Kagan have this to say about the “good policeman”:

[He has] a “tragic sense” of life—a recognition that law is not the sole measure of morality, that values often are in conflict, that causation and blame are not simple matters. But he combines that perspective with passion—a desire to do justice and to protect potential victims, and hence a willingness to use coercion and strict enforcement of the law in those cases where the offender deserves it or when cooperation cannot be elicited by forbearance.⁵⁵

54. See Brian Napier, *Working to Rule—A Breach of the Contract of Employment?*, 1 INDUS. L.J. 125, 125 (1972) (defining “working to rule” as “concerted action by one or more groups of members of unions . . . acted upon by the members under advice and in the belief that the action does not constitute any breach of the relevant contract of employment, even though carried out with the avowed intent of disrupting as effectively as possible the employers’ business” (quoting Sec’y of State for Employment v. Aslef (No. 2), [1972] 2 W.L.R. 1370 (C.A.) 1403 (Roskill L.J.) (U.K.))).

55. EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* 126 (1982).

Surely, police officers play a central role in the law's coordinating function. Yet, Bardach and Kagan suggest that effective performance requires them to interpret inclusively rather than exclusively. Lawyers have a different role than police officers, and their responsibilities are accordingly different. But there does not appear to be any reason why the goal of coordination would require them to take a narrower approach to interpreting the norms that structure that role.

Still another of Wendel's concerns about coordination seems to focus on notice. The more accurately and easily people can learn the law, the more reliably they can anticipate its effects on their lives and the more effectively they can make use of the autonomy the law provides them.⁵⁶ It is often asserted on behalf of positivist or exclusionary conceptions of legality that they provide better notice. Rule-based law is clearer and easier to ascertain than principles-based law, the argument goes. Stated as a general, abstract proposition, the argument reflects a basic jurisprudential mistake.

The mistake arises from the generalization of the lawyer's perspective to the society as a whole. Once a dispute arises or a future contingency is defined, a lawyer may be able to determine how rule-based law applies more reliably than she can with respect to principles-based law. Even this proposition is debatable, but we can concede it *arguendo*. But for the coordination argument, the relevant perspective is that of the citizen in civil society. It is not reasonable to expect him to analyze all the legal authority potentially relevant to any of his actions. Even unlimited legal assistance would not guarantee foreseeability given the uncertainty as to what situations he will find himself in. Thus, the most important determinant of foreseeability is not the analytical clarity of legal norms but the extent to which they coincide with the general expectations of the citizen. As Hayek, the past century's leading theorist of coordination, puts it,

What has been promulgated or announced beforehand will often be only a very imperfect formulation of principles which people can better honour in action than express in words. Only if one believes that all law is an expression of the will of a legislator and has been invented by him, rather than an expression of the principles required by the exigencies of a going order, does it seem that previous announcement is an indispensable condition of knowledge of the law.⁵⁷

VI. Anti-institutional?

There is some irony in Wendel's charge of anti-institutional bias. My book, *The Practice of Justice*, has a chapter called "Institutionalizing Ethics"

56. WENDEL, *supra* note 4, at 43.

57. 1 F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 118 (1973).

that discusses the structures and processes needed for elaborating and enforcing professional responsibility norms.⁵⁸ Deborah Rhode has an extensive article with the same title on the same subject.⁵⁹ Wendel does not engage these discussions and has almost nothing to say of his own on such matters. His concern with institutions is exhausted in a general attitude of deference toward formally established power.

The real anti-institutional bias in professional responsibility does not lie in the idealistic dispositions of academics or individual practitioners. It lies in the primitive accountability structures at both the regulatory and firm levels of the profession and in professional ideologies that resist accountability. The profession has used its substantial political power to resist outside regulation and to maintain ostensibly self-regulatory structures that are passive and lax. It uses norms of independent judgment and confidentiality to restrict monitoring of practice by regulators, investors, and insurers or other group legal service providers. And even its most elite practitioners organize themselves in ways that have more resemblance to their nineteenth-century ancestors than to modern business organizations in other fields. This mode of organization is, if not exactly Emersonian, highly individualistic. It treats as paradigmatic the professionally certified practitioner operating under conditions that are opaque to outsiders and that involve limited internal supervision. Yet, there is strong reason to believe that more modern and open forms of organization could enhance accountability to clients, third parties, and the public.⁶⁰

Do these new structures imply inclusionary or exclusionary legal judgment? My impression based on studies of other professions is that the most effective systems of human-service accountability combine transparent and systematic audit-type review with highly inclusionary judgment.⁶¹

It might turn out, however, that a reformed and more expansive system of professional regulation would mandate substantive norms different from

58. SIMON, *supra* note 7, at 195–215.

59. Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665 (1994).

60. See Christine Parker et al., *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, 37 J.L. & SOC'Y 466, 496–97 (2010) (describing the legal–regulatory framework in New South Wales, which attempts to encourage firms to adopt modern management and supervisory practices); see also William H. Simon, *The Ethics Teacher's Bittersweet Revenge: Virtue and Risk Management*, 94 GEO. L.J. 1985, 1987–92 (2006) (describing the contributions that risk management can make to the teaching of ethics and the theory of ethics); William H. Simon, *Why Is There No "Quality Movement," in Law Practice?* (2010) (unpublished manuscript) (on file with author) (discussing the applications of a potential quality movement to the legal profession).

61. See generally Kathleen G. Noonan, Charles F. Sabel, and William H. Simon, *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 L. & SOC. INQUIRY 523 (2009) (evaluating such systems in the welfare context); John Braithwaite & Valerie Braithwaite, *The Politics of Legalism: Rules Versus Standards in Nursing-Home Regulation*, 4 SOC. & LEGAL STUD. 307 (1995) (describing such systems in the nursing-home context).

those I have argued for. Traditionally, lawyers have sought great latitude to serve clients at the expense of third parties and the public, and they have sometimes preferred that the limits on the pursuit of client ends be framed categorically in rule terms rather than flexibly in principle terms. I disagree with both tendencies. Thus, if institutional reform were on the agenda, and it seemed likely to take a libertarian and rule-based form, I would face a practical conflict about whether and how to support reform. If reform entailed sacrifice of my substantive commitments, I might oppose it. Alternatively, perhaps the sacrifice would not be so great as to outweigh the benefits of better institutionalization. My choice would depend on the specifics of the proposals and the context.

Such conflicts among goals in specific strategic situations require compromise. I may not be able to get everything I prefer. As Wendel says, one should not expect the public realm to adopt all of one's values in a pluralistic society.⁶² Note, however, that this kind of compromise is quite different from the one Wendel thinks pluralism entails. In a practical political situation with real alternatives, I might plausibly believe that my sacrifice of some commitments would be compensated by enhanced vindication of others. But Wendel urges that we adopt a general policy of sacrificing our principles in the interest of an entirely abstract conception of social order without any reason to believe our sacrifice will produce any good at all.

In the current circumstances of primitive institutionalization of professional responsibility norms, lawyers have a lot of discretion to take both good-faith and bad-faith actions. Wendel's arguments will have no effect on bad-faith actions. The people inclined toward them are not listening. But if conscientious lawyers listen to Wendel, they will more often do things they believe to be unjust than they would if they listened to those he criticizes. If moral autonomy is a value, then there is a cost to this sacrifice. It should not be incurred without better reasons than Wendel gives.

Conclusion

Wendel is right that in a pluralistic society, the public realm must be governed by an overlapping consensus rather than more comprehensive and controversial moral views. If it meets certain minimal conditions of justice, this overlapping consensus deserves respect, and lawyers have an important role to play in enacting and fostering this respect. But Wendel mistakenly assumes, first, that the consensus must be embodied in the forms defined by positivist legality, and second, that respect must take the form of rule-based deference rather than principle-based deference. In fact, the moral infrastructure of the public realm is a mix of formal and informal, legal and

62. WENDEL, *supra* note 4, at 36.

moral. And most often the respect is owed to principles manifested in legal institutions, not to their formal expression.