# INTRODUCTORY COMMENT

# DEMOCRACY'S CHALLENGE

*Jens David Ohlin* & Yishai Blank***

This is no obituary for democracy, but it might be a report card. Democracy is a profound ideal, one at the center of the American political experiment and similar (self)-governments around the world. It is commonplace to say today, in America and in many countries throughout the world, that democracy is under threat, or that democracy is fragile, or that its moment had passed, or that the risks of backsliding are more prevalent than ever. But what do these predictions really mean? What are their causes? And how do they interact with the legal system and the nature of law?

The following pieces, presented at a conference at Cornell Law School, outlined a variety of challenges to democracy and brainstormed responses.[1] The pieces did not intend to catalogue the many ills that plague democracy in its current condition. Nor do the pieces intend to offer a complete treatment protocol. Rather, the pieces explore a handful of pressing and urgent problems for democracy, explore the relationship between legal and political institutions, and outline a series of responses that the law can bring to bear on these problems. Some of them try to venture into the root causes—historical, legal, political or social—for this phenomenon, which has become global over the past decade. And they often focus on relatively neglected aspects of democratic decline processes: the mechanics of elections, the role of lawyers, emergency reliefs granted by courts, "accounting" in measuring climate emissions, property law, and artificial intelligence. Tackling the challenges for democracy "from the margins," so to speak, proves to be highly profitable as it enables us to understand the complexity of such global processes. None of the pieces will cure ailments; even remission is not guaranteed. The goal, rather, is a better understanding of the challenges posed by democracy, a more nuanced description of the legal mechanisms and players involved in

* Allan R. Tessler Dean and Professor of Law, Cornell Law School.

** Dean and Professor of Law, Tel-Aviv University Buchmann Faculty of Law.

[1] The conference brought together legal scholars from Cornell Law School and the Tel Aviv University Buchmann Faculty of Law. Support for the conference was provided by Bob Diener ('82) and Dave Litman ('82).

bringing about these challenges, and a plea for creative thinking in meeting those challenges.

The piece by Professor Jed Stiglitz is noteworthy in its focus on mechanical democracy. By this phrase, Stiglitz does not mean the deeper principles and institutions of democracy but simply the set of rules, procedures, and institutions that are required to implement a system of majority rule through voting. In other words, mechanical democracy is embodied in this fundamental trio of the democratic ideal: the right to vote, to have votes counted, and to have public officeholders selected by this vote. This "mechanical" aspect of democracy is a *sine qua non* of the democratic order and is too often taken for granted. But the rules of mechanical democracy are surprisingly difficult to administer and oversee, subject to both capture and corruption, and subject to contestation and even attack. If only the mechanics of democracy could be administered by divine will or by a benevolent artificial intelligence?

Unfortunately, we have no such hope or luck; in the United States, the mechanics of democracy are overseen by political actors themselves whose fates are adjudicated by the very same democratic system. A more painful conflict of interest one could not imagine. In other democracies, outside of the United States, the mechanics are run by civil servants and bureaucrats with more authority and independence, but then political accountability is the concern. Stiglitz argues that although there can be richer accounts of democracy, those deeper accounts are factually dependent on the more foundational mechanical democracy and "[w]e should lay bare those foundations to realize their value." Rather than dismissing the significance of these mechanical elements, we should recognize their centrality and rededicate ourselves to their exploration and protection. While Stiglitz clearly does not reject the more substantive principles of democracy, his insistence that we focus on the more mundane "mechanics" of democracy suggests, perhaps, a more general critique: that we often fail to deal with the technical, mechanical and less salient aspects of our most revered and important institutions, thus inadvertently allowing their gradual erosion.

The article by Professor Brad Wendel focuses on the professional responsibilities of lawyers acting with democratic systems. This is no small question and certainly not orthogonal to the concept of democracy. The professional responsibility of lawyers is directly tied to the rule of law, and the rule of law is a prerequisite for a functioning democratic order. But how are lawyers to understand and fulfill these systemic responsibilities when lawyers have professional obligations to their clients? Professional Wendel has long argued that "fiduciary loyalty for lawyers entails reconciling individual and social interests with reference to the positive law of a political community." In other words, the laws of the political community within which the lawyer operates help to structure those larger systemic obligations that the lawyer must shoulder. What happens, though,

when that political community passes laws that push against traditional rule-of-law values? What if the political community is seized by an extreme form of populism that tramples over individual rights, all in the name of the "general will," with a nod to Rousseau or Carl Schmitt? What if the political community becomes fundamentally illiberal? What then? Wendel wants to assign to lawyers the obligation to preserve and protect the rule of law, but he also understands that this throws into sharp relief a painful question when the popular will and the rule of law push in opposite directions: "What is good about thwarting the will of the people based on arcane rules and procedures having no obvious connection to the general will, as embodied in the persona of the charismatic leader?"

What is required to answer this question, and what Wendel aims to explore, is the foundational relationship between the rule of law and the democratic order and whether a true democracy can survive without the rule of law. Put this way, it becomes clear that the lawyer's protection of the rule of law is not a subversion of the popular will but rather a precondition for a democratic system to spring up from the ground. Why? Because the rule of law necessarily entails a "constraint on the exercise of arbitrary power," something that is a real danger when "strong populism" emerges. Arbitrary power is the danger that lawyers are obligated to resist, and thus they can serve as a bulwark against extreme forms of populism that risk democracies.

In her comment, Professor Natalie Davidson argues that there are many concerning cases where Wendel's anti-arbitrariness norm is a bit too easy for the system to satisfy. In part, that is because Wendel cashes out arbitrariness in terms of reason-giving practices, and Davidson notes that populist governments are quite good at giving reasons to the public for their behavior. Indeed, these reasons are sometimes racist, or xenophobic, or cruel—but they are reasons nonetheless. Davidson accepts Wendel's overarching account but wishes that it was based on more substantive principles of justice flowing directly from morality, akin to the vision of justice long associated with Lon Fuller. In a Fuller-style conception of justice, the naked invocation of reasons by an authoritarian government would not be enough to elevate the practices of that government to the status of "legality." If the deeper moral principles of justice are not present, as articulated by Fuller, then lawyers would be released from their fiduciary obligations to their client and so their wider obligations to the overall system, and to justice generally, would rise to the surface.

Professor Alexandra D. Lahav focuses on access to justice—who can get equitable relief from the federal judiciary in the United States and if so, what form of relief—questions that are central to the rule of law. Implicit in the rule of law is that law-breaking behavior can be adjudicated by a court of law, both regarding disputes between private citizens but also between citizen and government. In the realm of relief, the emergency

injunction looms particularly large as a way of constraining government behavior while litigation winds its way through to a potential decision on the merits of the legal dispute. Where the government is a party to a lawsuit, or implicated in some way in the dispute, the trial judge stands in a unique position. The judge is at once an arbiter of a legal dispute, but insofar as the government is involved, the judge is now at the center of a question of public policy—a question that implicates the political branches of government, their capacity for deliberation and problem-solving, and their representation of their constituents as they weigh the competing considerations. A federal judge, though, is not a democratically elected official. When a judge enters this fray in a public law preliminary injunction case, how should they articulate their reasons to the general public, to the political branches, and to the legal profession? Professor Lahav looks at the processes and procedures that trial court judges use in these cases, especially the recent rise in so-called "administrative stays" that do not come with a reasoned judgment or explanation.

Lahav concludes that "[s]hortcuts rather than reasoning do the system no favors" and that it is the goal of civil procedure to provide a defense against arbitrary power—a fundamental concern that unites Lahav's and Wendel's contributions and their shared focus on the relationship between the rule of law and the democratic order, and their shared belief that public "reason-giving" is an essential part of that order. How can democratic deliberation thrive if no one—neither lawyer nor citizen—understands why government actors made their decisions? How can the mechanical power of the vote, which Stiglitz wants to protect, be meaningfully exercised if the voting public has no idea why decisions were made? But here Davidson's critique remains as a worrisome whisper in the ear. Is "reason-giving" thick enough to ground a meaningful conception of democracy and justice? And vice versa, perhaps reason-giving by courts is also not a condition at all for a democracy to thrive. Is it possible that our reliance on reasoning—by the courts as well as by the administration—is merely incidental but is not fundamental to a democratic order?

Professor Leehi Yona, an expert on environmental law and climate change, focuses on the "accounting" used for climate emissions. Although the accounting rules for understanding climate impact might sound overly technical, this subject is of a piece with Stiglitz's concern with mechanical democracy. The process by which counting occurs—whether of votes or of emissions—is, or ought to be, a central concern for democratic theory. For Stiglitz, no democratic system can exist unless we get the counting of the votes correct. For Yona, neither the public nor government can make meaningful decisions about climate mitigation—what to allow, what not to allow—unless we get the counting of climate impacts correct. Only then do public institutions—legislative, administrative, and judicial branches—have the information that they need. However, Yona reveals the gaps

and inaccuracies in these accounting methods, leading to incomplete or even erroneous information about climate impacts. Perhaps Yona's most important contribution is locating these gaps within an overall theory of democratic accountability because the gaps "are a failure of democratic institutions that aim to reduce inequality" because they "disrupt channels of accountability between the public and decision-makers." More broadly, Yona's piece can be seen as a reiteration of the fundamental connection between truth, science, and democracy. Democracy requires a sound factual basis—often a result of a rigorous scientific inquiry—on which the polity agrees, and only then the citizens can disagree on what to do about these facts. Once a factual common ground no longer exists, once science is undermined, it is impossible to democratically debate and agree upon the required policies.

In an incisive comment on Yona's contribution, Professor Issachar Rosen-Zvi argues that Yona might overestimate the importance of climate data in the following sense. Even more accurate information regarding climate data (without the gaps identified by Yona) might not be enough to produce better outcomes. In other words, the current political dynamic allows governments to get away with "business as usual" rather than structural intervention. Whether the data is complete or riddled with gaps will not change that underlying dynamic, Rosen-Zvi suggests, because disclosure regimes allow the government to pretend that they have done something useful and meaningful. One way to describe the tension between Yona and Rosen-Zvi is between two competing conceptions of the relationship between empirical data and deliberative democracy. One conception is optimistic (that the demos is sincerely struggling to make the best decisions in light of the correct data), the other cynical (that political forces will manipulate the expression and use of data rather than treating it as objective information to be wrestled with). The reader can decide which vision is correct.

Professor Leora Bilsky's contribution focuses on Israel's Absentees' Property Law of 1950. The statute imposed a comprehensive procedure for disposition of land confiscated from Palestinians during the 1948 war. Just as Yona takes a technical statutory regime and places it within an overall theory of democratic governance, Bilsky takes the 1950 Property Law and situates it within the overall ecosystem not just of Israeli property law but more importantly of a broader culture of Israeli democratic governance, with special focus on the constitutive element of citizenship which stands at the core of the Israeli state. Bilsky notes that Jewish critics of the law in 1950 were concerned about its concentration of legislative, executive, and judicial power with a "custodian" with virtually unfettered discretion to decide the fate of confiscated property—a scheme that provides a historical echo of contemporary criticisms of attempts by the Israeli Knesset to reduce the power and independence of the Israeli judiciary. Indeed, the

story here is not just about the continued war-footing of the state of Israel—then and now—but more relevantly the continued relevance of the fight for power between the branches of the Israeli government. It might even be said that among the most important questions for any theory of democratic governance—and any democratic government—is settling on the appropriate allocation of power between the branches in a way that promotes the core goals of democracy—representation, justice, fairness, and rights—in a way that successfully mediates the tension between the individual and the collective. At issue, for Blisky, is nothing less than the question: "Who belongs to the Israeli demos?" Perhaps one could sharpen the question to make it more pointed and simultaneously broader. *What* is the Israeli demos? What is Israel? This question could, and indeed must, be asked of any democracy.

Professors Moran Ofir and Ronit Levine-Schnur focus their contribution on the efficiency paradox of generative artificial intelligence, specifically examining how AI will impact economic markets and democratic systems. They worry that information is in danger of being monopolized—a result that is anathema to the democratic order, which depends on a radically decentralized information regime. Decisionmakers require access to information and in a democratic system, the public is supposed to be the decisionmakers, thus revealing a core tension with the building of AI infrastructure, such as large language models (LLMs) that are owned by for-profit corporations. To resolve this tension, Ofir and Levine-Schnur look to private universities as a possible template for managing this risk, as universities are information fiduciaries that operate for the common good. There are ways to incentivize individuals to pursue the production of information that can be owned—think of patents or intellectual property generally—in ways that promote rather than threaten the possibility of deliberative democracy.

Taken together, these contributions, and the discussions they inspire, reveal that the problems emerging from the democratic order are potentially infinite. Perhaps this is inevitable. Democracy's challenge is that the people will rule themselves. The people will decide. But the people are not an "it" but rather a "they," and they are also the ones who run the democratic system. At every turn, the democratic process complicates and invigorates our decisions about how to build a better society. The people are the mechanics of the car and its passengers at the same time. Let's hope we don't crash it.