Book Review Colloquy

Fidelity to Community: A Defense of Community Lawyering

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

Reviewed by Anthony V. Alfieri*

"Many of the lawyers . . . really looked skeptical at community action."[1]

Introduction

In July 2011, Miami-Dade County Mayor Carlos Gimenez, faced with a $400 million budget gap, proposed to close thirteen libraries across Greater Miami, including the Virrick Park Library in Coconut Grove Village West (the West Grove),[2] an impoverished Afro-Caribbean-American community[3] served by the University of Miami School of Law's Historic Black Church Program.[4] Now in its fourth year, the Historic Black Church Program

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1. Interview by Zona Hostetler with Gary Bellow, Professor, Harvard Law Sch., in Cambridge, Mass. (Mar. 17, 1999).

2. Matthew Haggman & Martha Brannigan, *Proposal to Shutter Miami-Dade Libraries Draws Fire*, MIAMI HERALD (July 14, 2011), http://www.miamiherald.com/2011/07/14/v-fullstory/2314852/proposal-to-shutter-miami-dade.html.

3. *See* Arva Moore Parks, *History of Coconut Grove*, *in* REIMAGINING WEST COCONUT GROVE 20, 20–23 (Samina Quraeshi ed., 2005) (documenting the history of the West Grove).

4. Founded in 2008, the Historic Black Church Program arose out of a student-driven community-outreach initiative combining the historic preservation of churches, the conservation of neighborhood cultural and social resources (libraries, parks, and schools), and the open, expanded access to legal rights education and provider-referral services. Building upon the legal–political practices of the civil rights and poor people's movements of the late twentieth century, the initiative emphasizes organizing faith-based coalitions and mobilizing local nonprofit groups in cooperation with public agencies (prosecutor and public defender offices as well as police and fire departments) and in partnership with private entities (banks, small businesses, and real estate developers) to assist communities beset by concentrated inner-city poverty. A confluence of socioeconomic factors—public-sector neglect, private-sector disinvestment, and nonprofit-sector abandonment—have

provides multidisciplinary resources in education, law, and social services to underserved, predominantly low-income residents of the West Grove through partnerships with the Coconut Grove Ministerial Alliance, a consortium of historic black churches and other local nonprofit entities, service providers, and schools for the purposes of grassroots community organization and legal rights mobilization.[5] Publicly, Miami-Dade County officials asserted that the libraries slated for closing "were picked on two criteria: use and geography."[6] Nevertheless, because the closings disproportionately impacted low-income communities of color adversely, the selection process raised serious questions and widespread suspicions of class bias and racial animus.[7]

Like many county library systems across the nation struggling to educate already large and growing low-income populations,[8] Miami-Dade County libraries "serve not only as a resource to borrow books and participate in literacy programs, but provide much-needed Internet service."[9]

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rendered inner-city communities across the nation highly susceptible to continuing and oftentimes permanent impoverishment. The Historic Black Church Program seeks to combat that impoverishment through community education, nonprofit institution building, and civic participation. The case study presented here stemmed from events occurring during the summer of 2011, in which the Historic Black Church Program served in a limited advisory role primarily in its capacity as a member of the Coconut Grove Ministerial Alliance, a consortium of Historic Black Churches. *Historic Black Church Program*, CENTER FOR ETHICS & PUB. SERVICE (University of Miami School of Law, Coral Gables, Florida), Fall 2010 & Spring 2011, at 1, 5.

5. On the Historic Black Church Program, see Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073, 1090–92 (2009); Anthony V. Alfieri, *Integrating Into a Burning House: Race- and Identity-Conscious Visions in* Brown*'s Inner City*, 84 S. CAL. L. REV. 541, 592–601 (2011) (book review) [hereinafter Alfieri, *Integrating Into a Burning House*]; Anthony V. Alfieri, *Post-racialism in the Inner City: Structure and Culture in Lawyering*, 98 GEO. L.J. 921, 927–28 (2010) [hereinafter Alfieri, *Post-racialism*]; CTR. FOR ETHICS & PUB. SERV., UNIV. OF MIAMI SCH. OF LAW, HISTORIC BLACK CHURCH PROGRAM: 2011–2012 PROJECTS (2011) (on file with author) [hereinafter HISTORIC BLACK CHURCH PROGRAM: 2011–2012 PROJECTS]; and CTR. FOR ETHICS & PUB. SERV., UNIV. OF MIAMI SCH. OF LAW, STRATEGIC PLAN (2011) (on file with author). The Program operates jointly with the University of Miami's College of Arts and Sciences and Schools of Architecture, Communication, and Education to supply faculty and student opportunities for civic engagement, service learning, and community-based research.

6. Haggman & Brannigan, *supra* note 2. County officials commented: "Some [libraries] are proposed to be closed because of light traffic, while others are targeted because another library is nearby." *Id.*

7. *See* Luisa Yanez, *Miami-Dade Mayor Carlos Gimenez Holds First Virtual Town Hall Meeting*, MIAMI HERALD (July 14, 2011), http://www.miamiherald.com/2011/07/14/2315006/miami-dade-mayor-holds-first-virtual.html (documenting the mayor's receipt of a complaint suggesting that the libraries selected to be closed were largely those in "black or poor neighborhoods"); *see also* Matthew Haggman & Martha Brannigan, *Miami-Dade Commission Supports Mayor's Proposed Tax Plan, but Spares County Libraries*, MIAMI HERALD (July 19, 2011), http://www.miamiherald.com/2011/07/19/v-fullstory/2321502/miami-dade-commission-supports.html (noting that the mayor's budget proposal was modified due to the concerns over closing libraries that were "particularly vital to lower-income groups").

8. Miami-Dade County officials report that "the Miami-Dade Public Library System is the eighth largest public library system in the country with 48 branches in neighborhoods throughout the county." *Capital Plan—Building Beyond Books*, MIAMI-DADE PUB. LIBR. SYS., http://www.mdpls.org/info/capital_dev/watchus_grow.asp.

9. Haggman & Brannigan, *supra* note 2.

Although described as "a very modest facility in terms of space," the Virrick Park Library reportedly offers "a thriving educational experience for a substantial number of both youngsters and adults."[10] As a result, both West Grove community advocates and elected officials protested the mayor's proposed closing of the Virrick Park Library, declaring that "the cost of the library is minimal compared to the value it provides the community."[11]

Within days of the mayor's announcement, West Grove church ministers and community leaders began to circulate e-mails opposing the Virrick Park Library closing and calling for political action to block it. To help map and gauge various strategic options, the Historic Black Church Program began to assess a range of legal–political tactics, including possible recommendations of limited direct-service representation, county-wide impact litigation, and legislative law reform. Direct-service representation required the recruitment of pro bono counsel (e.g., legal-services organizations and for-profit law firms), the solicitation of injured plaintiff parties (e.g., West Grove families and children), the formulation of plausible causes of action (e.g., civil rights disparate-impact claims and state constitutional right-to-education claims), and the fashioning of appropriate relief (e.g., declaratory and injunctive remedies, the latter requiring an impracticable evidentiary showing of irreparable injury and the probability of success on the merits). More daunting, impact or test-case litigation demanded the cooperation of multiple co-counsel and complex calculations of party standing and class certification. Law reform, by comparison, entailed private and public lobbying of key decision makers in the mayor's office and at the county commission.

In addition, the Historic Black Church Program explored possible nonlegal alternatives, such as private fund-raising to replace the projected library budget shortfall and the physical relocation of the Virrick Park Library to a neighborhood church or school. Furthermore, the Program contemplated a media campaign (e.g., editorials and letters), public protest (e.g., a march, rally, or sit-in), and political pressure (e.g., reporting selected public officials to regulatory agencies for the purposes of investigating ongoing unethical or unlawful conduct in unrelated matters),[12] all to persuade local municipal and county officials to help mobilize public opposition to the proposed closing.[13]

10. Jackie Bueno Sousa, *Library Anecdote Doesn't Tell Whole Story*, MIAMI HERALD (July 26, 2011), http://www.miamiherald.com/2011/07/26/2331540/library-anecdote-doesnt-tell-whole.html (quoting Miami-Dade County Commissioner Xavier Suarez).

11. *Id.*

12. Plainly, the instrumental reporting of public officials for unethical or unlawful conduct to regulatory agencies in unrelated matters for the purpose of gaining leverage in bargaining over community resources presents issues of both ordinary morality and substantive justice.

13. It is important to note that neither the faculty nor the students of the Historic Black Church Program ultimately recommended any of the legal–political actions under review here, though such actions assemble the common core of options frequently available to community lawyers.

Taken together, this conventional and sometimes controversial array of legal–political strategies and tactics will sound familiar to community lawyers. The notion of "community lawyering" is by now well entrenched in the literature of the legal profession.[14] Wide-ranging in scope, that literature spans civil rights and poverty-law studies,[15] clinical education and skills-training courses,[16] and the empirical work of interdisciplinary scholars.[17] Indeed, histories of the American civil rights and poor-people's movements highlight the role of community lawyers in legal advocacy and political organizing.[18] Likewise, developments in law school curricular design and campus–community outreach point to the integration of community-lawyering models into legal education more generally.[19] Similarly, the

14. By community lawyering, I mean neighborhood-based representation on behalf of underserved individuals, groups, and organizations in the form of direct-service, impact, or test-case litigation, legislative law reform, transactional counseling, and legal–political organizing.

15. On community lawyering in civil rights and poverty law, see generally Raymond H. Brescia, *Line in the Sand: Progressive Lawyering, "Master Communities," and a Battle for Affordable Housing in New York City*, 73 ALB. L. REV. 715 (2010); Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399 (2001); Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999 (2007); and Laurie Hauber, *Promoting Economic Justice Through Transactional Community-Centered Lawyering*, 27 ST. LOUIS U. PUB. L. REV. 3 (2007).

16. On community lawyering in clinical education and skills training, see generally Alicia Alvarez, *Community Development Clinics: What Does Poverty Have to Do with Them?*, 34 FORDHAM URB. L.J. 1269 (2007); Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLINICAL L. REV. 333 (2009); and Karen Tokarz et al., *Conversations on "Community Lawyering": The Newest (Oldest) Wave in Clinical Legal Education*, 28 WASH. U. J.L. & POL'Y 359 (2008).

17. For empirical and interdisciplinary scholarship on community lawyering and legal services, see Laurie A. Morin, *Legal Services Attorneys as Partners in Community Economic Development: Creating Wealth for Poor Communities Through Cooperative Economics*, 5 U. D.C. L. REV. 125 (2000) and Jeanne Charn & Jeffrey Selbin, The Clinic Lab Office 3–13 (2010) (unpublished manuscript) (on file with author). *See also* D. James Greiner & Cassandra W. Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. (forthcoming 2012), available at http://ssrn.com/abstract=1708664 (assessing the impact of poverty-law outreach, intake, client selection, and service delivery); Anthony Alfieri et al., Reply to Greiner and Pattanayak (Jan. 2012) (unpublished manuscript) (on file with author).

18. On the intersection of legal advocacy and political organizing in community lawyering, see generally Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001) and Loretta Price & Melinda Davis, *Seeds of Change: A Bibliographic Introduction to Law and Organizing*, 26 N.Y.U. REV. L. & SOC. CHANGE 615 (2000–2001).

19. On curricular models of community and related public-interest lawyering in legal education, see generally Martha F. Davis, *The Pendulum Swings Back: Poverty Law in the Old and New Curriculum*, 34 FORDHAM URB. L.J. 1391 (2007); Louis S. Rulli, *Too Long Neglected: Expanding Curricular Support for Public Interest Lawyering*, 55 CLEV. ST. L. REV. 547 (2007); Gregory L. Volz et al., *Higher Education and Community Lawyering: Common Ground, Consensus, and Collaboration for Economic Justice*, 2002 WIS. L. REV. 505; and W. Lawson Konvalinka, Book Note, *More Than a Poor Lawyer: A Study in Poverty Law*, 89 TEXAS L. REV. 449 (2010).

writings of law-and-society scholars underscore the significance of community or "cause" lawyering here and abroad.[20]

This Review will offer an ethical defense of community lawyering against the backdrop of W. Bradley Wendel's important new book, *Lawyers and Fidelity to Law*.[21] Building upon his prior distinguished work on legal ethics[22] and the contemporary writings of moral and political philosophers,[23] *Lawyers and Fidelity to Law* advances a theory of legal ethics positing "fidelity to law" as the central obligation of lawyers at work in liberal-democratic societies.[24] Wendel's moral and political arguments for a fidelity-to-law conception propound political legitimacy as a normative benchmark for lawyer decision making.[25] Moreover, his arguments ground the duties of lawyers in "democratic law making and the rule of law," thus situating the ethical and indeed normative value of lawyering in the "domain of politics" rather than in ordinary morality or social justice.[26] By defending a theory of legal ethics that places fidelity to law instead of client or community interests at the core of lawyers' obligations, Wendel seeks to rehabilitate the idea of legitimacy as a normative ideal for lawyers and to channel lawyers into a formal, procedural system of advocacy and counseling largely independent of substantive-justice objectives.[27] Wendel's transformation of the evaluative framework of legal ethics from the concerns of ordinary morality and substantive justice to the considerations of political legitimacy and process-oriented legality, I will argue, exposes community lawyers to new terms of normative criticism and erodes the justification of their crucial work in American law and society.

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20. On community-lawyering strands in cause lawyering, see John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927 (1999); Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 302, 302–36 (Austin Sarat & Stuart S. Scheingold eds., 2006); and Jayanth K. Krishnan, *Lawyering for a Cause and Experiences from Abroad*, 94 CALIF. L. REV. 575 (2006).

21. W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010). For helpful discussion of the ethics of community lawyering, see generally Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147 (2000).

22. *See generally* W. Bradley Wendel, *Lawyers as Quasi-public Actors*, 45 ALTA. L. REV. 83 (2008); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005); W. Bradley Wendel, *Legal Ethics as "Political Moralism" or the Morality of Politics*, 93 CORNELL L. REV. 1413 (2008); W. Bradley Wendel, *Razian Authority and Its Implications for Legal Ethics*, 13 LEGAL ETHICS 191 (2010); Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 GEO. J. LEGAL ETHICS 1065 (2010).

23. *See* JOHN RAWLS, POLITICAL LIBERALISM, at xxxvi (2005) (exploring ideas of "justice as fairness" and the "political conception of justice"); JOSEPH RAZ, *The Claims of Law*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 28, 28–33 (2d ed. 2009) (remarking on the law's requirement of adherence to legal rules even when there are compelling reasons for deviating from those rules).

24. WENDEL, *supra* note 21, at 7–9.

25. *Id.* at 2, 11, 15, 47–48, 55, 89–92, 98–99, 130.

26. *Id.* at 2.

27. *Id.* at 2, 4, 23, 42, 157, 215 n.19.

The Review proceeds in three parts. Part I describes Wendel's "fidelity to law" conception and its normative, positive-law underpinnings. Part II examines the meaning of and justification for community lawyering within Wendel's ethical framework. Part III sketches an outsider ethic of disobedience and resistance as an alternative guidepost for community lawyers.

I. Fidelity to Law as a Normative Defense of Positive Lawyering

"[T]he biggest problem . . . was that the lawyers would resist actually working directly with community organizers and community action people . . . ."[28]

Wendel's "fidelity-to-law" conception of ethical lawyering rests on the claim of political legitimacy. He defines political legitimacy as a property or quality of "political arrangements" acquired through the deserved "respect and allegiance of citizens," an allegiance that survives citizen quarrels and unjust laws.[29] On this definition, political legitimacy constitutes a normative precept animating the relationship and mediating the tension "between state power and citizens."[30] By bootstrapping the duties of lawyers to considerations of "democratic law-making and the rule of law," Wendel relocates the ethical value of lawyering from the fields of ordinary morality and substantive justice to "the domain of politics."[31] Thus configured, the value of lawyering derives from fidelity to the law, not the pursuit of client, nonclient, or broader community interests.[32]

Under Wendel's fidelity-to-law conception, law earns cultural and social "respect because of its capacity to underwrite a distinction between raw power and lawful power," or more bluntly, to sever or separate force from legality.[33] That capacity, he explains, "enables a particular kind of reason-giving" or considered judgment to be employed "independent[ly] of power or preferences."[34] Through public deliberation and the exercise of

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28. Interview by Zona Hostetler with Gary Bellow, *supra* note 1.

29. WENDEL, *supra* note 21, at 2.

30. *Id.*

31. *Id.*

32. *Id.* at 2, 26, 44, 49–50, 67, 71, 87, 89, 122–23, 168, 175, 178, 184, 191, 210; *see also id.* at 80 (explaining that the law does not permit lawyers to seek out every possible lawful advantage for their clients); *id.* at 84 (describing how lawyers may attempt to change the law through good-faith arguments only).

33. *Id.* at 2; *see also id.* at 3 (defining the concept of legality in terms of the "difference between the law and what someone—a citizen, judge, or lawyer—thinks ought to be done about something, as a matter of policy, morality, prudence, or common sense"); *id.* at 119 (distinguishing individual from institutional decision making); *id.* at 202 ("The claim of legality is, in essence, the avowal of having evaluated a scheme of legal entitlements and constraints from the perspective of one who regards them as creating reasons for action as such.").

34. *Id.* at 2; *see also id.* at 14 (describing how participants in a legal system act as if the law is not radically indeterminate and noting how legal reasoning results in an objective range of reasonable interpretations); *id.* at 61 (explaining that the law must be regarded as intrinsically reason giving in order to make a distinction between a legal right or permission and lawbreaking);

reasoned judgment, he adds, represented and unrepresented citizens may lay claim to legal entitlements in an orderly, regularized fashion within society.[35] Unlike preferences and interests or desires, according to Wendel, legal entitlements are "conferred by the society as a whole" both fairly, in the manner of process, and collectively, in the nature of political community.[36] For Wendel, "the legitimacy of laws enacted through fair procedures" gives rise to the political legitimacy of entitlements that citizens "accept" for moral rather than economic or political reasons.[37] In this way, legitimacy requires no appeal to higher law claims such as ordinary morality, individual and collective justice, or the public interest.[38]

Notwithstanding his axioms of legal entitlement and political legitimacy—and his enigmatic confidence in the natural moral reasoning conferred by citizenship—Wendel admits that the popular discourse of American law and culture contains "a significant strand of approval of law-breaking," especially when harnessed to the ends of justice.[39] From popular culture, in fact, he discerns a common appreciation for the instrumental value of law for citizens and their desires yet a lack of respect for the inherent value of law for society and its needs.[40] However valorized in culture and society, the law, Wendel acknowledges, "does not end debate in moral terms

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id. at 130 (discussing how even if one grants that the legal system needs political legitimacy, lawyers' roles are not limited to facilitating the access of individuals to legal meaning making); *id.* at 160–61 (distinguishing agent-neutral reasons from agent-relative reasons, which are not morally mandatory).

35. *Id.* at 2; *see also id.* at 6 (claiming there is value in lawyers' work within a system that maintains legitimate procedures and establishes a stable basis for coexistence and cooperation); *id.* at 8 (remarking that a lawyer's ability to help a client in a legal manner is limited by the client's legal entitlements); *id.* at 123 (explaining that there is room for dissent even in a well-ordered society where dissenters respect and obey fair and just institutions).

36. *Id.* at 2; *see also id.* at 197 (suggesting that official authority is ultimately derived from a community's practices); *id.* at 265 n.62 (mentioning that the goal directedness of any practice is a noncircular source of obligations internal to the practice). On legal authority, legislation, and consent, see JEREMY WALDRON, THE DIGNITY OF LEGISLATION 124–66 (1999).

37. WENDEL, *supra* note 21, at 2; *see also id.* at 62 (labeling as "good citizens" those who take the law as a source of reasons for action instead of merely as a source of negative consequences). Wendel's privileging of moral conviction over economic or political interest goes largely unexplained.

38. *Id.* at 2, 9–10, 29, 56, 120, 210.

39. *Id.* at 3 (noting popular images of "heroic" lawyers marked by their willingness "to bend the rules in pursuit of substantive justice"). *See generally* William H. Simon, *Moral Pluck: Legal Ethics in Popular Culture*, 101 COLUM. L. REV. 421 (2001) (profiling three prominent portrayals of lawyers and discussing popular culture's exaltation of their legal transgressions in pursuit of basic moral values).

40. *See* WENDEL, *supra* note 21, at 2 (citing the ability of citizens to gain power through appeal to legal entitlements); *id.* at 3 (repeating the attitudes of some clients that the law should be followed only if it helps accomplish their goals); *id.* at 82 (describing some lawyers' view that their role is to press their clients' interests "right up to the boundaries of the law"); *id.* at 114–15 (remarking on the popular conception of the law as "an irritant, rather than something that deserves allegiance").

about a matter."[41] Debate, he allows, may encompass "public criticism, protests, civil disobedience, and other acts designed to change the law" for moral and political reasons.[42] Nonetheless, he insists, "lawyers are charged with an obligation to treat the law with respect," ideally in a democratic spirit of civic obedience to positive law.[43]

For purposes of political theory, Wendel assumes that the law, under "a reasonably well-functioning democratic political order," symbolizes "a collective achievement by people who share an interest in living alongside one another in conditions of relative peace and stability."[44] On this democratic view, law furnishes "procedures that enable citizens to resolve disagreements that otherwise would remain intractable, making it impossible to work together on common projects."[45] In calling upon lawyers to respect the law, Wendel urges the resolution of societal conflicts and controversies "through public, reasonably accessible procedures that enable citizens to reach a provisional settlement"—put simply, "to enable cooperative action in response to some collective need."[46]

Extending out from this public stance, Wendel assembles twin political purposes for ethical lawyering. From the outset, he seeks to rejuvenate the idea of legitimacy as a normative touchstone for lawyers. Throughout, he also strives to channel lawyers within a positive-law system crafted "to supersede disagreements over what substantive justice requires."[47] For

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41. *Id.* at 3; *see also id.* at 107 (recognizing that the existence of moral pluralism may conflict with the legal norms established in society); *id.* at 115–16 (asserting that the law legitimates certain actions in a pluralistic society).

42. *Id.* at 3.

43. *Id.*; *see also* W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 424 (2004) (contending that "lawyers have an obligation to respect the law and maintain its capacity to serve as a framework for coordinated action").

44. WENDEL, *supra* note 21, at 4; *see also id.* at 2 (asserting that law enables civil interaction by performing an equalizing function); *id.* at 91 (stating that law is essential to the political order of a society, allowing people to coexist peacefully).

45. *Id.* at 4; *see also id.* at 89 (asserting that laws are societally instituted procedures for resolving disagreements that establish the framework for cooperation); *id.* at 96–98 (exploring the types of disagreements that make law necessary and arguing that law facilitates the existence of societies with a diversity of viewpoints).

46. *Id.* at 4 (citing the settlement function as a "larger-scale phenomenon" that "supersedes diffuse disagreement over normative issues by replacing the contested individual moral and political beliefs of citizens with a shared social position"); *see also id.* at 99 (noting that "members of society might reasonably opt for the use of procedural mechanisms to transcend the disagreements that divide them, and to establish a framework for coordinated action").

47. *Id.* at 4; *see also id.* at 10 (arguing that to "regard professional duties . . . as aiming directly at justice or other moral notions such as efficiency or autonomy, would essentially vitiate the capacity of the legal system to supersede disagreements about these values"); *id.* at 26 ("The main argument in this book is that in the majority of cases, a fully worked-out moral analysis of what a lawyer ought to do will conclude that the lawyer has an obligation of fidelity to the law that precludes reasoning on the basis of ordinary non-institutional moral values."); *id.* at 54 (asserting that "one of the most important functions of the law is to supersede uncertainty and disagreement and provide a resolution of competing claims of right, so that citizens can coexist and work together on mutually beneficial projects").

Wendel, "shifting the evaluative frame of reference from ordinary morality and justice to considerations of political legitimacy" alters "the terms of the normative criticism of lawyers."[48]

Consider in this light the case of community lawyers here in Miami and elsewhere. Typically engaged in a wide range of civil rights and antipoverty work, community-based lawyers frequently challenge state-sanctioned patterns and practices of class bias or racial animus embodied in discrimination and disparate treatment—repeated patterns and practices increasingly insulated doctrinally from federal and state court attack. Wendel's revised evaluative framework pushes normative criticism of such lawyer-engineered challenges away from considerations of morality and justice—precisely those considerations essential to the condemnation of racial discrimination and economic inequality. Instead, his framework tilts normative criticism of such lawyer challenges toward considerations of rights-based entitlement, political legitimacy, and procedural legality, and hence toward the acceptance of discrimination and disparate treatment as good-faith attempts by democratic lawmakers to balance competing social interests in the allocation of scarce resources,[49] here in Miami with respect to neighborhood libraries. This normative reassessment transforms the criticism of community lawyers who advise clients, particularly clients and communities of color, on the permissibility of strategic resistance to state-sanctioned patterns or practices of racial discrimination and racially disparate treatment from the accusation that their conduct reflects complicity in the moral wrong of contempt for nonclient, majority-political entitlements to the charge that their conduct actually tarnishes them as "abusers of the law."[50]

On Wendel's normative valence, the charge of lawyer abuse of the law arises from the morally deduced obligation "to respect the institutions, procedures, and professional roles that constitute the legal system."[51] In order to demonstrate that the law and the legal system are worthy of popular respect,[52] Wendel draws upon the "political normative considerations relating

48. *Id.* at 4; *see also id.* at 87–89 ("[C]onsiderations associated with the value of legality and the rule of law provide reasons for lawyers to act with fidelity to law, rather than acting on the basis of the moral and nonmoral considerations that would otherwise apply in the absence of the lawyer–client relationship.").

49. *See id.* at 4 ("The effect of shifting the evaluative frame of reference from ordinary morality and justice to considerations of political legitimacy is to change the terms of the normative criticism of lawyers."); *id.* at 86 (asserting that "the legal entitlements of clients, not client interests, fix the boundaries of lawyers' duty of loyalty to their clients"); *id.* at 122 ("[T]he fundamental obligation of the lawyer's role is fidelity to the law itself. The law supersedes moral disagreement and provides a basis, however thin, for social cooperation and solidarity."); *id.* at 177 (pronouncing that the "obligation of fidelity to law must be understood in context, with some lawyers having greater latitude than others to assert less well-supported legal positions on behalf of clients").

50. *Id.* at 5; *see also id.* at 86 (summarizing a "Principle of Neutrality" in which the boundaries of a lawyer's duty of loyalty are fixed by clients' legal entitlements rather than ordinary morality).

51. *Id.* at 5.

52. *Id.*

to the ethics of citizenship in a liberal democracy."[53] Employing John Rawls and his notion of the "burdens of judgment," Wendel construes the ethics of citizenship in terms of pluralism and disagreement.[54] His embrace of ethical pluralism stems from the recognition of diverse interests, capacities, and ends in a liberal democracy and the inexorable likelihood of value conflicts.[55] Out of commitments to a democratic society and value pluralism, Wendel endorses "fair terms of cooperation" in law, culture, and society in spite of the familiar presence of "deep and intractable disagreements at the level of comprehensive moral doctrines."[56] Cooperative fairness, expressed in positive lawmaking and law-applying procedures—for example, in the drafting and implementation of legislative budget-making authority—in this sense fosters legitimacy.[57] To Wendel, "governance through fair democratic procedures is something worth respecting" in law, politics, culture, and society.[58] Accordingly, he observes, lawyers, even community lawyers, "do something valuable by working within a system that maintains legitimate procedures for establishing a stable basis for coexistence and cooperation."[59]

The liberal backdrop of democratic governance, fair procedure, and political legitimacy informs the core moral content of Wendel's vision of legal ethics, a vision closely aligned with the standard conception of ethics dominant within the Anglo-American legal profession.[60] To a substantial

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53. *Id.*; *see also id.* at 115 (positing a moral obligation to obey even unjust laws provided that such laws "do[] not exceed some limit of injustice").

54. *Id.* at 5; *see also id.* at 55 (rejecting the argument that society's need for law arises from the inherent selfishness and inadequacy of its members); *id.* at 92 (locating Rawls's "burdens of judgment" in the context of nonideal ethics (citing RAWLS, *supra* note 23, at 55–58 (1993))). By the burdens of judgment, Wendel means "the indeterminacy in practice of our evaluative concepts, due to empirical uncertainty and moral pluralism." *Id.* at 5.

55. *Cf.* RAWLS, *supra* note 23, at 56–57 (positing that the sources of reasonable disagreement—the burdens of judgment—derive from differences in people's total experiences, the ways in which they assess and weigh moral considerations, and the ways in which they assess and evaluate conflicting and complex evidence that bears on their judgments); Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389, 396–402 (2005) (contending that the sources of moral pluralism can be categorized and explained as arising from "epistemological difficulty," "value pluralism," or the differences in people's "cultural identit[ies] and experience[s]").

56. WENDEL, *supra* note 21, at 5.

57. *See id.* at 5–6 (arguing that citizens in a democracy must agree on certain, tolerably fair lawmaking procedures); *id.* at 99 (discussing perceived imperfections in the legislative process); *id.* at 101–02 (arguing that congressional-lawmaking procedures are fundamentally legitimate despite some perceived imperfections).

58. *Id.* at 6; *see also id.* at 88 (suggesting that respect for the law is warranted where the procedures for making, interpreting, and applying laws are legitimate).

59. *Id.* at 6; *see also id.* at 86–105 (arguing that the capacity of the legal system to treat citizens equally through the application of legitimate and fair procedures for making and applying law vindicates the rule of law, even where some outcomes work injustice, because fair procedure enables citizens to resolve disagreement cooperatively).

60. *See id.* at 5 (insisting that the book will argue that the legal system is worthy of respect by virtue of its "rel[iance] on political normative considerations relating to the ethics of citizenship in a liberal democracy"); *id.* at 28–30 (discussing the standard conception of legal ethics).

extent, Wendel defends the standard conception, albeit in modified form. His conceptual adjustment culls from three principles: two guide lawyer actions, and a third shapes the normative evaluation of such actions.[61] The first—the Principle of Partisanship—calls for the lawyer "to advance the interests of her client within the bounds of the law,"[62] while the second—the Principle of Neutrality—excuses the lawyer from consideration of either "the morality of the client's cause" or "the morality of particular actions taken to advance the client's cause," presuming "both are lawful."[63] The third—the Principle of Nonaccountability—follows from lawyer adherence to and institutional observance of the first two principles, thus permitting Wendel to conclude that "neither third-party observers nor the lawyer herself should regard the lawyer as a wrongdoer," at least "in moral terms."[64]

In contrast to the overriding instrumental logic of the traditional standard conception, Wendel argues that "lawyers should act to protect the legal *entitlements* of clients" and not simply pursue their private interests or public preferences.[65] For Wendel, the law empowers lawyers to act for clients through the attorney–client relationship and "sets limitations on the lawful use of those powers."[66] By showing that "the legal system deserves the allegiance of citizens," he contends, "lawyers will be seen to play a justified role in society" and therefore will accrue, and perhaps regain, ethical value as a profession.[67]

II. Fidelity to Law as a Normative Criticism of Community Lawyering

"I wasn't sure that this model of a policy-oriented, direct action-oriented, community action connected legal services program could really work."[68]

Wendel's fidelity-to-law conception of legal ethics presents a serious, normative criticism of community lawyering. In defending a theory of legal ethics in which fidelity to law shapes the professional responsibilities of lawyers, Wendel both recasts and reinforces the basic premise of role-differentiated morality. Bound up in "the claim that occupying a social role

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61. *See id.* at 6 ("The Standard Conception consists of two principles that guide the actions of lawyers, and a third principle that is supposed to inform the normative evaluation of the actions of lawyers."); *id.* at 28 (discussing the three principles that constitute the Dominant View).

62. *Id.* at 6; *see also id.* at 29–30 (enumerating the three principles that constitute the Dominant View).

63. *Id.* at 6.

64. *Id.*; *see also id.* at 29–31 ("The Principle of Nonaccountability means that, as long as the lawyer acts within the law, her actions may not be evaluated in ordinary moral terms.").

65. *Id.* at 6; *see also id.* at 31 (arguing that "the legal entitlements of clients, not client interests, should be paramount for lawyers").

66. *Id.* at 6.

67. *Id.* at 7; *see also id.* at 6 n.* (remarking that "since fidelity to law, not client interests, is a principal difference between this view and the standard conception, the position here might be referred to as the fidelity to law conception, the entitlement view, or something similar").

68. Interview by Zona Hostetler with Gary Bellow, *supra* note 1.

provides an institutional excuse for what would otherwise be wrongdoing," the notion of role-differentiated morality, he points out, departs from the more universally compelling concept of ordinary morality.[69] For many community lawyers, for example, the commands of ordinary morality pilot their work, often in street-level collaboration with neighborhood residents and groups. Despite this divergence and the personal and professional sway of ordinary morality, for Wendel, "roles do real normative work by excluding consideration of reasons that someone outside the role would have to take into account."[70] This role-specific, outsider-norm exclusion narrows Wendel's evaluative frame of reference to certain institutional roles and practices that, when applied to community lawyers, act to constrain their work across multiple, varied contexts. Those roles and practices, he concedes, demand moral justification at a higher, systematic level of generality beyond routine case-by-case application in localized settings.[71] To that end, he ties the lawyer's role to a set of values embodied by the character of citizenship in a pluralistic society where the day-to-day "lives of individuals are comprehensively regulated by political institutions."[72] This tie, however, fails to bind individuals disenfranchised by mainstream political institutions and denied the full rights and privileges of citizenship, as illustrated by the history of the West Grove.

Respect for the values of citizenship in a pluralistic society molds Wendel's understanding of lawyers when clients or circumstances summon them to act in their professional capacity as advocates, advisors, and counselors. On this understanding, lawyers play out "a small but significant part" in maintaining, and indeed preserving, the mainstay institutions of a pluralistic society—namely courts, legislatures, and administrative or regulatory agencies.[73] By attending to these institutions and keeping them in "good working order,"[74] Wendel contends, the lawyering role garners "significant moral weight."[75] That weight, along with its underlying norms

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69. WENDEL, *supra* note 21, at 7; *see also id.* at 20 (explaining the distinction between ordinary and role-differentiated morality); *id.* at 31 (introducing the conflict between the standard conception and ordinary morality).

70. *Id.* at 7; *see also id.* at 20 (linking this role-based morality to the creation of genuine duties related to a larger system of general morality); *id.* at 23 (suggesting that ordinary morality justifies the larger structure of which role-differentiated morality is a part).

71. *Id.* at 7, 27, 122.

72. *Id.* at 7; *see also id.* at 90–91 (arguing that a system is just if it adequately enables citizens with different moral viewpoints to participate equally in democratic institutions); *id.* at 116 (suggesting that lawyers best serve the value of legality if they act not on what they perceive to be required by morality but rather to facilitate settlement of normative disagreements).

73. *Id.* at 7.

74. *Id.* at 7; *see also id.* at 64 (describing lawyers who shirk their responsibility to keep the system in "good working order" as "Holmesian bad men"); *id.* at 84 (condemning lawyers who act as "saboteurs or guerilla warriors" by failing to respect "existing positive law").

75. *Id.* at 7; *see also id.* at 62 (differentiating between "good" and "bad" citizens based on factors that motivate compliance with, and regard for, the law).

of fairness and legality, draws upon "a freestanding morality of public life."[76] In this respect, he reasons, lawyers resemble *political officials* more than ordinary moral agents.[77] Such resemblance affords Wendel an opportunity to erect a new regime of interwoven public and lawyer ethics rooted in citizen respect for the law and the value of legality.[78]

Unlike Wendel's civic-minded, "political" lawyers, community lawyers encounter a profoundly diminished "morality of public life" in their work. Public life in impoverished communities like the West Grove reveals decades of economic abandonment and political neglect. Devastated by concentrated poverty, public life for low-income households in Miami and elsewhere lacks the basic institutional features of a "working" society, such as accessible and functional employment markets, public schools, social services, and mass transportation. In these increasingly desperate and despairing circumstances, community lawyers struggle under Wendel's formalist injunction to construct their role primarily out of the citizenship norms of respect for law and legality.

Yet, from this starting point, Wendel returns to the Principle of Partisanship, asserting that the law simultaneously imposes "limits on permissible advocacy" and "constitutes the lawyer's role."[79] For Wendel, the constitutive function of law and legal entitlements materially works to empower lawyers to act on behalf of clients.[80] Legal entitlements, he emphasizes, express "claims of right, as distinct from assertions of interest,"[81] a distinction historically contingent on political power, cultural dominance, and socioeconomic hierarchy. Wendel makes no mention of these pivotal contingencies, an oversight that ignores the historical absence and diminution of the legal entitlements of segregated communities like the West Grove. The distinctive quality of legal entitlements, he contends, redirects the standard conception of a lawyer's professional duties from the

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76. *Id.* at 7; *see also id.* at 23 (contending that "[o]ne of the principal arguments in this book is that legal ethics is part of a freestanding political morality"); *id.* at 26 (clarifying that "freestanding values," while not "unrelated to ordinary morality," are largely dependent on the "institutional context"); *id.* at 33–36 (analyzing Stephen Pepper's "first-class citizenship" model and concurring with David Luban's criticism of that model); *id.* at 156–57 (clarifying that people can remain "moral agents" while "grounded in freestanding political considerations" including "the inherent dignity and equality of all citizens, and the ideal of legitimacy").

77. *Id.* at 7.

78. *Id.* at 8, 10, 18, 48–49, 85, 87, 92, 117, 131.

79. *Id.* at 8.

80. *See id.* (pointing out that a client's "extra-legal interests . . . do not convey authority upon an agent to act in a distinctively legal manner on behalf of the client"); *see also id.* at 6 (previewing the notion that the law "empowers lawyers to do anything at all for clients"); *id.* at 52 (explaining that the client's legal entitlements serve as the basis of the lawyer's power to act on behalf of the client); *id.* at 129 (providing examples of lawyers' use of clients' procedural entitlements to challenge the existing distribution of entitlements).

81. *Id.* at 8; *see also id.* at 54 (concluding that lawyers are prohibited from adopting unreasonable interpretations of clients' legal entitlements "simply because it would be advantageous to their clients if they did so").

zealous protection of a client's lawful interests to the protection of a client's legal entitlements.[82]

In addition to this redirection, Wendel's entitlements view of the standard conception requires that lawyers not only recognize but also affirm the law as legitimate.[83] To Wendel, this recognition acknowledges that the law should be and in fact stands "worthy of being taken seriously."[84] It also acknowledges that the law should be "interpreted in good faith with due regard to its meaning, and not simply seen as an obstacle standing in the way of the client's goals."[85] That dual recognition propels Wendel's claim "that lawyers must advise clients on the basis of genuine legal entitlements and assert or rely upon only those entitlements in litigation or transactional representation that are sufficiently well grounded."[86]

The claim of genuine legal entitlements changes the basis for ethical criticism of community lawyering from the standpoint of ordinary morality or injustice to infidelity to law.[87] Infidelity of this kind links legal ethics and lawyers' professional obligations to "respect for the law and the legal system."[88] Elevating respect for the law and the legal system to a normative plane treats law as a social achievement by its very nature "worthy of the loyalty of citizens and lawyers."[89] No doubt most community lawyers endorse this treatment, according the law formal respect and granting the legal system institutional loyalty. Most also applaud the social achievement of the law in establishing legal entitlements and safeguarding legal protections,

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82. *Id.* at 8, 115–17, 123–55.

83. *Id.* at 8, 167–68.

84. *Id.* at 8; *see also id.* at 40 (observing that clients are entitled to the type of protection from their lawyers that a friend may provide, "which is to have the interests of an individual taken seriously, as against the claims of the wider collectivity").

85. *Id.* at 8. *But see id.* at 85 (acknowledging that "there may be cases in which legal injustice cannot be interpreted away" and providing as an example the legal principle of "separate but equal" as it existed in the early twentieth century).

86. *Id.* at 8. Wendel's dual recognition also concedes the frequent difficulty in differentiating "between a loophole or malfunction, on the one hand, and a genuine legal entitlement on the other." *Id.*; *see also id.* at 115 (comparing the refusal to justify positions on the basis of legal entitlements to the "express[ion] of bare desires, like a toddler throwing a tantrum"); *id.* at 123 (defending the notion that "the ethics of lawyering is constituted principally by the political obligation of respect for the law, not ordinary moral considerations").

87. *See id.* at 7–8 (calling attention to the conceptual wrong turn in legal ethics in utilizing the toolkit of ordinary ethics to address the problems of lawyers and suggesting instead that lawyers strive to ensure their reliance on legal entitlements in litigation or transactional work, a reliance sufficiently well-grounded in the law); *id.* at 123 (advocating for a theory of legal ethics that "ha[s] something to say about when the obligation of fidelity to law runs out in the face of substantive injustice"); *id.* at 128 (explaining that a lawyer's refusal to assist a borrower in asserting a legal entitlement would be "to deprive a client of that very thing for which the role of lawyer is constituted").

88. *Id.* at 9; *see id.* at 123 (grounding the ethics of lawyering based on respect for the law, as opposed to "ordinary moral considerations"); *id.* at 132 (arguing that lawyers are ethically prohibited from employing extralegal means to combat injustice).

89. *Id.* at 9; *see also id.* at 158 (arguing that actors in the political realm "display allegiance to a conception of moral responsibility with procedural justice at the foundation").

including "the capacity of official institutions to recognize rights in favor of disempowered citizens against the powerful."[90] To that extent, they join Wendel in affirming the law as legitimate and worthy of serious, good-faith interpretation. Their interpretative horizon, however, goes beyond the settled ground of legal entitlements, genuine or not. Of necessity, daily combat against inner-city poverty and racial inequality requires the creative enlargement of conventional lawyer roles and functions as well as the expansion of constitutional, statutory, and common law entitlements. Considerations of morality and justice fuel the augmentation of legal role, function, and entitlement.

Wendel connects the social function of law to the "reasoned settlement of empirical uncertainty and normative controversy."[91] Consistent with this function, Wendel remarks, law provides "a basis for cooperative activity"[92] in accordance with the changing "circumstances of politics."[93] Borrowed from Jeremy Waldron, the notion of the circumstances of politics implies not only a shared societal interest in building a tolerant forum for group cooperative action,[94] but also a dispute-resolution procedure open to competing positions and respectful of participants, each consistent with a commitment to negotiation, settlement, and stability.[95] Echoing Rawls, Wendel explains that procedures tailored to dispute resolution and tied to a "threshold standard of fairness permit people to reach a reasoned settlement of what would otherwise be intractable disagreement."[96] Such fairness procedures render law legitimate to the extent that the law "responds

90. W. Bradley Wendel, *Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics*, 90 TEXAS L. REV. 727, 737 n.43 (2012) ("I will admit to worrying that treating the law instrumentally will result in a long-term impairment of its capacity to underwrite demands for respect by the powerless.").

91. WENDEL, *supra* note 21, at 9; *see also id.* at 210 (contending that adherence to the law is preferable to asking lawyers to be loyal to sometimes-inconsistent ideas about the public interest).

92. *Id.* at 9.

93. *Id.* (citing JEREMY WALDRON, LAW AND DISAGREEMENT 86, 101 (1999)).

94. *Id.* at 9–10; *see also id.* at 18–19 (claiming that legal ethics entails the application of a political normative system that is informed in part by the capacity of law to enable cooperation); *id.* at 36 (noting that legality is important because it enables societal coordination and stability); *id.* at 54, 93, 98 (describing law as a way to stabilize and coordinate the interests of citizens in light of both substantive moral disagreements and mundane disagreements).

95. *See id.* at 9 ("Procedures that meet a threshold standard of fairness permit people to reach a reasoned settlement of what would otherwise be intractable disagreement."); *id.* at 116 ("In a pluralistic society, the law provides a framework for coordinated action in the face of disagreement."); *id.* at 129 (describing the law as creating a framework of moderate stability and indicating ways lawyers can challenge settlement).

96. *Id.* at 9; *see also id.* at 88 ("Rawls believes that reasonable citizens may subscribe to a diversity of reasonable comprehensive doctrines, but from within those comprehensive doctrines they may be able to endorse a political justification for a fair scheme of cooperation."); *id.* at 92–96 (explaining that fair procedures are needed to resolve disagreements between citizens that disagree about matters of morality or justice).

adequately to the needs of citizens in the circumstances of politics."[97] To his credit, Wendel confesses that a gap sometimes separates legitimacy and authority, noting that however legitimate their hold, "laws can be unjust."[98]

Community lawyers work under conditions of socioeconomic dysfunction and legal–political conflict similarly marked by empirical uncertainty and normative controversy. Shaped by hierarchy, those conditions impede the cooperation and negotiation of politics, in part because of disagreement over the allocation of scarce resources—in this instance, county library funds—and in part because of inequalities of class and race. Wendel's fairness procedures, to the extent relevant and reliable, neither address nor dismantle the conditions of hierarchy that undermine the legitimacy of law and the legal system for marginalized groups. Laws and legal systems that fail to respond adequately to the economic and social needs of citizens, and hence preserve and reproduce socioeconomic hierarchy, claim authority without legitimacy.

Still, Wendel grants the legal system a broad and deep capacity to supersede public disagreements about cultural and social values.[99] By design, he contends, the law operates "to create a more or less autonomous domain of reasons, rooted in the community's procedures for resolving conflict and settling on a common course of action."[100] Embedded and discharged within this domain, the obligations of lawyers flow from and carry out what Wendel calls the "artificial reason of law" without the necessity, benefit, or cost of ordinary moral reasons and substantive-justice considerations.[101] This artificial reason, he maintains, pervades the institutional roles and practices of the legal system to mold "social solidarity and mutual respect."[102] The value of that contribution to society and legality and the associated "moral worth" of the law renders the lawyer's role morally respectable.[103]

Wendel discovers both moral respectability and social utility in the role of the lawyer, particularly when that role facilitates "the functioning of a complex institutional arrangement that makes stability, coexistence, and

97. *Id.* at 9; *see also id.* at 98–113 (arguing that a political system must meet a minimum, imperfect standard in terms of providing access to the political process in order to be considered legitimate).

98. *Id.* at 9 (defining *authority* in terms of "the justified claim to create obligations"); *see also id.* at 115 (arguing that there is an obligation to follow unjust laws); *id.* at 119 (noting that institutions such as prosecutors' offices can reach unjust results).

99. *Id.* at 9, 123.

100. *Id.* at 10; *see also id.* at 96, 112, 123 (stating that law provides a framework for reaching decisions when there is disagreement about moral judgments).

101. *Id.* at 10.

102. *Id.* at 10; *see also id.* at 101 (emphasizing that normative debate could be endless without this function of the law); *id.* at 246 n.113 (referencing "the connection between legality and mutual respect").

103. *Id.* at 10; *see also id.* at 49–50, 85 (declaring that a client's entitlements are a moral imperative per se, independent of ordinary moral considerations).

cooperation possible in a pluralistic society."[104] To realize the social good of legality, Wendel urges lawyers to imagine the legal system and their clients' legal entitlements as reason-giving factors that effectively "override considerations that would otherwise apply to persons not acting in the same professional capacity."[105] This override proviso bars community lawyers from consideration of "ordinary moral considerations when deciding how to act on behalf of a client."[106] Rooted in a deep-seated respect for law, the proviso endures even when the law itself—here a local, legislatively mandated budget cutback—appears motivated by racial animus or intended to exacerbate racial inequality.[107]

To be sure, Wendel concedes that lawyers should be "free to challenge unjust, wasteful, or stupid laws" under the standard procedures enacted to secure legal change, whether in the form of "civil-rights lawsuits, impact litigation, class actions, constitutional tort claims, lobbying," or "other vehicles."[108] Crucial to this concession is a distinction "between using legal procedures to challenge unjust laws and subverting them."[109] For Wendel, the obligation of fidelity to law ethically constrains lawyers to act narrowly to defend only the legal entitlements of clients.[110] Narrowing the space available for the exercise of ordinary moral discretion in advocacy or counseling, he admits, deprives lawyers of the freedom to serve clients as "friends or wise counselors."[111] Within that confined professional space,

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104. *Id.* at 10; *see also id.* at 98 (claiming that in the context of disagreement, the value of the law is in its treatment of disagreeing parties as equals).

105. *Id.* at 10.

106. *See id.* at 10 (warning that a citizen's or lawyer's right to "refuse to obey" law "would open a whole new arena of disagreement, this time over whether procedures were sufficiently representative, transparent, accessible to all citizens, and so on"); *see also id.* at 158 (describing "a moral justification for what seems like an exclusion of morality from professional life"); *id.* at 167–68 (citing reasons as to why the lawyer–client relationship should be structured by the ideal of fidelity to law and not to clients).

107. *See id.* at 203–04 (arguing that even where the requirements of antidiscrimination law are ambiguous, lawyers maintain fidelity to the law rather than enable their clients to contest its substantive meaning); *see also id.* at 10–11 (claiming that the lawyer's role should not be understood in ordinary moral terms and affirming the principle of legality as itself a social good); *id.* at 88–89 (stating that duties of lawyers must be oriented toward respect for the law itself even if a lawyer believes that a particular law is unjust); *id.* at 107 (emphasizing the importance of lawyers obeying and respecting the law).

108. *Id.* at 11; *see also id.* at 84 (emphasizing the importance for lawyers to work within the law when challenging oppression); *id.* at 123 (acknowledging that just legal systems can and do enact unjust laws that require challenge); *id.* at 129 (noting that "lawyers are encouraged by professional tradition to . . . challenge injustice"). Wendel declares: "Using the legal system to challenge unjust laws is one of the most noble things that lawyers do." *Id.* at 11.

109. *Id.* at 11; *see also id.* at 118 (giving an example of a lawyer who subverted the government's case in a murder trial); *id.* at 132 (advocating that lawyers should use legal means to oppose injustice).

110. *Id.* at 10–11; *see also id.* at 122–43 (describing the implications of legal entitlements for the practice of law).

111. *Id.* at 10–11 (mentioning that lawyers "contingently may be friends or counselors in addition to serving as expert legal advisors," though pointing out that "those additional roles are

lawyers function as self-described quasi-political actors to assert and to protect their clients' legal entitlements and corresponding "political and legal values" against the well-known "coercive force of the state."[112]

Wendel's commitment to the political value of legality and his recognition of the importance of institutionally prescribed roles create dissonance for community lawyers when the law and the legal system require morally disagreeable, albeit politically justified, actions such as compliance with the mayor's unjust directive to close the Virrick Park Library.[113] That dissonance, Wendel speculates without support, may actually enhance the level of lawyer deliberation in parsing the consequences of harmful action to clients and nonclients.[114] Even when, as here, those consequences and their underlying motivations appear race-infected and therefore unjust, Wendel's ethical imperative of political morality persists in place.[115]

Applied to the West Grove, Wendel's political-morality imperative practically precludes representation of neighborhood residents in opposition to the Virrick Park Library closing because their constitutional and statutory *interests* in education, literacy, and equal protection lack the force of legal *entitlements*. Read fairly, the current context of federal and state law, however indeterminate, fails to give rise to an appropriate range of reasonable interpretations sufficient to support any facial or as-applied challenge in this instance, despite the latitude granted by the adversary system.[116] Contrary to Wendel's contentions, the purported craft of participating in the making and evaluating of legal arguments derived from the internal point of view of lawyering[117]—here, for example, displayed in inventing implausible forms of declaratory and injunctive relief—produces neither reflective equilibrium nor ethical coherence for community advocates struggling to

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optional from the standpoint of the political justification of the lawyer's role"); *see also id.* at 34–35 (exploring lawyer–client personal and political relationships).

112. *Id.* at 11; *see also id.* at 34–37 (assessing the role of client autonomy within the legal system and concluding that lawyers have an ethical duty to justify their actions based on the legal entitlements of clients and not the interests or preferences of either clients or lawyers).

113. *See id.* at 11 (distinguishing between political and social morality and the scope of obligations required by each); *id.* at 18 (same); *see also id.* at 49–50 (contending that lawyers are obligated to prioritize political morality and its commitment to the value of legality); *id.* at 85 (concluding that "lawyers should act with reference to their clients' legal entitlements, not ordinary moral considerations").

114. *Id.* at 12.

115. *Id.* at 12, 85–105.

116. *See id.* at 13, 206 (acknowledging that in some cases, but not all, statutory law is subject to multiple interpretations).

117. *Id.* at 15 (asserting that there are "better and worse ways to go about interpreting and applying the law"); *see also id.* at 177 (arguing that "[e]thical lawyering is often a matter of knowing what may be done, given legal ambiguity or uncertainty"); *id.* at 198–200 (contending that "it is essential that a theory of legal ethics take account of the way the content of the law may be contestable" and emphasizing the role of judges and lawyers in ensuring that this is the case).

reconcile the claimed legality of the Virrick Park Library closing and the professional responsibilities of moral agency and justice promotion.[118]

III. Community Lawyering and the Ethic of Disobedience and Resistance

"So I was involved in the protest activity."[119]

For civil rights and poverty lawyers working in impoverished communities like the West Grove, engrafting Wendel's internal point of view of ethical lawyering and its accompanying fidelity-to-law obligation in the context of the Virrick Park Library dispute reveals not legality and legitimacy but racialized power, repressive order, and authoritarian impulse.[120] Neither ethical coherence nor reflective equilibrium can guide lawyers when circumstances, as here, suggest racial bias and invidious discrimination at the hands of the dominant social order.[121] Rather, such circumstances evoke Bill Simon's call for a turn to justice[122] and social solidarity.[123] Both claims of racial injustice and claims of countermajoritarian solidarity cause turmoil in the law. Indeed, the task for community lawyers is to "unsettle law," and their efforts to do so should be applauded rather than viewed as a "threat."[124] As Kate Kruse observes, "[T]he continual ebb and flow of normative controversy can be viewed as an incident of, rather than an impediment to, a free and just society."[125] Instead of hewing to a "rigid and wooden"[126] vision of

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118. *Id.* at 16, 87, 206–07.

119. Interview by Zona Hostetler with Gary Bellow, *supra* note 1.

120. William H. Simon, *Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn*, 90 TEXAS L. REV. 709, 710 (2012) (book review). Simon remarks:

> 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.

Id.

121. *See id.* ("[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.").

122. *Id.* at 721 ("Lawyers should focus on the direct consequences of their actions and should try to vindicate justice in the particular case . . . ."); *see also* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY, at xvii, xxii–xxiii (1988) (proposing that "lawyers are uniquely situated to . . . make the law more just" and "urging a professional ethic" by which lawyers engage in "moral activism" by "self-consciously promot[ing] unrepresented interests"); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 17 (2000) (maintaining that lawyers "must accept greater obligations to *pursue* justice"); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 9 (1998) (defending an approach to ethical decision making that requires lawyers to "take such actions as . . . seem likely to promote justice").

123. Simon, *supra* note 120, at 722.

124. Katherine R. Kruse, *Fidelity to Law and the Moral Pluralism Premise*, 90 TEXAS L. REV. 658, 658 (2012) (book review).

125. *Id.*

lawyer political morality, community lawyers should consider the "morality and practicalities"[127] of a client's or community's situation. In the already blighted situation of the West Grove, now in jeopardy of losing a vital neighborhood resource essential for public literacy, practical morality requires a democratic ethic of disobedience and resistance.[128]

In the context of low-income communities of color, democratic lawyering[129] offers race- and identity-conscious strategies of advocacy and counseling fashioned from dissenting voices traditionally outside law, legality, and legitimacy.[130] Methods of race- and identity-conscious representation, developed by the Civil Rights Movement and enlarged by critical theories of race, stand to reshape Wendel's vision of ethical lawyering. From the civil rights movement, Wendel might integrate outsider, dignity-restoring narratives and relations of empowerment to rectify the public and private humiliations of law and the legal system in Miami-Dade

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126. Stephen L. Pepper, *The Lawyer Knows More than the Law*, 90 TEXAS L. REV. 691, 706 (2012) (book review) (observing that "in Wendel's vision the overall morality and practicalities of the situation are not a necessary part of the conversation with the client").

127. *Id.*

128. *See* Janine Sisak, *If the Shoe Doesn't Fit . . . Reformulating Rebellious Lawyering to Encompass Community Group Representation*, 25 FORDHAM URB. L.J. 873, 878 (1998) ("Rebellious lawyering mobilizes, organizes, and empowers clients to formulate a collective response to issues poor people face. It demands cooperation and collaboration between clients, lawyers, and other lay professionals in an effort to overcome the oppression inherent in the poverty law context." (footnote omitted)); Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947, 948 (1992) (suggesting that lawyers who represent socioeconomically and politically subordinate clients have "an obligation to empower clients that largely translates into concepts of mobilization, organization, and deprofessionalization").

129. *See* Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383, 1386 (2009) (urging that those lawyers who work collaboratively with low-income people and people of color and their communities to push for social change should be understood as performing "democratic lawyering" because democracy is central to their aspirations, values, and methods); David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 546–49 (2008) (arguing that democratic experimentalism—the dominant approach to antipoverty law over the last four decades—has had major shortcomings and should be replaced by a substantive model of antipoverty law that takes a more proactive approach to fighting poverty).

130. *See* Anthony V. Alfieri, Gideon *in White/*Gideon *in Black: Race and Identity in Lawyering*, 114 YALE L.J. 1459, 1463 (2005) (examining the work of John Hart Ely and sketching "community-centered guidelines for lawyers laboring to advance the legal, political, and economic interests of unrepresented individuals and groups"); Alfieri, *Integrating Into a Burning House*, *supra* note 5, at 601 (noting that "[n]ew directions in advocacy may come through the adoption of a flexible, race- and identity-conscious vision of community-based empowerment"); Alfieri, *Post-racialism*, *supra* note 5, at 956, 963 (proposing that in order to be effective, civil rights and poverty lawyers must understand, or *uncover*, how cultural and structural forces in low-income and minority communities interact to create collective outcomes for those living in the community, so that these lawyers can enable their clients "to engage in authentic self-elaboration, to obtain equal treatment, and to exercise the liberty of full participation in cultural and social environments"); Anthony V. Alfieri, *(Un)covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805, 806 (2008) (arguing that effective legal change should not be measured on a case-by-case basis, but rather "by the degree to which [disadvantaged] individual clients are able to collaborate in local and national alliances to enlarge civil rights and to alleviate poverty").

County. The narratives and relations of empowerment, however complex and difficult, undergirding grassroots organization and mobilization enable lawyers to break free from traditional conceptions of the adversary role and craft function. Fundamental to that break is the incorporation of difference-based community voices and stories into the lawyering process. From critical theories of race, Wendel also might interweave the values of community participation and civic dialogue, especially between majority and minority communities. Only from dialogue will come a moral recognition of common cross-racial interests in economic justice and social solidarity, here embodied in the Virrick Park Library. In segregated communities like the West Grove, where the law and the legal system long ago failed, lawyer candor, collaboration, and race-conscious conversation best steer the normative assessment of legal–political strategies (e.g., direct-service representation, county-wide impact litigation, and legislative law reform) and the practical consideration of alternative nonlegal tactics (e.g., private fund-raising initiatives, church and school partnerships, media campaigns, public protests, and political pressure points).

Conclusion

Despite the acute conditions of poverty and racial inequality in the West Grove and in other historically segregated communities across America, Wendel admonishes lawyers, including civil rights and poverty lawyers, not to aim directly at justice and not to take account of ordinary morality in their legal–political advocacy and counseling decisions. Instead, he urges lawyers to guide their ethical decision making by the political values of democratic legitimacy and the rule of law and, moreover, to discover in the basic institutions and procedures of the legal system a natural core of morality and justice. That discovery, he contends, gives rise to a moral stance against both powerful actors and arbitrary power. From this ideal stance, according to Wendel, lawyers may justifiably engage the law and the legal system in a way that equally respects and protects all citizens independent of the corruptions of power and privilege.

For Wendel, the value of the lawyer's social role and function, and its normative significance in preserving the rule of law and in safeguarding political legitimacy, cannot be overstated. On his interior view of fidelity to law and ethical obligation, the lawyer's role and function ensures fair procedures in lawmaking and law interpreting, notwithstanding admitted procedural and substantive defects in the legitimacy of the prevailing legal system. Confronting defects in the form and content of law too vigorously, Wendel fears, threatens to reignite normative controversy, sow political disharmony, and stir social discord that is customarily and deliberately repressed by law, thereby putting individual autonomy and collective

cooperation at risk.[131] Yet, casting lawyers as quasi-public officials and binding them tightly to narrow institutional roles and craft functions marshaled in defense of client legal entitlements will not curb threats to the law rising out of minority community-based claims of ordinary morality and social justice. It will only guarantee that lawyers will once again go outside law to reclaim the spirit of disobedience and resistance found in communities like the West Grove.

131. WENDEL, *supra* note 21, at 208–11.