COMMENT

GOVERNMENT LAWYERS, POPULISM AND POSITIVISM: A RESPONSE TO W. BRADLEY WENDEL

*Natalie R. Davidson**

Introduction

Brad Wendel's Article addresses one of the most urgent questions of our time. Faced with the demands of populist leaders to set aside legality and give full expression to the "general will of the people" that the populist leader purports to represent, what should government lawyers do? The Article aims to develop a normative ground for lawyers' obligation to stick to legality even if this means acting as a counter-majoritarian force. To do so, it arms lawyers with an account of their duties grounded in legal theory and legal ethics.

It begins by offering what it terms "a frankly moralized conception of the rule of law" in the context of liberal democracy or liberal democratic values.[1] In turn, this theoretical justification for insisting on legality is meant to assist in conceptualizing lawyer's fiduciary loyalties anew. The Article asks whether it is "possible to square the duty of loyalty owed by lawyers to their clients with the obligations that follow from the value of legality?"[2] The Article's answer is that "[i]n both public and private advisory contexts, the duty of loyalty to the client is geared toward promoting the lawful objectives of the client, not the client's interests full-stop."[3] In other words, from the perspective of legal ethics, the government lawyer should not provide their client legal tools to further all objectives, only those objectives that are lawful. Crucially, this limitation on legal services does not derive from the public interest, such that lawyers' duties towards their clients would be balanced against their duties towards the public. Instead, this limitation should be understood as internal to the fiduciary duty of lawyers in a society respecting the rule of law.

Wendel's account of government lawyers' duties embedded in role morality gives shape to long-standing intuitions about the lawyer's role.

* Senior Lecturer (Associate Professor), Tel Aviv University Buchmann Faculty of Law.

1 W. Bradley Wendel, *Government Lawyers and the Challenge of Populism*, 34 Cornell J.L. & Pub. Pol'y 385, 391 (2025).

2 *Id.* at 390.

3 *Id.* at 406.

The Article convincingly weaves together key works in legal theory and legal ethics. It also gives lawyers argumentative tools to counter the inevitable populist accusation of democratic illegitimacy. Lawyers, on this account, are not stepping out of professional bounds when they refuse to support a populist client's demands. To the contrary, it is the demands to support authoritarian requests that exceed the lawyer's fiduciary duty. For these reasons, I see this Article as now indispensable to any discussion of lawyers in the face of populism, whether in the United States or elsewhere. In particular, the Article's structure, whereby a discussion of lawyers' fiduciary duties should be preceded by a robust understanding of the rule of law, is a structure that should be the starting point for any debate on lawyers' duties.

Precisely because the structure of Wendel's account is so fruitful, in the following pages I would like to detail a few disagreements with the substance of the account. My disagreements are instrumentalist in nature. That is, I challenge the account in both of its stages to the extent it claims to offer a way for lawyers to address contemporary authoritarian populists. In particular, I argue that the account is overly positivist. A positivist approach cannot stand up to populism beyond the very short term, as populists' jurisprudential approach is itself positivist.

I. THE RULE OF LAW, ARBITRARINESS, AND LEGAL FORM

The starting point, indeed the first sentence in the Article, is a departure from the pretense of the rule of law as politically or morally neutral.[4] The question of the project is what politics or morality law can legitimately serve. Not every political or moral value will do. The politics inherent in the rule of law "must have some connection to the distinctive mode of governance that we identify with legal systems and procedures."[5]

Relying on Gerald Postema's recent *Law's Rule*[6] and Jeremy Waldron's reconstruction of Fuller,[7] the Article espouses the view that the value underlying the rule of law is anti-arbitrariness, with arbitrariness understood primarily as a defect in a process of decision-making. As the Article makes clear, this conception of the rule of law is the exact opposite of the populist conception of democracy, understood as the expression of pure will. Arbitrariness, on this account, is wrong not because of irrationality, but because it fails to treat others as equals: "Arbitrariness, therefore, is disrespect in the exercise of power; it consists of treating

4 "The professional role of lawyers is grounded, normatively, in political values." *Id.* at 385.

5 *Id.* at 391.

6 GERALD J. POSTEMA, LAW'S RULE: THE NATURE, VALUE, AND VIABILITY OF THE RULE OF LAW (2022).

7 Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1 (2008).

members of the community as though they need not be taken seriously as equals."[8]

There are many different conceptions of the rule of law, and any scholar's choice reflects to a large extent the scholar's moral assumptions with which it is difficult to argue. However, I would like to suggest that an account of the rule of law closer to Fuller would better serve the Article's objective of addressing the contemporary populist challenge to legality. In giving concrete meaning to anti-arbitrariness, the Article's focus is primarily on the decision-maker giving reasons.[9] Yet recent experience with populist rule in the United States, Israel, and elsewhere teaches us that populists are more than willing to give reasons for their decisions, and shamelessly brandish self-interested, xenophobic, or fascist reasons. Think of President Trump's executive order to withhold federal funding from schools that teach that the United States is "fundamentally racist, sexist or otherwise discriminatory" and to "prioritize federal resources, consistent with applicable law, to promote patriotic education."[10] While this order limits the use of resources to applicable law, the justifications it gives emphasize values central to fascist ideology, including national unity, parental authority, and purportedly correct ideologies:

> Section 1. Purpose and Policy. Parents trust America's schools to provide their children with a rigorous education and to instill a patriotic admiration for our incredible Nation and the values for which we stand.
>
> In recent years, however, parents have witnessed schools indoctrinate their children in radical, anti-American ideologies while deliberately blocking parental oversight. Such an environment operates as an echo chamber, in which students are forced to accept these ideologies without question or critical examination. In many cases, innocent children are compelled to adopt identities as either victims or oppressors solely based on their skin color and other immutable characteristics. In other instances, young men and women are made to question whether they were born in the wrong body and whether to view their parents and their reality as enemies to be blamed. These practices not only erode critical thinking but also sow division, confusion, and distrust, which undermine the very foundations of personal identity and family unity.

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8 Wendel, *supra* note 1, at 394.

9 *See, e.g.*, *id.* at 407.

10 Zach Montague & Erica L. Green, *Trump Signs Order to Promote 'Patriotic Education' in the Classroom*, N.Y. TIMES (Jan. 29, 2025), https://www.nytimes.com/2025/01/29/us/politics/trump-executive-orders-schools-antisemitism-race-gender.html [https://perma.cc/9BL2-U3SM].

> Imprinting anti-American, subversive, harmful, and false ideologies on our Nation's children not only violates longstanding anti-discrimination civil rights law in many cases, but usurps basic parental authority.[11]

These justifications also include civil rights and critical thinking, but it is not difficult to imagine that in the near future these nods to liberal values will be abandoned in executive decision-making. President Trump has also been open about using the presidency to advance family business interests.[12]

It is true that the Article's account of anti-arbitrariness is broader than decision-making, and includes requirements of both procedure and substance. Yet the nature of populist rule means that challenges based on either procedure or substance are necessarily limited. Populists often follow rules of procedure. Indeed, the literature on democratic backsliding precisely emphasizes would-be authoritarians' use of democratic and legal procedure to achieve authoritarian objectives.[13] Recent analyses of the jurisprudential approach undergirding populist arguments point to its version of positivism (sometimes referred to as "instrumentalism"), according to which legality is assigned to a norm by sole virtue of the fact that it is an expression of the will of the sovereign.[14] Populists' positivism once they are in power has led one group of critical legal scholars to urge those wishing to challenge populist rule to draw attention to the likely impact of populist reforms on individual freedoms as well as on the concentration of political power, rather than solely examining the reforms' compliance with legal procedure.[15]

Challenging the substance of populist policies from a rule of law perspective is certainly feasible, but is particularly vulnerable to the charge of counter-majoritarianism. Contemporary populists challenge the purported rationality and neutrality of law, and seek to expose the fallacy of the law/politics distinction.[16] Harnessing real discontent with liberal

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[11] Exec. Order No. 14190, 90 Fed. Reg. 8853 (Jan. 29, 2025) ("Ending Radical Indoctrination in K-12 Schooling").

[12] Eric Petry, *Uncovering Conflicts of Interest and Self-Dealing in the Executive Branch*, BRENNAN CTR. FOR JUST. (Feb. 21, 2025), https://www.brennancenter.org/our-work/research-reports/uncovering-conflicts-interest-and-self-dealing-executive-branch [https://perma.cc/XX6T-B7LV].

[13] *See* Aziz Huq & Tom Ginsburg, How to Lose a Constitutional Democracy, 65 UCLA L. REV. 78 (2018); David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 547–48 (2018).

[14] *See* Vasileios Adamidis, *Democracy, Populism, and the Rule of Law: A Reconsideration of Their Interconnectedness,* 44 POLITICS 386, 391 (2024); Ofra Bloch & Natalie R. Davidson, *Countering Authoritarian Populists' Legal Theory*, 26 THEORETICAL INQUIRIES L. (forthcoming 2025).

[15] Rafal Manko et al., *Introduction* to LAW, POPULISM, AND THE POLITICAL IN SEMI-PERIPHERAL CENTRAL AND EASTERN EUROPE 1 (Rafal Manko et al. eds., 2024).

[16] Paul Blokker, *Populism as a Constitutional Project*, 17 INT'L J. CONST. L. 535, 549 (2019) ("The populist understanding of the law denies its closed, self-sufficient, and

democracy, populists attack the professional legal elite of judges and other legal officials operating checks on decision-making and legislation, typically accusing them of representing a certain class and ideology under cover of legal neutrality. While the substance of populist decisions should certainly be criticized, including by lawyers, if substance becomes the main area of challenge by legal advisors to the government, these lawyers will find themselves wading uncomfortably into the territory of policy, and feeding the populist critique that under cover of expertise lawyers are imposing a certain political agenda.

For these reasons, a more promising approach to challenging populist authoritarian legality is to follow Fuller and emphasize the morality embedded in the forms of law. Discussing judicial review, Leora Bilsky and I have drawn on writing by Kristen Rundle and Jeremy Waldron recovering Fuller's jurisprudence.[17] Similar to Wendel's emphasis on respect in his reading of Waldron, we emphasized Fuller's view that what is unique about social ordering through the rule of law as opposed to the rule of men is that legal subjects are not subserviently told what to do, but they are constructed as responsible and autonomous agents. Yet we rely more closely on Rundle, and thus emphasize Fuller's insight that the limitations set by the rule of law on rulers in favor of individuals' agency are to be found neither in the content of the applicable norms nor in the process through which norms were decided upon but, instead, in the way in which law communicates its norms—that is, in the forms of law—through the principles of generality, promulgation, clarity, avoidance of contradiction and impossibility, constancy through time, non-retroactivity, and the requirement that there be congruence between official action and declared rule.[18] Fuller's focus on form is particularly apt to address the legal techniques of democratic erosion employed by populists. Moreover, because his conception of the rule of law is narrowly tailored to the legal craft, it avoids the pitfalls of substantive debates on policy, thereby granting lawyers heightened empirical legitimacy for their opposition to populists.

The populists' compliance with procedure and distortion of form can be illustrated through Trump's executive order threatening to revoke government contracts with the law firm Perkins Coie. Wendel writes that this order suffered from both procedural and substantive flaws.[19] He notes

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self-referential nature, and emphasizes the ultimately always already political nature of the law. Hence, the law in the populist view becomes inseparable from extra-legal sources, such as political power and the societal community, and is in this repoliticized. As such, for populists the law always needs to be the expression of the "national interest.").

17 Natalie R. Davidson & Leora Bilsky, *The Judicial Review of Legality*, 72 U. TORONTO L.J. 403 (2022)(referring to KRISTEN RUNDLE, FORMS LIBERATE: RECLAIMING THE JURISPRUDENCE OF LON L FULLER (2012); Jeremy Waldron, *Why Law: Efficacy, Freedom, or Fidelity?*, 13 L. & PHIL. 259 (1994)).

18 RUNDLE, *supra* note 17, at 2.

19 Wendel, *supra* note 1, at 396.

that "[p]rocedurally, there is abundant evidence that none of the executive orders in the first few months of the second Trump Administration were developed in consultation with the Office of Legal Counsel (OLC), the branch of the Justice Department that advises the President on compliance with law."[20] This is true in with respect to this specific executive order, but it is easy to imagine the Trump administration staffing the Office of Legal Counsel with lawyers subservient to it, in which case the procedural step of consultation will be of little assistance. As to the substance of the order, Wendel writes, "I believe that at root legality entails respect for the principles underlying past decisions and an aspiration to consistency, as an aspect of the respect for the rational agency of the subjects of official directives."[21] However, these characteristics are not substantive but related to form—specifically, constancy through time, and the requirement of generality that is Fuller's paramount criterion of the rule of law.[22]

II. THE RULE OF LAW, POSITIVISM AND LAWYERS' FIDUCIARY DUTIES

Having presented his account of the rule of law, Wendel argues for reconceptualizing lawyers' fiduciary duties. In his view, the lawyer's duty to further their clients' interests draws limitations not from external values—and notably, not from some conception of democracy—but internally, from the principal-agent relationship between lawyer and client. This internal-limits model of lawyers' fiduciary duties derives from the way the relationship with the client is constituted, namely the fact that the lawyer can only advocate for the client's lawful actions and objectives. This is not only a negative duty for the lawyer not to break the law on behalf of the client, but to actively ascertain that the course of action desired by the client is adequately supported by the law.

This important second step in the Article is best expressed through the following passage:

> The lawyer cannot conjure up power to do something that the law does not permit the client to do. Perhaps the point is clearer in the context of some of the executive orders issued by President Trump in the early months of his second presidential term. Many of these orders purport to bring about a result that depends on legal authority the president simply does not have. In the case of the law firm executive orders, for example, Article II of the Constitution, the First Amendment, the Due Process Clause, and the right

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[20] *Id.*

[21] *Id.*

[22] According to Rundle, it is the "foundational requirement from which all else . . . is generated." RUNDLE, *supra* note 17, at 129.

> to counsel under the Fifth and Sixth Amendments do not permit the president to cancel government contracts with clients of a law firm that angers the president by representing his political opponents or taking positions that he believes to be contrary to American values. A lawyer called upon to draft such an order should respond that doing so would be beyond what the lawyer may do, because the lawyer's ability to bring about a lawful result is conceptually inextricable from the extent of the client's (here, the President's) lawful power.[23]

As can be gleaned from the above quote, it appears that in Wendel's account, legality is primarily what is legally permissible. Though the Article does not elaborate on the relationship between non-arbitrariness and legal permissibility, this approach to fiduciary duties is coherent with the Article's account of the rule of law, if we understand positive law to require giving reasons, following procedural rules and complying with certain substantive requirements. This positivist approach may also seem apt to limit executive power in the context of the United States, where it is highly impractical for the president and his party to amend the constitution. As a result, many limitations on executive power embodied in positive U.S. law are more resilient than in other jurisdictions such as Hungary or Israel.

However, I would like to suggest that such resilience is overall an illusion in the face of the populist onslaught—and therefore that the positivist limitations embedded in lawyers' fiduciary duties can only go so far in limiting populist damage. In the United States, the Supreme Court and lower courts, packed by Trump, can alter significantly the interpretation of the Constitution, as happened when the Supreme Court overturned its earlier interpretation of the right to obtain an abortion.[24] Wendel addresses an adjacent issue when he argues that for his account to hold there is no need to assume that the law is completely determinate.[25] He writes, "I believe, based on the fiduciary structure of the lawyer-client relationship, that when a reasonable lawyer, employing the techniques and craft of legal analysis learned through extensive training and experience, would conclude that the law does not permit the client to do something, the lawyer may not assist the client in that course of action."[26] But what if the courts reinterpret existing rules in a very determinate manner that allows executive power to be exercised in an arbitrary manner? In such a case, limitations based solely on positive law would be ineffective.

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23 Wendel, *supra* note 1, at 400.

24 Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).

25 Wendel, *supra* note 1, at 401.

26 *Id.*

Moreover, a lawyer's client might be in charge precisely of determining the content or form of legislation or regulations—for instance if the lawyer is an advisor within the legislature or the executive. Beyond advising the client to follow procedural rules for changing norms, under the Article's approach lawyers are under a duty to facilitate many executive decisions that are utterly arbitrary, in the sense that they exhibit disrespect for members of the political community: for instance, changes of rules so frequent that individuals and institutions have difficulty planning their affairs, as was the case with the Trump administration's numerous and sudden changes to tariffs.[27]

CONCLUSION

Wendel's Article offers a fruitful framework for considering the duties of government lawyers in light of the rule of law. While the question of lawyers' duties in the face of populist rule is pressing today, it is part of a longstanding inquiry into the ethics of lawyering under authoritarianism.[28] As such, the ability of the Article's account to address contemporary forms of populist rule may be secondary to the Article's broader scholarly contribution. Nevertheless, I would suggest that positivism is inherently insufficient to the task of countering arbitrariness. To give concrete form to our intuitions about the morality embedded in the rule of law, it is necessary to develop a non-positivist understanding of lawyers' fiduciary duties.

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[27] Daisuke Wakabayashi et al., *'How Are We Going to Afford This?' U.S. Companies Face Tariff Reality*, N.Y. TIMES (2025), https://www.nytimes.com/2025/03/01/business/trump-tariffs-american-importers.html [https://perma.cc/2PQQ-JRBR].

[28] *See* David Luban, *Complicity and Lesser Evils: A Tale of Two Lawyers*, 34 GEO. J. LEGAL ETHICS 613 (2021).