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Fidelity to Law and the Moral Pluralism Premise

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

Reviewed by Katherine R. Kruse*

Bradley Wendel is a pioneer on the new frontier of theoretical legal ethics. Wendel follows the lead of William Simon in breaking from the long-dominant discourse of moral theory in legal ethics and moving legal ethics toward a jurisprudence of lawyering.[1] Rather than pursuing the more traditional question of whether it is possible for good lawyers to be good persons, Wendel focuses our attention on what it means to be a good lawyer. One of the core functions of law practice is the interpretation of law. Clients seek legal advice because they want to understand what the law says and how the law constrains their choices. Because lawyers have the power to interpret and declare the law through legal advice, Wendel argues, they have a professional responsibility to interpret the law faithfully.[2] *Lawyers and Fidelity to Law* is Wendel's exploration of what it means for lawyers to fulfill this professional responsibility.

Legal ethics, Wendel once wrote, must be "'normative all the way down,' with a theory of democracy justifying a theory of the function of law, which in turn justifies a conception of the lawyer's role."[3] In *Fidelity to Law*, Wendel presents and defends such a comprehensive theory of lawyering with two interrelated arguments: a functional argument that law deserves respect because of its capacity to settle normative controversy in a morally pluralistic

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* Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. I would like to thank each and every contributor to this Colloquy for his or her friendship, mentorship, and intellectual companionship. You make legal ethics an exciting and rewarding field of study for me and for so many others. I owe particular thanks to Steve Pepper and Brad Wendel for comments on this Review, and to Ben Zipursky for sharing his thoughts in more than one helpful discussion about Wendel's book.

1. W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 194–200 (2010). William Simon's early work was based on jurisprudential theory. *See generally* William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 33–34 [hereinafter Simon, *Ideology of Advocacy*] (arguing that "to take the value of individuality seriously would require the abandonment of the Ideology of Advocacy and of legal professionalism" and that "respect for the value of law itself may require the repudiation of legal professionalism"). His break from moral theory became explicit in WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998) [hereinafter SIMON, PRACTICE OF JUSTICE]. I have written more about this movement in Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493 (2011).

2. WENDEL, *supra* note 1, at 189.

3. W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1176–77 (2005).

society and a normative argument that law deserves respect because democratic lawmaking processes respect the equality and dignity of citizens. This Review focuses on one of the links in the chain of Wendel's normative-all-the-way-down argument: his move from the premise of moral pluralism to his conclusion that the function of law is to settle normative controversy in society.

I question Wendel's move on both practical and theoretical grounds. Practically, it is questionable that law has the capacity to settle moral controversy—at least the deepest kind of controversy that society is unable to settle as a result of reasonable moral pluralism. And that is important, because at the deepest level of Wendel's normative-all-the-way-down argument, law's capacity to do something for us that we cannot do for ourselves is the source of the respect that we owe the law.[4] More importantly, I question whether, in a morally pluralistic society, we should *want* law to settle normative controversy. Wendel argues that we need to settle such controversies so that we can move on and organize our affairs despite our deep disagreement about values. I argue, however, that efforts to unsettle law need not be seen as a threat: the continual ebb and flow of normative controversy can be viewed as an incident of, rather than an impediment to, a free and just society.

I. Wendel's Argument from the Moral Pluralism Premise

Fidelity to Law reinterprets the traditional partisan, and morally neutral, role morality of lawyers, grounding legal ethics in both jurisprudential and political theory. True to Wendel's earlier work,[5] *Fidelity to Law* neither condones lawyers' minimal technical adherence to the law governing lawyers nor simply refers lawyers to moral values for guidance. Although in the past Wendel has argued that legal–professional values are plural,[6] he now centers his theory of legal ethics around a single overarching value: fidelity to law. Wendel reshapes lawyers' duty of partisanship around clients' *legal entitlements*—defined as "what the law, properly interpreted, actually provides" for a client[7]—rather than the zealous pursuit of a client's *legal interests*.[8] And Wendel reinterprets lawyers' traditional duty of moral

4. *See* WENDEL, *supra* note 1, at 89 ("The 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. The values of dignity and equality therefore underwrite the claim of the legal system to have a right to the respect of citizens.").

5. *See generally* W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1 (1999) (outlining an approach to the study of values in the legal profession).

6. *See id.* at 37 (stating that "a satisfying account of professional responsibility must allow for plural values"); *see also* W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U. L.Q. 113, 116 (2000) ("[T]he foundational normative values of lawyering are substantively plural and, in many cases, incommensurable.").

7. WENDEL, *supra* note 1, at 59.

8. *Id.* at 78–79.

neutrality toward their clients' ends as respect for the authority of law even in the face of disagreement with its substantive justice.[9]

Wendel grounds legal ethics in a jurisprudence heavily influenced by H.L.A. Hart's positivism. Wendel's fidelity to law precludes gamesmanship and sharp practices that toy with the ordinary meaning of law as understood within the accepted interpretive practices of lawyers, judges, and other participants in the legal system.[10] These shared interpretive practices form what he calls the "rule[s] of recognition" within the legal profession,[11] allowing lawyers to judge some interpretations as more plausible than others.[12] Wendel also argues that fidelity to law requires lawyers to view law from an internal point of view that credits law with being "*about* something"—directed at purposes that authorize behavior as socially beneficial.[13] Law is a reason-giving domain capable of separation from morality, he argues, and lawyers exhibit fidelity to law by providing their clients with legal reasons for action.[14] As a corollary, although lawyers are free to provide moral counseling, fidelity to law precludes lawyers from inserting their moral judgments into legal representation by nullifying unjust laws covertly or by "dress[ing] up moral advice as a judgment about what the law permits."[15]

The Hartian positivism that influences Wendel's jurisprudence of lawyering is grounded even more deeply (normative all the way down) in a theory about the legitimacy of law.[16] Wendel insists that the legitimacy of law must be established on a basis that is independent of its content, defining legitimate legal systems as those that provide a basis to respect law's authority even for those who believe that the law is substantively unjust.[17] In a society characterized by reasonable moral pluralism, Wendel argues, assessments of the *substantive justice* of a law cannot provide a basis for shared judgments about the law's legitimacy because citizens will disagree about the normative criteria for measuring justice.[18] The *fairness* of the procedures by which law is enacted provides a similarly unstable basis for legitimacy, because reasonable persons in a pluralistic society will disagree about the criteria for judging procedural fairness.[19]

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9. *Id.* at 88.
10. *Id.* at 190–94.
11. *Id.* at 196–98.
12. *Id.* at 186.
13. *Id.* at 196.
14. *Id.* at 194–95.
15. *Id.* at 139.
16. *See supra* note 3 and accompanying text; *see also* Daniel C.K. Chow, *A Pragmatic Model of Law*, 67 WASH. L. REV. 755, 816 n.286 (1992) (explaining that the persuasive power of law, which stems from the "political justification" of rules, forms the crux of Hart's positivism).
17. WENDEL, *supra* note 1, at 87–88.
18. *Id.* at 88.
19. *Id.* at 102.

Although he does not separate them neatly, Wendel provides two interrelated arguments for establishing the legitimacy of law in a morally pluralistic society: a functional argument and a normative argument. Wendel's functional argument is based on the capacity of law to transform brute demands into claims of legal entitlement.[20] Law deserves respect even from those who disagree with its substantive justice, Wendel argues, because law establishes a stable framework within which citizens can coordinate their activities despite the deep, persistent, and ultimately irreconcilable normative controversy that characterizes a morally pluralistic society.[21] Borrowing from Jeremy Waldron, Wendel argues that as a morally pluralistic society we are in the "circumstances of politics," meaning that we recognize the need for a stable framework for cooperation and cannot agree on the normative basis for that framework, but we are committed to treating each other as equals and with respect.[22] Law provides a way to transcend the competing demands of underlying normative controversy and transform them into agreed-upon criteria of legality.[23] According to Wendel, this is a significant achievement: law "makes a viable and lasting community possible in the kind of society we inhabit, characterized by a diversity of religious and ethical viewpoints," because law permits us to "recognize obligations to one another, mediated through the political institutions of our society, despite substantive disagreements."[24] Because law does something for society that it cannot do for itself, Wendel argues, law has practical authority: law's settlement of normative controversy provides us with a reason to comply with law that is independent of whether the law got the resolution of the controversy right.[25]

Wendel's functional argument is underwritten by a normative argument that law is entitled to respect because the democratic lawmaking processes through which it is enacted respect the equality and dignity of citizens.[26] There are ways to settle normative controversy in society that are not normatively attractive, Wendel points out, such as installing a dictator.[27] Settlement of normative controversy through the use of force might compel compliance with law, but it would not provide citizens with a reason to respect the authority of law. There are also ways to settle a controversy that are random, like flipping a coin, or corrupt, like taking a bribe.[28] In Wendel's view, random or corrupt processes would not garner the necessary respect for the authority of law, because the settlement they would provide would not be based on a balancing of the underlying reasons. To garner

20. *Id.* at 89.
21. *Id.* at 97.
22. *Id.* at 90.
23. *Id.* at 91.
24. *Id.* at 97.
25. *Id.* at 107–13.
26. *Id.* at 89.
27. *Id.* at 98.
28. *Id.* at 111.

respect, law must be the product of processes that meet what Wendel calls the moral constraint of equality by using fair procedures that are reasonably responsive to citizen demands for participation.[29] Law gains its legitimacy, in Wendel's view, when it is decided according to processes "adequately . . . responsive to citizen demands for participation."[30]

There is a tension between Wendel's functional and normative arguments for respecting the authority of law. Without the normative argument to back it up, the functional argument devolves into nothing more than force backed by sanctions, failing to provide a basis for viewing law from Hart's "internal point of view" as an independent source of guidance for societal behavior.[31] However, if the normative argument sets too high of a standard for procedural fairness and participation, the functional capacity of law to settle normative controversy begins to unravel into second-order controversies over contested notions of fairness in society.[32] Wendel resolves the tension in favor of finality.[33] Wendel sets a relatively low threshold for fairness,[34] requiring fidelity to law as long as laws are enacted according to "tolerably fair" procedures that reflect "rough equality" among citizens.[35] To demand more, Wendel argues, would deprive law of the capacity "to settle conflict and establish a provisional basis for coordinated action."[36]

As a result of this low threshold, Wendel's functional argument ends up doing most of the work in his theory of legal ethics. The functional argument provides an independent reason to respect the authority of law: because normative controversy is really difficult to settle in a morally pluralistic society and law's capacity to transform competing normative demands into agreed-upon criteria of legality is an achievement worthy of respect. And, the functional argument plays a significant limiting role with respect to a purely normative argument that law deserves respect because (and only to the extent that) it is enacted according to a fair and inclusive lawmaking process.[37] Because citizens can be counted on to disagree about the fairness of legal process, the functional need to settle normative controversy requires that the standards of fair processes remain exceedingly lax.

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29. *Id.* at 91.

30. *Id.*

31. *See id.* at 102 (explaining that setting the bar of legitimacy—which is discussed in the normative argument—too low risks allowing an authoritative regime).

32. *Id.* at 101–02.

33. *Id.*

34. *Id.* at 102.

35. *Id.* (emphasis omitted).

36. *Id.*

37. *See id.* at 101–02 (asserting that while the normative requirement of fairness is an important aspect of legitimacy, the functional requirement of finality must predominate in order to avoid political gridlock).

II. What Follows from the Moral-Pluralism Premise?

It would be possible to take issue with Wendel on the moral-pluralism premise itself and to argue that society is much more normatively cohesive than Wendel paints it to be. As a fellow traveler in addressing the challenges of moral pluralism for legal ethics, I do not take that tack.[38] Instead, I raise two problems with Wendel's claim about what follows from the moral-pluralism premise: (1) whether, as a practical matter, law has the capacity to settle the kinds of deep, intractable moral controversies posed by the moral-pluralism premise, and (2) whether, as a theoretical matter, we should want law to play this settlement function.

A. The Moral-Pluralism Premise

The moral-pluralism premise is, at its essence, a claim that there can be, and is, a plurality of reasonable moral viewpoints in society.[39] In a morally pluralistic society, people disagree about moral judgments based on competing comprehensive conceptions of morality drawn from a variety of philosophical and religious sources, none of which can be objectively deemed "right" or "wrong" from a standpoint outside its own theoretical framework. The claim of reasonable moral pluralism is not simply that moral disagreement exists in society but that moral disagreement is reasonable and predictable. As John Rawls put it, a plurality of moral and religious views is "the natural outcome of . . . human reason under enduring free institutions" and a permanent feature of modern democratic societies.[40]

Because of its general application, law declares societal norms that apply across competing moral viewpoints and attaches sanctions to disobedience of those norms. Yet, to be effective in creating societal repose, these declarations must be accepted as legitimate. When enacted into law, societal norms become ensconced in specific language, which opens up space for technical manipulation of law's language. The sanctions attached to disobedience of law similarly open up space for citizens to skirt legal sanctions with the attitude of a classic Holmesian bad man "who cares only for the material consequences which . . . knowledge [of the law] enables him to predict."[41] Because of this interpretive and enforcement "play" within the law, any settlement of normative controversy in law will be continually

38. *See* Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389, 396–402 (2005) (comparing and contrasting different theories on the sources of moral pluralism but embracing moral pluralism as a whole).

39. WENDEL, *supra* note 1, at 88.

40. JOHN RAWLS, POLITICAL LIBERALISM, at xxiv (2005).

41. Oliver Wendell Holmes, Jr., Justice, Supreme Judicial Court of Mass., The Path of the Law, Address at the Boston University School of Law (Jan. 8, 1897), *in* 10 HARV. L. REV. 457, 459 (1897).

undermined by interpretive games and covert disobedience by citizens whose strongly held moral beliefs run counter to law's settlement.[42]

If settlement of normative controversy is the aim and function of law, then Wendel's criterion of legitimacy—that law must be capable of deciding normative controversy in a way that satisfies those who believe that it has been decided incorrectly—is the correct standard to apply. To garner a level of respect for law's authority that rules out those kinds of maneuvers, law must do more than merely declare a victor in a societal battle of normative wills. Law must provide a reason for respect that is strong enough to trump the moral reasons to avoid law's reach that inevitably will be held by citizens who believe that the law has been wrongly decided.

B. Can Law Settle Normative Controversy in a Morally Pluralistic Society?

Wendel's description of the way law settles normative controversy can be seen as an allegory whose narrative structure casts deep and persistent normative controversy as *trouble* and law as *the hero*, rescuing society from discord.[43] In this narrative, society is unable to reason its way out of deep and intractable normative controversy but nevertheless needs to settle normative controversy so that it can move on in relative peace and harmony. To solve this problem, society submits a matter to the legal process, which transforms the dispute into settled law about which society can agree. Wendel's functional argument in a nutshell is that we should respect the law, despite our moral disagreement with its content, because law does for us something that we cannot do for ourselves: law rescues us from moral pluralism.[44]

In this subpart, I argue that Wendel's allegorical narrative about the way law settles normative controversy is not fully accurate. Although law plays a role in the complex interaction between legal and social norms that characterize both microdecisions about compliance with law in an area of normative contest and on the larger stage of law and social movements, the translation of normative controversy into legal language does not fulfill the settlement role on which Wendel's functional argument rests. If law lacks the capacity to settle deep and persistent normative controversy in society, then Wendel's functional argument for the legitimacy of law falls away. If it

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42. *See* SIMON, PRACTICE OF JUSTICE, *supra* note 1, at 37–41 (identifying interpretation and enforcement as the most important problems with the "Positivist premise" of legal norms); Simon, *Ideology of Advocacy*, *supra* note 1, at 44–46 (explaining that citizens use their "procedural discretion to thwart the enforcement of the substantive rules . . . in accordance with their individual ends").

43. This is an implicit reference to the work on narrative structure by Anthony Amsterdam and Jerome Bruner. *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 158–59 (2000) (describing two Supreme Court decisions on race-based controversies as "avert[ing] . . . catastrophes" and comparing the Court's role to that of the ancient Greek hero Menelaus).

44. *See* WENDEL, *supra* note 1, at 9 ("[T]he function of the law is to provide a reasoned settlement of empirical uncertainty and normative controversy, and a basis for cooperative activity . . . .").

turns out that law is a non-autonomous realm in which deep and persistent normative controversy continues to be contested even when translated into legal terms, then we have no special reason to respect the provisional settlements of positive law—legislative acts, judicial decisions, and constitutional amendments—simply because they are law.

Although I take issue with Wendel's claim that law has the capacity to settle deep and persistent normative controversy in society, I separate that from the related claim that law creates a framework that permits us to coordinate productive societal activity.[45] In my view, the latter claim—that law has the capacity to coordinate productive societal activity—paints a largely accurate picture of the function of law. Law tells us on which side of the road to drive and on what day to pay our taxes. Law provides structures for administrative regulation of the environment, workplace health and safety, transportation systems, financial markets, and many other activities where private activity affects the public good. Law provides rules for establishing property rights in everything from land to intellectual property. Law provides avenues of private redress to compensate persons who have been injured by the negligent actions of others. Law creates standards and procedures for entering and becoming a citizen of the country. In these ways and many others, law functions to order our affairs and enable us to live together in a large and complex society.

It is also accurate, in my view, to say that normative judgments are woven into the fabric of legal standards and procedures. These normative judgments can be understood to fall on a continuum from uncontroversial to hotly contested. Some normative judgments—like the very idea that property can and should be owned—are open to possible moral criticism but are so deeply embedded in our societal norms that they are rarely questioned. Other normative judgments embedded in the law—like the idea that animals can be owned as property or that the government has the right to levy taxes—enjoy generalized societal acceptance with pockets of resistance by fringe or countercultural groups.[46] Still other normative judgments—like the idea that marriage should be limited to unions between a man and a woman or (alternatively) should be extended to same-sex couples—are the subject of broad and divisive moral controversy.[47]

Where I depart from Wendel is in the central claim of his functional argument that law has the capacity to settle a hotly contested controversy

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45. *See supra* note 21 and accompanying text.

46. *See, e.g.*, IRWIN SCHIFF, THE FEDERAL MAFIA: HOW IT ILLEGALLY IMPOSES AND UNLAWFULLY COLLECTS INCOME TAXES 11 (2d ed. 1992) (arguing that paying income tax is "strictly voluntary" because a compulsory income tax would be unconstitutional); Diane Sullivan & Holly Vietzke, *An Animal Is Not an iPod*, 4 J. ANIMAL L. 41, 58 (2008) (concluding that the American legal system should not classify animals as property because "animals are sentient creatures capable of experiencing great pain").

47. *See infra* notes 56–71 and accompanying text.

over societal norms.[48] With respect to the deeply divisive moral issues in society, it is more plausible to say that law provides a medium through which normative controversy can be (and continues to be) contested. As scholars who study law and society acknowledge, the interaction between legal and social norms is complex. At the micro level of framing and settling disputes, law often plays a peripheral role compared to more dominant social norms.[49] Although the law provides the contours within which private ordering occurs, as exemplified by Mnookin and Kornhauser's famous metaphor of dispute resolution "in the shadow of the law,"[50] these contours are indistinct,[51] and they expand or contract as law interacts with social norms in low-level-legal and extralegal decision making.[52] A similarly complex interplay of legal and social norms occurs at the macro level.[53] As scholars who study legal reform and social movements relate, law absorbs and reflects underlying normative controversy through cycles of backlash, co-optation, and bureaucratic resistance to contested legislative enactments and judicial rulings.[54] Submitting a normative controversy to the legal process can frame and transform the terms of the underlying normative controversy, and the legal process can mobilize collective action.[55] But law does not in any real sense "settle" the controversy.

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48. *See supra* note 25 and accompanying text.

49. *See, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 4 (1991) (contending that neighbors develop and enforce adaptive norms of neighborliness that trump formal legal entitlements); Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115, 117 (1979) (arguing that "the politics of bargaining" often has a more significant influence on professional practice than legal norms).

50. *See generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (providing a framework for considering how courtroom rules and procedures affect bargaining that occurs outside the courtroom).

51. Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be,"* 2005 WIS. L. REV. 365, 395 ("Americans bargain in the shadow of the law, but shadows are usually distortions of the object between the sun and the ground.").

52. For a summary of literature on this subject, see Herbert Jacob, *The Elusive Shadow of the Law*, 26 LAW & SOC'Y REV. 565, 565–71 (1992). Some scholars of law and society go so far as to characterize systems of private ordering as a form of law and to describe the interaction among systems of ordering as a "legal pluralism." *See, e.g.*, Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 889–90 (1988) (concluding that legal pluralism, including "sociolegal phenomena," moves away from the ideology of legal centralism and suggests attention to other forms of ordering and their interaction with state law).

53. *See generally* CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart A. Scheingold eds., 2006) (describing the social movements that have been created by lawyers performing work in specific areas of concern); JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978) (examining several attempts that have been made to use the legal system to affect social change).

54. For a summary of this literature, see Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

55. *See, e.g.*, Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 604 (2009) (describing the use of litigation to facilitate social change as "an imperfect but indispensable strategy").

The current moral and legal controversy over same-sex marriage in the United States illustrates the dynamic influences that evade settlement of normative controversy through law. The earliest same-sex marriage cases were litigated in the mid-1970s, when four state courts rejected legal challenges to marriage laws brought by same-sex couples.[56] Those cases were brought in the early days of the post-Stonewall-riots gay rights movement when societal attitudes condemning homosexuality had not yet been significantly unsettled,[57] and the idea that marriage was limited to unions between a man and a woman was so widely shared as to be virtually unquestionable.[58] Needless to say, the plaintiffs in those cases resoundingly lost their legal claims and, in some cases, suffered other forms of discriminatory treatment as a result of their activism.[59]

However, by the time same-sex marriage resurfaced as a legal issue in the 1990s, societal norms about homosexuality were in greater flux, and the same-sex marriage issue was met with a dizzying sequence of legal successes and failures for both pro- and anti-same-sex-marriage advocacy groups.[60] Courts in some states recognized the right to marry,[61] setting off a backlash of federal and state "defense-of-marriage" acts to legislatively prevent the

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56. Scott Barclay & Shauna Fisher, *Cause Lawyers in the First Wave of Same Sex Marriage Litigation*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 53, at 84, 84.

57. *See* William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1423–24 (1993) (observing that gay rights issues were "suppressed or ignored" before the Stonewall riots, and that even after the riots, activists struggled for over twenty years to secure "some of the same benefits regularly bestowed upon different-sex couples").

58. *Id.* at 1427–29 (asserting that early court opinions rejecting arguments in favor of a right to gay marriage relied on the ground that same-sex marriage did not fit within the societal definition of marriage).

59. John Singer, the plaintiff in a 1974 Washington state case, was fired from a federal civil-service position for his activism. Barclay & Fisher, *supra* note 56, at 89. Jay Baker, a student activist who litigated a 1971 same-sex marriage case came under scrutiny in his application to the Minnesota Bar for filing marriage documents and for being openly gay. *Id.* at 89–90.

60. *See generally* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010) (arguing against the thesis that same-sex-marriage litigation undercuts the ends pursued by the gay rights movement); Eskridge, *supra* note 57 (recounting the history of same-sex marriage); Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 DRAKE L. REV. 861 (2006) (discussing the ambiguous results of legal efforts to effect social change regarding perceptions of homosexuality). The continually unfolding history of the gay-marriage debate is catalogued online on *Wikipedia*. Wikipedia, *Same-Sex Marriage in the United States*, http://en.wikipedia.org/wiki/Same-sex_marriage_in_the_United_States (last modified Nov. 7, 2011).

61. *See In re* Marriage Cases, 183 P.3d 384, 409, 453 (Cal. 2008) (holding that a family code provision stating that "only marriage between a man and a woman is valid or recognized in California" is unconstitutional); Baehr v. Lewin, 852 P.2d 44, 55, 67 (Haw. 1993) (recognizing the right to marry and holding that a law that, on its face, discriminates based on sex against the applicant–couples in the exercise of the civil right of marriage implicates the equal protection clause of the Hawaiian constitution and requires a court to apply a strict scrutiny test); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) ("[B]arring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.").

recognition of same-sex marriages from other states.[62] Anti-same-sex-marriage activists mobilized to pass legislation and constitutional amendments to limit marriage to unions between a man and a woman, sometimes accompanied by the creation of special legal status for "domestic partners,"[63] which were in turn held to violate some state constitutions.[64] Rather than settling the normative controversy over homosexuality and gay marriage, law became an arena in which the controversy over gay marriage was, and continues to be, contested.[65]

Although it is problematic to say that law has "settled" the underlying normative controversy over same-sex marriage in the United States, it is equally problematic to contend that law has played no role. As in many social movements, the legal process has shaped and arguably transformed the debate. For example, the earliest judicial cases in the 1970s "settled" the law decisively against same-sex marriage for another twenty years.[66] Yet, widening the lens to consider the role those lawsuits played within the larger gay rights social movement, the very act of litigating the cases was arguably an important "claiming" of the idea of same-sex marriage, appropriating it from Equal Rights Amendment opponents—who were presenting the idea of gay marriage as part of the parade of horribles likely to result from passing a constitutional amendment against sex discrimination[67]—and transforming the idea of same-sex marriage "from the ridiculous to the possible."[68] As the ensuing same-sex-marriage debate continues, the language of law continues to provide ways to formulate and package the issues in the debate. Around the same time the early same-sex-marriage cases were being decided, William Rehnquist analogized homosexuality to a public health concern, saying that the question of whether gay student groups should be able to organize on campus was "akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles."[69] More

62. Schacter, *supra* note 60, at 869.

63. Cummings & NeJaime, *supra* note 60, at 1250; Schacter, *supra* note 60, at 869–70.

64. *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008) (holding that a statute banning same-sex marriage but providing for civil unions failed intermediate scrutiny under the state constitution); Baker v. State, 744 A.2d 864, 886 (Vt. 1999) (holding a marriage statute that provides unequal rights to same-sex couples unconstitutional under the state constitution).

65. The latest big event was the passage of legislation permitting same-sex marriage in New York. Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011, *available at* http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html.

66. *See* Eskridge, *supra* note 57, at 1427 n.17 (chronicling a number of the judicial decisions rejecting the same-sex marriage argument from 1971 to 1993). When the first modern gay-marriage case was brought in Hawaii, social-movement lawyers advised against it, thinking that the time was not yet right to mount a legal challenge. Cummings & NeJaime, *supra* note 60, at 1250.

67. Barclay & Fisher, *supra* note 56, at 86–87, 90–91.

68. *Id.* at 91.

69. Ratchford v. Gay Lib, 434 U.S. 1080, 1084 (1978) (Rehnquist, J., dissenting).

recently—and controversially—gay-marriage proponents have analogized state prohibitions on same-sex marriage to miscegenation laws, drawing on both civil rights history and the language of civil rights.[70] Equally controversially, gay-marriage opponents have analogized same-sex marriage restrictions to laws prohibiting bigamy, drawing on the history of state protection of marriage against First Amendment claims arising out of religious pluralism.[71]

Wendel recognizes the possibility of law to "transform brute demands into claims of [legal] entitlement[s]" and sees in it law's potential to settle normative controversy: by translating normative controversy into legal terms, we are able to deliberate about it as a society rather than simply "expressing bare desires, like a toddler throwing a tantrum."[72] What Wendel overlooks in this argument is that normative debate already transcends tantrum throwing and provides ways to frame disagreement with reference to reason and the public good. In a morally pluralistic society, the normative claims under dispute are not the expressions of "brute demands" but are appeals to deeply and sincerely held beliefs about the right and the good. Although translating these controversies into legal terms calls in additional resources by invoking the language of law and the precedential histories that attach to it, the deep and persistent underlying normative controversies do not suddenly become more agreeable through this transformation.

C. Should Law Settle Normative Controversy in a Morally Pluralistic Society?

In the previous subpart, I took issue with Wendel's normative-all-the-way-down argument at its deepest level, in which he grounds the lawyer's role in society in a conception of the function of law to settle normative controversy. As we climb back up the normative ladder to examine the role of lawyers in society, what is most at stake is the legitimacy of lawyers' professional activities advising and assisting clients in the "shadow of the law."[73] Wendel is sensitive to the need for openness in the political process, emphasizing that law should be seen as establishing "only a *provisional*

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70. *See* Eskridge, *supra* note 57, at 1423–34 (describing the pro- and anti-gay marriage arguments based on liberal legal theory). *See generally* Randall Kennedy, *Marriage and the Struggle for Gay, Lesbian, and Black Liberation*, 2005 UTAH L. REV. 781 (discussing the parallels between civil rights history and current gay rights issues).

71. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (arguing that the constitutionality of both state laws prohibiting same-sex marriage and state laws prohibiting bigamy could be called into question based on the majority's ruling that a state law criminalizing homosexual conduct was unconstitutional). In 1879, the United States Supreme Court upheld a criminal statute prohibiting bigamy in the Territory of Utah against the religious objection of a member of the Church of Jesus Christ of Latter-Day Saints (Mormon Church) who challenged the constitutionality of the law and its application to him on First Amendment grounds. Reynolds v. United States, 98 U.S. 145, 161–67 (1879).

72. WENDEL, *supra* note 1, at 114–15.

73. *See supra* note 50 and accompanying text.

settlement" that "creates a structure or a framework of moderate stability" within which "disagreement remains possible."[74] And he endorses resistance to the existing provisional settlement that law provides through "legally established means"[75] and even through public and symbolic campaigns of lawbreaking aimed at persuading the community of the injustice of settled law.[76] What fidelity to settled law rules out is covert nullification or subversion of legal norms to meet selfish and private ends,[77] and acts of civil disobedience that "destabiliz[e] the common framework of legal entitlements," even when pursued out of a belief that the law is unjust.[78]

Others argue that the law retains an open and evolving character, not only through formal legal challenge and acts of principled civil disobedience but also through the intentional flouting of law by acquisitive and self-interested lawbreakers.[79] And we can see something approaching this in the same-sex marriage debate, where private action in contravention of settled law has been at work steadily under the radar of the formal legal challenges, as same-sex couples have gone quietly about the task of forming alternative families, using legal standards originally designed for guardianship and adoption of at-risk children.[80] The democratic legitimacy of judicial interpretations that stretch or skirt statutory language to approve second-parent adoption is questionable but can be defended by appealing to "thicker democratic values" that view enacted law as only one of the pieces in a larger and more dynamic account of democratic legitimacy.[81] These thicker democratic values would also endorse the quiet individual relief that same-sex couples have gained against settled law in uncontested trial-court adoption cases. Under this thicker view of democratic legitimacy, the quiet stretching, or (more radically) flouting, of the law to create new social forms of family or property ownership is an important way of opening up society to a plurality of life forms and choices, to which the law is then able to respond.[82]

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74. WENDEL, *supra* note 1, at 129.

75. *Id.*

76. *Id.* at 124–25.

77. *Id.* at 131–35.

78. *Id.* at 124–25.

79. *See, e.g.*, Eduardo Moisés Peñalver & Sonia Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1106 (2007) (describing settlers in the nineteenth-century American West as flouting established property laws to set up "communities governed by their own conception of just, albeit self-serving, property relations" and noting that while this was initially condemned, "the law slowly but surely adapted itself to the reality the settlers had created on the ground").

80. *See generally* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990) (discussing different ways courts may address the legal challenges posed by an increasing number of same-sex couples with children); Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933 (2000) (discussing different courts' use of statutory interpretation to stretch existing adoption-law statutes to meet the legal challenges posed by same-sex adoptions).

81. Schacter, *supra* note 80, at 947–49.

82. Peñalver & Katyal, *supra* note 79, at 1098; Schacter, *supra* note 80, at 947–49.

Wendel's ideals for the democratic values of procedural fairness and participation are by contrast admittedly thin and focused on majoritarian legislative decision making. He accepts as legitimate any decisions made through legal processes that are "adequately (not ideally) responsive to citizen demands for participation."[83] Laws are legitimate, he argues, even if they are skewed by differentials in wealth and power[84] and reinforced by structural inequality and discrimination in education, housing, and employment;[85] even if lawmaking processes are distorted by political maneuvering that avoids "respectful consideration of competing points of view."[86] And, Wendel's theory of legitimacy requires citizens to tolerate "localized injustice" toward the targets of irrational majoritarian bias.[87] The legal process does the best it can to take "opposing viewpoints as seriously as possible," Wendel argues, but "[a]t some point the majority is entitled to say, 'we have heard enough,' and move on."[88]

Wendel accepts this thin procedural account of legitimacy because he concludes that in a morally pluralistic society, "it likely is the best we can do."[89] Insisting on too idealized of a conception of fair process, he argues, will leave "no way for a society to use the legal system to bootstrap itself out" of deep and persistent moral controversy.[90] But if the legal system is largely ineffective in bootstrapping society out of deep and persistent moral controversy, this concern falls away, opening the way for a thicker and more robust conception of procedural fairness and the legitimacy of legal process to emerge.

The loss of faith in law's capacity to settle normative controversy may seem to be a jurisprudential nightmare of society mired in ever-spiraling normative controversy without any authoritative way out of the quagmire of moral pluralism. Yet the flipside of law's failure to settle normative controversy is law's capacity to open space within the law for a plurality of moral viewpoints to thrive. This, I would argue, is not a jurisprudential nightmare, but the "Noble Dream"[91] of a flexible and responsive legal system. The idea

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83. WENDEL, *supra* note 1, at 91.

84. *Id.*

85. *See id.* (arguing that laws are legitimate in America, even though "the ability of many citizens to participate in the political process is limited by . . . differentials in wealth and power . . . reinforced by structural features such as inequality in primary and secondary education" as well as persistent discrimination against women and minorities).

86. *Id.* at 100.

87. *Id.* at 103.

88. *Id.* at 101.

89. *Id.* at 91.

90. *Id.* at 102.

91. H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 978 (1977) (describing the "Noble Dream" as litigants' belief that a judge will "apply to their cases existing law and not make new law for them" even if precedent and black-letter law are ambiguous). David Luban has appropriated Hart's metaphor to describe a jurisprudence of lawyering. DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 131–32 (2007).

that society should aim for flexibility and openness in the face of moral pluralism rather than seek the settlement of moral controversy finds support within much of liberal political theory. When Mill, for example, writes about the need for protection against the "tyranny of the majority," he means not only the tyranny of majority opinion enacted into law, but a broader "tyranny of the prevailing opinion and feeling" and "tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways."[92] Isaiah Berlin, rejecting the idea that "a total harmony of true values is somewhere to be found,"[93] argued that the "precondition for decent societies" was to minimize the inevitable social and political collisions of a pluralistic society "by promoting and preserving an uneasy equilibrium, which is constantly threatened and in constant need of repair."[94] Societal order and stability are important values according to these political philosophers, but so are openness, flexibility, and progress.[95] And in their view, the existence of normative controversy is not nearly as troublesome as society's attempts to settle it.

In such a thicker conception, lawyers' fidelity to law need not be confined to respecting the authority of law settled according to thin procedural standards of adequate fairness. Legitimate legal process would extend beyond majoritarian lawmaking to include the complex interplay created between private compliance with (or deviance from) law and public lawmaking. Rather than being arbiters of law's legitimacy, the role of lawyers would be defined by their participation in the legal process of legitimizing or destabilizing law based on the clients' case-by-case judgments about law's legitimacy—whether law was deserving of their respect and compliance. And the professional responsibilities of lawyers would spring from their facilitative role as intermediaries between their clients and the law, requiring lawyers to make law accessible enough to assist clients in informed decision making about the legitimacy of marginal compliance or noncompliance.

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92. JOHN STUART MILL, *On Liberty*, *in* ON LIBERTY AND OTHER ESSAYS 5, 8–9 (John Gray ed., 1991).

93. ISAIAH BERLIN, *Two Concepts of Liberty*, *in* LIBERTY 166, 213 (Henry Hardy ed., 2002).

94. ISAIAH BERLIN, *The Pursuit of the Ideal*, *in* THE CROOKED TIMBER OF HUMANITY 1, 19 (Henry Hardy ed., 1990); *see also* ISAIAH BERLIN, *The Decline of Utopian Ideas in the West*, *in* THE CROOKED TIMBER OF HUMANITY, *supra*, at 20, 47 ("[T]he best that one can do [in the face of moral pluralism] is to try to promote some kind of equilibrium, necessarily unstable, between the different aspirations of differing groups of human beings . . . .").

95. For example, Mill argued that order and progress were both necessary to good government but that order was included within progress, "not [as] an additional end to be reconciled with Progress, but a part and means of Progress itself." JOHN STUART MILL, *Considerations on Representative Government*, *in* ON LIBERTY AND OTHER ESSAYS, *supra* note 92, at 203, 223.

Conclusion

Bradley Wendel's *Lawyers and Fidelity to Law* is a remarkable step and a valuable contribution to the jurisprudence of lawyering that is emerging in the field of theoretical legal ethics. Although I disagree with him in the details of the jurisprudence of lawyering that he has developed, I do so largely within the contours of a debate that he has been instrumental in defining. Wendel's insistence that lawyers are quasi-political actors, his vision of legal ethics as normative all the way down, and his sensitivity to the challenges of moral pluralism set important parameters for the continuing debate. After *Lawyers and Fidelity to Law*, legal ethics will never be the same.